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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

From September Term, 1870, to December Term, 1873.

C. B. BELLINGER,
REPORTER.

VOLUME 4.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

SEPTEMBER TERM, 1869.

JAMES HEATHERLY and MARY J. HEATHERLY, Appellants, v. HENRY G. HADLEY and H. C. OWEN, Respondents.

DISPENSING WITH THE CLASSIFICATION OF BILLS—RIGHTS OF SUITORS.—The Code, by dispensing with the classification of bills, has not taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill.

JURISDICTION.—Having obtained jurisdiction for one purpose, a Court of equity may hold it for all purposes connected with the transaction.

PROOF CANNOT AID AN ALLEGATION OF SERVICE.—Proof cannot add to the force of an undisputed allegation of the pleading. Where the pleading points out a particular mode of service, if the mode pointed out falls short of due service, proofs cannot aid the allegation. Nothing shall be intended to be out of the jurisdiction of a Superior Court except that which specially appears to be so.

RECORD RECITAL OF JURISDICTIONAL FACTS.—If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally. If the record is silent as to jurisdictional facts, they will be presumed to have been duly established, but such presumption may be rebutted by extrinsic evidence. If it appears by the record expressly, or by necessary implication, that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the parties, no presumption in favor of the jurisdiction arises, and the judgment will be void.

STRICT COMPLIANCE WITH THE STATUTE NECESSARY.— When a Court of record seeks to acquire jurisdiction by a course specially pointed out by statute, a strict compliance is necessary.

PROOF OF SERVICE.—Proof of service must be made in the Court in which the process is returnable.

A PARTY IS NOT PRECLUDED BY RECITALS IN A DECREE.—A recital in a decree, "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree. When the decree contains a recital that due service was made and the return purports to set out the mode of service, and the mode set out is insufficient the recital will not aid the return.

EXTRINSIC EVIDENCE IN AID OF THE RECORD.—When extrinsic evidence is admitted in aid of the record, the fact permitted to be proved in a subsequent proceeding is not solely that process was in fact served, but that there was proof of service before the Court that rendered the decree.

ADMISSION OF SERVICE.—An admission of service must state the time and place.

Appeal from Marion County.

This is a suit in equity, brought by plaintiffs to have a certain decree of foreclosure rendered against them and others in favor of defendants, in the Circuit Court for the County of Lane, in October, 1863, and the sale made under it, set aside, and an accounting taken between the parties, upon the grounds—

That there is no proof, as required by law, of the service of summons and that the Court had no jurisdiction in the prior suit; and

That the decree in that suit was for a greater amount than was due, and that it was procured by fraud.

At the preceding term of this Court, the suit was heard upon an appeal from a decree rendered in favor of the defendants upon the pleadings. The proceedings upon that appeal are reported in 2 Ogn. 269. The decree appealed from was then set aside, and the case being remanded to the Circuit Court for further proceedings, was heard before a referee upon proofs, without amendment of the pleadings. The referee found among other facts that there was no legal service of summons upon Heatherly; that the Sheriff's return did not show such service, and that it could not be shown in any other way; that the Court had no jurisdiction,

and that the judgment and sale should be set aside. He then proceeded to state an account between the parties, in which he found Heatherly indebted to defendants about $6400, on payment of which he was to have possession of the premises.

Both parties filed exceptions and moved to set aside the report, and defendants moved the Court on the pleadings and evidence to dismiss the bill. This motion was allowed, the Court finding that the original decree of foreclosure was valid and binding; that the sale made under it passed the title to the purchaser; that there was no fraud or misrepresentation in procuring the decree; that the sale was regular, and that legal notice thereof had been given.

The other facts appear in the opinion of the Court.

Williams & Willis, for Appellants.

The only proof of service of summons and complaint authorized by law is the return of the officer thereon. (Civ. Code, § 53.)

It does not appear by this certificate that a *certified* copy of the complaint was served;

That James Heatherly could not be found;

That a certified copy of complaint and summons was left for defendant James Heatherly, and it appears that but one copy of the complaint and summons was left for two defendants. She was one of the defendants upon whom they attempt to prove service by this return, and it was necessary to leave copies with her to get service on her, and if the complaint had been duly certified, it might have been a service on her. It ought to clearly appear that he was the person intended to be served, and that the service was sufficient. (1 Ogn. 112, 113, 114; 24 Ill. 227.)

Jurisdictional facts ought to appear affirmatively, and when what was done appears by the return, it cannot be aided otherwise. Where other than personal service is relied on, there must be a strict compliance with the statute. (13 How. Pr. R. 43; 16 How. Pr. R. 144, 149, 150; 12 Cal. 100-2; 20 Cal. 81; 14 How. Pr. R. 381; 3 How. Pr. R. 109; 34 Barb. N. Y. 95; 26 Ill. 507.)

If a Court has acted without jurisdiction, the proceeding is void. And if this appears upon the record the whole is a nullity. (11 Wend. 648, 652; 14 How. (U. S.) 337; 28 N. Y. 294; 30 Ill. 109, 116; 23 Ill. 445; 13 Wisc. 569; 18 Ill. 551.)

The defendant may show, notwithstanding it is averred in the record that he was duly served, that in fact he never was served. (5 Wend. 148; 9 Wisc. 328; 16 Ill. 27.)

Where the record discloses a particular mode adopted to obtain jurisdiction, if that is not sufficient, it will not be presumed that any other mode was adopted, or that jurisdiction was acquired in any other way. (14 Wisc. 28; 23 U. S. Dig., p. 344, div. 119.)

The decree of foreclosure was void, and not voidable, and the remedy is not, as contended, by appeal, for no appeal would lie under our Code, nor by motion under § 100 of the Civil Code, for that only provides relief for "mistakes in advertence, surprise, or excusable neglect" of a defendant in suffering a judgment at law to go against him, but a decree may be impeached under § 377 of the Civil Code.

By that section, "bills of revivor, of review, cross-bill, etc., are abolished," "but a decree in equity may be impeached and set aside, or suspended, or avoided, or carried into execution by an original suit." This may have abolished the remedy in any of the ways referred to, but left the right formerly obtained in that way to be now obtained by an original suit to impeach a decree. And this section in equity practice has a similar meaning to § 62 in pleading at law. By bill of review, judgments and decrees were always set aside for defects apparent on the record (Story Eq. Pl. § 407), of jurisdiction or otherwise. Such a bill was not an original bill, but was filed by leave of the Court. Under our practice the same rights are enforced without leave, by an original bill to impeach a decree. And the decree may be impeached for want of jurisdiction in the Court to render it; and when thus drawn in question for that purpose, it is not a *collateral* attack, but a *direct* proceeding to impeach, and no presumptions will be indulged

in its favor, but whatever is necessary to support it must appear. (4 Texas 391; 11 Cal. 372; 30 Ill. 223; 13 Ohio State R. 438.)

Equity grants relief not only against deeds, writings, and solemn assurances, but against judgments and decrees, obtained by fraud and imposition. (2 Barb. 586; 3 Barb. 616; 1 Johns. Ch. 401.)

S. Ellsworth and L. F. Mosher, for Respondents.

There is on file with the testimony a complaint sworn to by James Heatherly, in which it is stated that the service was made by a copy of complaint prepared and certified to by plaintiffs' attorney. In addition to this, the decree of foreclosure recites that "the defendants being duly served with process, come not," etc.

1. The return of the Sheriff is, by a fair interpretation of the language, a full and complete service according to the statute. It is not necessary to serve the wife in a foreclosure suit. (2 Johns. Ch. 139; *Fahie* v. *Pressy,* 2 Ogn. 22.)

2. The jurisdiction of Superior Courts is presumed, and their judgments are conclusive in themselves, unless plainly beyond their jurisdiction. (*Astor v. Grignon's Lessee,* 2 How. 319; *Foot v. Stevens,* 17 Wend. 483; *Hart v. Sexias,* 21 Wend. 40; *Voorhees v. Bank United States,* 10 Pet. 193; *Tallman v. Ely,* 6 Wisc. 244; 13 Ohio (N. S.), 446; 14 Iowa, 309; 9 Cal. 320; 33 Cal. 505; 11 Cush. Mass. 277; 10 Allen, 488; 20 N. Y. 298; 40 Barb. N. Y. 417.)

The law on this point is laid down by the Supreme Court of this State in *Carland v. Heineborg* (2 Ogn. 97), in these words: "It is essential that Courts have such jurisdiction, that parties and their rights shall not be unfairly dealt with; and when a Court has so disposed of its business as to leave no other impression upon us, after due consideration, than the strongest of presumptions that it has properly exercised its authority, neither technicality, nor apparent omission, nor loss, should cause us to disturb a solemn decree."

3. Where the record of a Superior Court sets forth the

facts necessary to give it jurisdiction, they cannot be contradicted in a collateral proceeding. (*Astor v. Grignon's Lessee,* 2 How. 319; 39 Ill. 127; 31 Ill. 162; 27 Ill. 145, 496; 33 Cal. 678; 14 Iowa, 309; 22 Maine, 128; 18 Pick. 393; 13 Ohio (N. S.), 431; 1 Smith Leading Cases, 841.)

4. The testimony in this case shows that the service was correctly made. This testimony was not introduced to contradict the Sheriff's return, but to show that the supposed irregularity in the service was a technical defect of the Sheriff in making his return. That proof of the service can be made *aliunde,* we cite: 6 Barb. N. Y. 621; 2 Ogn. 53; 6 Wisc. 256; 20 N. Y. 304; 2 Hill, 413; 1 Ogn. 295; 15 Johns. 121.

5. Irregularities in service do not render a judgment void, but voidable. (*Fisher v. Bassett,* 9 Leigh, 119; *Prigg v. Adams,* 2 Salk. R. 674; 18 How. Pr. R. 347; 4 E. D. Smith, N. Y. 428; 12 Barb. N. Y. 547; 2 Barb. N. Y. 586.)

6. If the Court had jurisdiction, a sale made under its decree cannot be set aside, however erroneous, and the plaintiff in execution stands in the same position of any other purchaser. (*Gray v. Brignardello,* 1 Wall. 627; *Parker's Heirs v. Anderson's Heirs,* 5 T. B. Monroe, 445.)

7. Sheriff's sale was regularly confirmed. (Civ. Code, § 293, sub-div. 4.)

By the Court, Upton, J.:

The prominent points presented for our consideration by this appeal are embodied in the following opinion delivered in the Circuit Court upon rendering the decree appealed from:

"The Court finds that (in the view the Court takes of the case as it is now presented) many of the findings of the referee become immaterial, for the referee holds that the decree of foreclosure was void for want of sufficient service on the plaintiff (then defendant) to give the Court jurisdiction.

"I entertain a different view, and hold that the decree, in the absence of fraud or mistake in procuring it, is binding

and cannot be declared void in a collateral proceeding by mere inspection of the record.

"And as there is no sufficient evidence of fraud in the procurement, the decree will have to stand and is binding on the land, and the sale under it operates as a transfer of the title. I think the objection to the regularity of the sale, on the ground of a want of notice, cannot avail to disturb the sale at this time, in the absence of evidence to show that there was fraud and collusion in making it, or injury to the plaintiff. And I also think that the weight of authority is in favor of the purchaser.

"The real issue in this cause is as to whether there was fraud or not in procuring the decree of foreclosure which this suit is brought to set aside.

"I fully agree with the findings of the referee in that behalf, that there is no sufficient evidence of fraud. And as the plaintiff has failed in this issue, the plaintiff cannot open the decree to inquire into the various amounts that went into that decree to make up its aggregate; for this suit is not brought to reform the decree in these respects; it is to declare the decree void and then go into the original account between the parties and strike a balance between them, to ascertain what is now due on the mortgage for which the land is liable, and as the Court cannot set aside the decree, it cannot go into these accounts. I think also, in a case of this kind, when an issue has been made on the facts of the regularity of the service, that declarations of the plaintiff that he was duly served and had due notice of the suit in which the decree was rendered, may be given in evidence to support the regularity of the service and to show jurisdiction."

The two questions for determination are:

First. Is the attempt to impeach the original decree which is made by this plaintiff direct or collateral?

Second. If it be found to be direct, are the grounds for setting it aside sufficient?

In reply to the first question, we are unable to assent to the proposition that this is a collateral proceeding.

The statute abolishes bills of review, and the nomencla-

ture of bills heretofore used, and provides that "a decree in equity may be impeached and set aside, or suspended, or avoided, or carried into execution by an original suit." (Civ. Code, § 377.) A bill of review, for which the Code now substitutes an original suit, was a bill filed to procure an alteration or reversal of a decree made in a former suit. It was requisite that a bill of review show either error in law appearing *in the record,* without resorting to extrinsic evidence, or some new matter that has arisen in time after the decree, or some discovery after the decree. If the facts stated in the complaint, taken as true, show such errors in law appearing in the record of the former suit as justify the intervention of a Court of equity, this case is such as was formerly presented by a bill of review; or by a bill in the nature of a bill of review, according to whether or not the decree had been enrolled.

The gravamen of the complaint in this case is the wrong alleged to be done by the rendition of a decree for more money than was due; for interest that was unlawful, and upon a false representation of the condition of the accounts; and that such decree was rendered when, for want of sufficient service, the Court had no jurisdiction of the person of the defendant, the present plaintiff. The complaint also charges that the decree was obtained by fraud. Facts are stated in the complaint which, if true, would authorize a Court of equity to suspend or set aside the decree, and to order an account, and decree a resale of the premises.

The complaint, besides containing the general prayer, asks specifically, not only that the decree may be set aside, but that an account may be taken, and that the present plaintiff be allowed to redeem.

It will not be seriously contended that the Code, by dispensing with the classification of bills, has taken away the right of suitors to present any cause of suit that formerly could be presented by any form of bill. Every complaint is to be judged by the facts stated in it, and not by its formal words; and the prayer for general relief authorizes the Court to administer such relief as is required by the

case made by the pleadings and evidence. (Story, Eq. Pl. §§ 40, 41.)

It is true, the complaint treats the original decree, and the sale made under it, as void for want of service of summons; and it has been held that equity will not relieve against a void judgment or decree. If relief from a deed alleged to be void was the only point presented, it could be well questioned whether this suit could be maintained at all. It has, however, often been held that a void decree may be a cloud on title to real estate. (*Johnson v. Johnson*, 30 Ill. 2-15.) But beyond that, the bill charges fraud, mistake and the abuse of a trust, and the pleadings show a complicated and disputed account, with a lien upon land for a balance yet to be ascertained. To determine the character of this proceeding and the jurisdiction, the complaint is taken as true. Several grounds of equity jurisdiction appear by the bill. There is no better established rule of equity practice than that, having obtained jurisdiction for one purpose, a Court of equity may hold it for all purposes connected with the transaction.

Appeal cases in equity are to be "tried anew upon and in regard to all questions both of law and fact presented by the transcript." (Civ. Code, § 533.)

If this Court finds that the original decree and sale are invalid, there is no reason why it cannot proceed to determine the state of the accounts, and if a sale is necessary, to decree a sale in case of non-payment. If the Circuit Court had found that the present plaintiff, James Heatherly, was not served with summons in the former suit, it would have been proper for that Court to ascertain the state of the accounts between the parties and make final determination of all matters presented by the pleadings. The facts necessary to a complete determination of the controversy are set out in the pleadings, and the Court was authorized by its general equity powers, as well as by the express directions of §§ 241 and 397 of the Civil Code, to hear and pass upon them.

This point having been disposed of, we come, secondly, to the question whether the grounds upon which the original

decree is attacked or any of them are sufficient to justify its avoidance, and the entry of a decree consistent with the equities of the case as now presented.

Two prominent reasons are assigned by the appellants, in their complaint, why the decree which they attack should be set aside. They are:

First. Fraud in its procurement.

Second. Want of jurisdiction, of the person of the appellant, in the Court rendering the decree.

The finding of the referee against the alleged fraud being sustained by the Circuit Court, need not be further considered.

What is sufficient service of process, and what is competent proof of service, are questions of very great practical importance, upon which the title to property often depends, and they should rest upon well-defined principles and be governed by settled rules. The facts relied upon to establish service of summons are contained in the allegations of the answer and are there stated in the following words: And the said defendants "deny that he, the said James Heatherly, had no notice of the commencement of the said foreclosure suit. But on the contrary, defendants allege that although said James Heatherly was absent temporarily from the county, having gone professionally, as he stated in his own oath in one of the former suits heretofore mentioned, to raise money to redeem his mortgaged property, yet both said defendants were duly and legally served with summons and complaint in said foreclosure by personal service thereof, by the Sheriff of Lane County, as is substantially stated on oath by James Heatherly, in one of the former suits hereinafter mentioned, *and as will more fully appear* by the said Sheriff's return of service endorsed on the said summons, directed to said plaintiffs (then defendants), of which the following is a copy, to wit:

"I hereby certify that I have this 14th day of October, 1863, served the above summons by leaving a certified copy thereof, together with a copy of the affidavit and complaint prepared by plaintiff's attorneys, in the hands of Mary J. Heatherly, wife of the defendant, James Heatherly (she

being a white person above 14 years of age), at his usual place of abode in Lane County, Oregon.

"T. J. BRATTAIN,
"Sheriff.

"And as defendants believe, and therefore allege, plaintiff, James Heatherly, had knowledge of said judgment a few months after its rendition by way of one Mowry, to whom he claimed to have sold some of the mortgaged premises."

As these are all the facts alleged in regard to the service, the case cannot be made stronger by proving facts that are not alleged. The replication denies none of these allegations, except that the Sheriff made the return above recited; that denial is in the form of want of knowledge or information and was deemed of no effect when the case was before this Court at the last term; and the return was produced before the referee and is literally as set forth in the answer. The first sentence above quoted from the answer does not present an issue, for two reasons: First, it speaks of a notice, but does not affirm or deny anything in regard to a summons. Second, it is qualified by the subsequent statements, which undertake to specify how Heatherly received notice. If we except the denial relating to the form of the Sheriff's return, it is evident there is no issue of fact as to whether or not Heatherly was served with process. The Sheriff's return is produced and made part of this record; and all other evidence in regard to the service is irrelevant for want of an issue.

The sole inquiry in regard to service is, whether the facts alleged in the answer and above set out, constitute service of summons and confer jurisdiction of the persons of James Heatherly and wife. The referee's report shows that these defendants did introduce evidence, under objection, to the effect that James Heatherly was absent from the State at the time of this service, and remained absent until a considerable time after the judgment and the sale of the premises, and that he said, in a sworn complaint filed by him, that a copy of the summons and complaint was left with his wife.

I cannot conceive that this evidence would, if properly

introduced, make any stronger case than that stated in the answer; on the contrary, it would strongly tend to show that the place where the copy was left with the wife was not the defendant's place of abode. This branch of the subject may be dismissed for the present by repeating that proofs cannot add to the force of an undisputed allegation of the pleadings. The question of jurisdiction of the person is limited to the inquiry whether the answer shows that Heatherly and wife were served with process.

The statute provides that "the summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared *and certified* by the plaintiff, his agent or attorney," as follows: * * * * * "To the defendant personally, or if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling-house or usual place of abode of the defendant." And § 60 of the Code provides that "proof of the service of the summons, or of the deposit thereof in the post-office, shall be as follows: If the service or deposit in the post-office be by the Sheriff or his deputy, the certificate of such Sheriff or deputy, or if by any other person, his affidavit thereof, or in case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same; or the written admission of the defendant. In case of service otherwise than by publication, the certificate, affidavit, or *admission* must state the *time and place* of service."

The answer alleges that Heatherly and wife were served *as will more fully appear* by the Sheriff's return.

An attempt was made in the argument to sever the language of the answer and make of it, not only the allegation of the service as specified in the return, but also an additional allegation of due service. The language will not bear that construction. There is but one service spoken of, and the particular mode of service is pointed out. If the mode pointed out falls short of due service, proofs cannot aid the allegation, and the answer is fatally defective.

The grounds of objection to the service as shown in the return are the following:

1. Although it is claimed there was good service on both Heatherly and wife, yet only one copy of summons or complaint was delivered.

2. It was not served personally on Mr. Heatherly, and it does not appear affirmatively that he was "not found."

3. It does not appear that the copy of the complaint *was certified* by the plaintiff, his agent or attorney.

I can see no reason for taking a view of any of these points more favorably to the sufficiency of the service of process, than was expressed in the opinion of the Court when this case was before it, at the preceding term; but, on the contrary, several of the cases to which I shall have occasion to refer, hold to much more rigid rules than were there announced. The care exhibited by counsel in their investigations, and the able manner in which the case has been presented, as well as the importance of a thorough understanding of the principle that ought to determine a jurisdictional question, so often involving the rights of property, induce me to advert to some of the positions taken, and to several of the authorities cited.

The first position to which I will refer is that "the jurisdiction of a Superior Court is presumed." As a general proposition, this is true.

The rule has been stated as follows: "Nothing shall be intended to be out of the jurisdiction of a Superior Court, except that which especially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, unless it be so expressly alleged." (*Peacock v. Bell,* 1 Saund. 74; 4 Cow. 296.)

When, then, does a matter especially appear to be out of the jurisdiction?

The following rules are laid down in aid of this inquiry: "If the record contains a *recital of the facts* requisite to confer jurisdiction, it is conclusive, and cannot be contradicted by extrinsic evidence" (when attacked collaterally). "If the record is silent as to the jurisdictional facts, they will be presumed to have been duly established; but such presumption may be rebutted by extrinsic evidence." (1 Smith's Lead. Cases, 5th Ed. 816.)

But the same authorities maintain the following additional propositions:

First. "If it appear by the record expressly, *or by necessary implication,* that the cause of action was beyond the jurisdiction of the Court, or that the Court proceeded without notice to the paries, no presumption in favor of jurisdiction arises, and the judgment will be void."

Second. "If the Court is not in the exercise of its general jurisdiction, but of some special statutory jurisdiction, it is as to such proceedings an inferior Court, and not aided by presumptions in favor of jurisdiction." (Id. and 2 Cowen & Hill's Notes, n. 87, p. 779.)

When a Court of record seeks to acquire jurisdiction, not in its ordinary mode, but by a course specially pointed out by statute, a strict compliance is necessary. There must be a strict compliance with the statutory mode, and the Court where the process was returnable must act upon proofs of the service *presented in that Court.* This is a point that is overlooked in the argument presented by the respondents. If we look through the authorities cited by the respective counsel in this case, we find many cases where the subject of introducing proof *aliunde* is discussed. But the proposition, that the Courts have permitted to be proved in a subsequent proceeding, is not solely, that process was in fact served, but that *there was proof of service before the Court that rendered the decree.* Accordingly the evidence is usually spoken of as admitted in aid of the record, or to supply a lost or absent record, upon the same principle that in the case of lost instruments there can be no evidence of the terms of the agreement other than the contents of the writing, so in proving a judicial proceeding what transpired in the Court is the subject of inquiry.

There arises a distinction between introducing proof to supply a lost record, or proof of what actually transpired in the Court to explain an ambiguity and in aid of the record, and offering proof of service, now for the first time, that should have been made in the Court when the cause was tried. The latter is simply a proposal to construct a record *nunc pro tunc* from the memory of witness. But the Court

now has no control over that cause or its record, and cannot record *there* the facts found in the course of this trial, and cannot make a record that will show that that Court had jurisdiction.

A record when duly proved should import absolute verity. It should import the same thing at all times, and wherever it is produced. But the rule contended for, under which the respondent offers to prove *aliunde* that James Heatherly admitted, after the judgment was rendered, that he had been served, would make a record subordinate to, and dependent upon, the memory of witnesses. Title would be made to rest, not upon service proved in Court where the matter was adjudicated and a sale decreed, but upon *what can be* proved by the memory of witnesses, about the service of process, whenever in future that record shall be produced as the foundation of title.

The case of *Trimble v. Longworth* (13 Ohio, 431), is directly in point not only on the vital questions in this case, but upon several of the positions taken in the argument. It was a bill to reform a decree. The case seems to have been very carefully considered, and if the opinion of the Court be taken as sound law, it settles the following points:

1st. The formal recital in a decree that the defendant was duly served, does not import absolute verity when inconsistent with the return or other proofs of service filed in the cause.

2d. An attack, such as is here made upon a decree, is direct and not a collateral attack.

3d. When jurisdiction of the person is put in issue, it must be proved by the record itself.

4th. A recital in the decree "that notice has been given in due form of law," will not preclude a party from denying the jurisdiction in a suit brought to reform the decree.

5th. The return or other proof of service filed in the case is a part of the record, and in a case like the one under consideration the *record itself* shows that the Court had not obtained jurisdiction of the person.

In *Peck v. Straus* (33 Cal. 687), referred to by counsel in the argument the objection was that the affidavit of ser-

vice, stating that the person who served the process was a citizen twenty-one years old, did not aver that he was such when the service was made. That is, it does not appear but that he might have become a citizen or have become twenty-one years old since the service, and before making the affidavit. The case can afford us but little light. It differs from the one at bar in these particulars:

1. The defendant in the original case had actual notice and an opportunity to defend if he chose.

2. The aggrieved party does not state that the party serving was not authorized, nor that himself was misled or prejudiced.

3. He does not show that he had any defense, or could now make one if the case was opened.

4. The record shows that all the papers contemplated by law in making a service, were actually delivered to the defendant personally.

5. No claim for relief was made, except that the defendant was attempting to enforce the judgment; the plaintiff did not claim that it was for too great an amount, or that he could obtain a more favorable result if allowed to answer.

If it had been the view of the Court that a strict compliance with the statute was not necessary, or that it need not be shown by the record, reference would have been made to the case of *McMillan and Wife v. Reynolds* (11 Cal. 372), which must have been overruled to warrant such construction of the law. The same Court held, in a still later case, that a judgment was invalid when the Sheriff returned that he had served a copy, without stating whether or not it was *certified;* and it has uniformly been held by that Court, that when the statute points out a particular mode of service, the statute must be strictly followed.

Other cases are cited, but I think none of them go to the extent of sustaining the decree sought to be reviewed. Reference to them must necessarily be brief.

In *Astor v. Grignon's Lessee* (2 How. 319), it is said: "The license to the administrator is full and explicit, showing what was considered on the petition and evidence, and that

every requisite of the law had been complied with before the order was made, by proof of the existence of all the facts upon which the power to make it depended." There was nothing in the record to contradict this, and this case scarcely goes further than to hold that when jurisdiction has been once acquired, error will not be presumed.

Foot v. Stevens (17 Wend. 483), relates to the effect of a record where *it does not appear what steps* were taken to bring the defendant into Court, and the omission is declared to be "a mere formal defect." It is not in point in a case where the mode of service *is* shown by the record.

Hart v. Seixas (21 Wend. 40), is also a case where the record is silent as to the mode of service.

The case of *Reno v. Pinder* (20 N. Y. 298), presents the question whether a return to which the constable's name was subscribed by another, by the constable's direction, is sufficient, and does not touch any question under consideration.

From a careful examination of all the authorities cited, I am satisfied that what was decided in regard to jurisdiction of the person, and the effect of the record, when this case was before the Court at the preceding term, is settled law both in England and America, and that a less stringent rule would be inconsistent with correct practice, and hazardous to rights of property.

But if evidence *aliunde* could be received to supply the deficiency in the record, that offered in this case is insufficient. The extraneous proof offered consists of an admission contained in a pleading filed by James Heatherly in another cause, which admission does not state any *time or place* of service, and is excluded by § 60 of the Code. Further, the document containing the alleged admission shows that James Heatherly did not dwell, and had no "usual place of abode" in this State, and knew nothing of the suit until after the decree. The alleged admissions are as follows:

First. An affidavit made in 1865, in which Heatherly deposes that there "was no personal service of the summons

and complaint made upon this plaintiff in the action in which such sale was made."

Second. A complaint filed by him in 1867 in which he says, "The said defendants by their attorneys of record issued a summons, irregular in not running in the name of the State of Oregon, and void as plaintiff believes, and directed to the plaintiff, Mary J. Heatherly and others commanding said plaintiff to appear in the said Court within the given time named therein, and answer said bill named therein, or they would take judgment for the sum of $7634 and interest, and *prepared a certified copy* of said bill and said pretended summons, and the Sheriff of said Lane County left the same with Mary J. Heatherly, wife of this plaintiff, who was then *living separate and apart from him,* thereby claiming to have served this plaintiff with notice of said suit. And plaintiff further alleges that at the time of commencement of said suit, and at the pretended service of said summons, and at the rendition of the judgment therein, hereinafter mentioned, this plaintiff was absent from the State of Oregon and *residing in Idaho Territory,* and continued to be until December, 1864, and denies all knowledge of the suit until long after judgment."

The admission does not show the time or place of service, nor show whether it was the same transaction mentioned in the Sheriff's return, *nor who certified* to the copies. The probabilities may be that a copy of the complaint was certified "by the plaintiff, his agent or attorney." But courts will not intentionally take jurisdiction of the person upon probabilities, and thus make up a record that is to import absolute verity against the person or the property of the citizen when it is uncertain whether he has notice. Proof is entirely wanting to show who certified to the copy mentioned. It may be that this same paper was left at Mr. Heatherly's house, and that Mr. Heatherly was deposing falsely in regard to his place of abode. But in the absence of proof this Court cannot assume that the copies mentioned by Heatherly were certified by a particular person, nor that they are the copies mentioned in the Sheriff's return. In addition to this is the vital point whether

proof of service was made *in the Court* that decreed the sale; and the other, equally fatal, that the allegations of the answer are no broader than the facts proved by the Sheriff's return, and these allegations cannot be enlarged by evidence. Since none of the allegations of the answer, in this respect, are put in issue by the replication (the want of knowledge of the existence of the Sheriff's return being treated as shown on the former appeal), not even a perfect judgment-roll could be properly put in evidence, because no issue of fact is presented on the point.

A party is not allowed to state one case in his bill or answer and make out a different one by his proofs. (*Boon v. Chiles,* 10 Pet. 209; 8 Wheat. 527; 6 Wheat. 468; 11 Wheat. 103; 7 Pet. 274.)

I infer that on the trial in the Circuit Court special attention was not given to the latter point, for the Chief Justice says: "I think, also, in a case of this kind, *where an issue* has been made on the *fact* of the regularity of service, that declarations of the plaintiff that he was duly served and had due notice of the suit in which the decree was rendered, may be given in evidence to support the regularity of the service and show jurisdiction." We have seen that the pleadings do not present such an issue of fact, and the evidence offered does not show an admission of service; and there is no pretense that proof other than the return was made in the Court that made the record. The practice contended for would inevitably impair the value of record evidence.

There are many cases of defective service where Courts of equity have refused to interfere to disturb the judgment or decree, but upon the ground that the bill disclosed no equity in the plaintiff. Where it is disclosed by the bill that the decree prayed for would have no effect but to enable the plaintiff to perpetuate a fraud or delay a creditor, equity declines to interfere; not on the ground that the defective service is held good, but that the Court has a discretion which should only be exercised in favor of a meritorious cause.

There is nothing in the position taken by counsel that

the objection to the mode of service is technical. It is perfectly evident that Heatherly knew nothing of this suit until his land was sold; that if he has lost a chance to defend; it is because by a technical compliance with the statute the defendants have secured technical rights. The rule that requires a statute to be strictly pursued in order to obtain a right given solely by statute, is no more technical than a rule that makes a deed evidence of title to land and excludes parol evidence of a sale, or the rule that excludes parol evidence of the terms of a written contract. On the contrary, the effort to hold property by a decree and sale which the buyer knew was made during the absence and without the knowledge of the former owner, rests all its validity upon a technical compliance with the statute. Rights thus acquired are as purely technical as it is possible to imagine. *When acquired* they are entitled to full protection, but there is no intermediate standpoint between a perfect right, and the absolute nullity that results from a failure to comply with the statute.

If these defendants have strictly pursued the statute, and this is disclosed by their answer, and if they are chargeable with no fraud, either actual or constructive, they have obtained the mortgaged property, whether these plaintiffs had or had not knowledge of the proceedings. But if their answer lacks anything of showing such strict compliance in obtaining service, they have taken nothing by the proceeding. It is no objection that their proceeding is technical, or that one man's property is conveyed to another without his having actually knowledge of any suit. The present plaintiff was bound to know the law, and to know that if the present defendants complied with it, they could foreclose without personal notice to him. And on the other hand, he may well claim that nothing short of a compliance with the statute shall affect him or his property. The decree sought to be reviewed by this suit contains the following recital:

"This cause coming on to be heard on the bill of complaint, and the defendant, though duly served with process, having failed to answer and made default," it is ordered,

etc. I do not recollect that this recital was relied upon in the argument, as aiding the case made in the answer; but I allude to it here because the effect of such recitals is discussed in several of the cases to which the attention of the Court has been called.

The law applicable to such recitals may be briefly stated to be, that, when the decree recites due service, and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return. (*Randall v. Sawyer,* 16 Ill. 27; *Moore v. Stark,* 2 Ohio St. 369; *McMillan v. Reynolds,* 11 Cal. 372; *Braley v. Seamon,* 3 Cal. 610; *Anderson v. Bell,* 9 Cal. 321; *Polard v. Wegner,* 13 Wisc. 569; *Selden v. Wright,* 1 Seld. 497; *Sibly v. Waffle,* 2 Smith, 198.)

The decree and sale should be set aside for want of jurisdiction in the Court rendering it over the persons of the appellants; and a decree of foreclosure rendered against James Heatherly, and the interests of Mary J. Heatherly, in the mortgaged premises, for the amount found due, less the costs of this suit.

NOTE.—The foregoing decision was rendered when the Court was composed of Boise, C. J., and Prim, Wilson and Upton, Justices. It was probably overlooked in the publication of the decisions of the September Term, 1869.

SEPTEMBER TERM, 1870.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

SEPTEMBER TERM, 1870.

L. A. SEELY, Appellant, v. D. SEBASTIAN, JOHN FEASTER, JAMES McCONNELL, NELSON McCONNELL, R. V. SHORT, THOMAS HARRIS and JESSE V. BOON, Respondents.

JURISDICTION OF COUNTY COMMISSIONERS.—The Act of 1868, to facilitate the draining of lands in certain cases, only gives to the Board of County Commissioners jurisdiction to locate a ditch where there is none. The Commissioners are not authorized to tap the ditch of an adjoining proprietor and assess damages and benefits to such proprietor.

COMPENSATION FOR TAPPING DITCH ALREADY DUG.—The compensation mentioned in section 8 of the Act for the appropriation of an existing ditch, is in the nature of a contribution, and is distinct from the damages which the Commissioners are authorized to assess for the cutting of a new ditch.

PUBLIC USE.—By public use is meant for the use of many, or where the public is interested.

APPEAL from Clackamas County.

The bill alleges in substance that petitioner is the owner of certain lands in Clackamas County, in what is known as Black Creek Swamp; that some years since, wishing to drain these swamp lands, he obtained the consent of the owners of the lands lying on the natural outlet of these

swamp lands, to construct a ditch through their lands to drain these lands. That he constructed such ditch at a large outlay, to wit, about $1800, and extended the ditch from the lands below this swamp through his swamp lands, with side ditches, to the main ditch; that respondents own lands lying above his in this same swamp, and which, if drained, must be drained through his (plaintiff's) land, and that in January, 1869, these respondents petitioned the County Court of said county of Clackamas to appoint Commissioners to locate a ditch through the said lands of petitioners to drain their lands. This proceeding was under Act of 24th October, 1868. The Commissioners met and located such ditch, appropriating for that purpose the main ditch of petitioner already dug through his lands, and connecting with the ditch he had constructed through the lands of the proprietors below him on the outlet. They awarded $100 damages to petitioner, which sum was paid into Court by respondents and was received by petitioner. Petitioner claims that by virtue of the eighth section of the said Act of October 24, 1868, the respondents having tapped and used his ditches are bound to contribute to pay him for the construction thereof a reasonable compensation, which he claims should be in proportion to their mutual benefits derived from its use in draining their lands.

Respondents claim that the award of damages assessed to the petitioner, of one hundred dollars, is the legal compensation intended by the statute.

The bill was dismissed in the Court below and appellant appeals to this Court.

J. H. Stinson, for Appellant.

The statute to facilitate the draining of lands in certain cases (Laws 1868, 21) is in derogation of the rights of private property. It takes an interest or estate in one man's lands and conveys it to another without the owner's consent, and unless such procedure be for the public good, although compensation be made to the owner, the statute is unconstitutional and void. (Const. of Oregon, Art. 1, § 18.)

That the applicant has "land so situated that it requires

draining," and that some "person or persons owning lands adjacent thereto object to ditches being cut on their land," are jurisdictional facts; and unless they appear upon the face of the petition, the County Court can have no jurisdiction.

The statute being in derogation of the rights of private property, and by it a special power being granted to the County Court, the County Court must pursue the statute strictly, and exercise no power not specially granted therein, and as the statute does not grant to the County Court the power to appoint Commissioners to assess a compensation for ditches already dug, the County Court cannot assume such power. (*Sharp v. Spear*, 4 Hill, 76; *Spear v. Johnson*, 4 Hill, 92; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107.)

In the present case, as the County Court had no jurisdiction to appoint Commissioners, and consequently said Commissioners when appointed had no power to act, the assessment of damages for opening a ditch on appellant's land and the payment of such assessment into the County Court and its reception by appellant conveyed no title or right of easement in appellant's land, but the opening of such ditch upon the land of appellant was a trespass, and the receiving of such assessment of damages by appellant was but a waiver of the damages which appellant might have received in an action at law. (1 Washb. on Real Property, 14; 2 Washb. on Real Property, 24, 25, 27, 37 and 67; *Pitcher v. Turin Plank Road Co.*, 10 Barb. 436; *Gardner v. Mayor of Troy*, 26 Barb. 423; *Allen v. Mayor of New York*, 4 E. D. Smith, 404.)

The statute to facilitate the draining of lands in certain cases (Laws 1868, 21) provides in § 4 that the Commissioners appointed to locate a ditch to be dug by the applicant across the lands of another, in assessing the damages done to the land by the opening and use of such ditch, shall take into consideration the benefits (if any) such ditch will be to the aforesaid lands, and equity following the law, when a ditch is already dug and tapped and of mutual benefit to all parties using it, will enforce contribution under § 8.

(*Campbell v. Meiser*, 4 John. Ch. R. 334; *Stephens v. Cooper*, 1 John. Ch. R. 425; *Secruneth v. Thompson*, 9 Pick. 31.)

Logan, Shattuck & Killen, for Respondents.

However informal the proceeding in the County Court may have been, and although the Court may even have had no jurisdiction to do what it undertook to do, appellant is, by having received the one hundred dollars paid into Court by respondent under the award of the Commissioners, with full knowledge of what it was paid to him for, estopped from maintaining this proceeding, and especially is he so estopped when he has not refunded the money or offered so to do. (Story Eq. Jur., §§ 1546-1549; 1 Redfield on R. R. 362.)

Independently of any proceeding in Court, treating the Clerk as *agent* for respondent in the payment of the money, we have a written grant of an easement through appellent's land and the right to flow water into his ditch, for a valuable consideration. And to strengthen this view of the matter, this receipt or contract makes special reference to the proceedings of the County Court and of the parties, and must be construed with reference to them. They are a part of the *things done*.

"Drain on land of another is easement and can only be created by deed, although licensee may have spent money and done work." (Gale & Whately on Easements, 12, 14, note 16 and 17; 11 Ill. 164.) The complaint does not state facts sufficient to constitute a cause of suit, entitling plaintiff to an injunction. (37 N. H. 254, and cases cited.)

By the Court, BOISE, J.:

The statute says: "Any person whose land is so situated that it requires draining, and when any person or persons owning land adjacent thereto object to ditches being cut or dug on their land, may make application in writing to the County Court of his county, at a regular session thereof, for the right of way, etc., and privilege to cut a ditch," etc. When this application is made, the County Commissioners' Court shall appoint Commissioners to locate such ditch

and assess the damages to the owners of the land through whose land the ditch is to be cut—but "in assessing such damages they shall take into consideration the benefit that such ditch will be to the aforesaid lands" through which the ditch is to be cut.

This statute is intended to provide for cutting a ditch where there is none; the work is to be done by the petitioners to the County Court, and it is only in this matter that the Commissioners have jurisdiction. They have no jurisdiction to lay out a ditch over a ditch cut by an adjoining proprietor; and by way of damages, assess the compensation of the owner of the ditch, so appropriated, by tapping his ditch.

This compensation is provided for in the eighth section of the Act, and is distinct from the damages which the Commissioners are directed to assess for the cutting of a new ditch. We think this compensation named in § 8 is in the nature of a contribution, and is a proper matter for a suit in chancery, where all the parties interested in and using the ditch for their common benefit, may be made parties and compelled to pay their equitable share.

It has been insisted that this Act is unconstitutional, as it provides for taking private property for private use (and not for public). We think there is nothing in this point. By public use is meant for the use of many or where the public is interested.

Suppose a large marsh is situated in such a manner that the miasma arising therefrom affects the public health of a large number of people. To provide for its drainage would be a matter of public concern, and could be regulated by law. So if draining of large swamps would add largely to the area of valuable lands in the State and increase its resources, it would be the proper subject of legislation; and it has been the practice of all States to legislate on this subject, and encourage the drainage of these lands, both as contributing to the public health and agricultural advancement of the country. They are often so situated that their redemption is impossible by private enterprise, and the State may then contribute to that end. Millions of acres of

such lands have been redeemed in this country and in Europe at the expense of government, and we think there can be no question but what our Legislature has this authority, which has been sanctioned by the usage of the whole civilized world.

Judgment will be reversed and a new trial ordered.

SUSANNAH BAMFORD, Appellant, v. JAMES BAMFORD, Sr., JAMES BAMFORD, Jr., and G. W. McBRIDE, Respondents.

DECREE DOES NOT CONFER LEGAL OR EQUITABLE RIGHT TO PROPERTY, WHEN.—In a suit for a divorce, where the complaint contains no allegations concerning property and the decree contains nothing on the subject, the party at whose prayer the decree is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree.

JUDGMENT ROLL SHOULD CONTAIN A DESCRIPTION.—When real property is transferred from one party to another by a decree granting a divorce, the judgment-roll should contain a description of the land transferred.

INVESTIGATION MUST BE HAD IN THE SAME SUIT.—Although a Court may first pass upon the question of granting or denying the divorce and afterwards investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit.

FINAL DECREE CANNOT BE DISTURBED.—The decree of divorce having become final cannot be disturbed, unless by a suit in the nature of a bill of review. Where one seeks to open a judgment or decree, it should be shown that the party applying is without fault, or that the fault is excusable. It is not a sufficient excuse that the defendant had executed a fraudulent conveyance to a third party before the suit for divorce was begun. The statement of an opinion or conclusion is not sufficient.

AMENDING PLEADINGS.—Discretion in regard to amending pleadings is in the Circuit Court.

APPEAL from Linn County.

The plaintiff having previously obtained a decree of divorce brings this suit to obtain from her former husband, James Bamford, Sr., and his assigns, certain real and personal property. The suit for the divorce was commenced by her in 1869, and in March of that year a divorce was decreed in her favor. It does not appear that the complaint in the divorce suit contained any allegations in regard to

property, and the decree there rendered does not refer to that subject.

The plaintiff now charges that in January, 1868, her then husband, James Bamford, Sr., owned certain parcels of land which she describes, and certain personal property of the value of $1430, described in the complaint, and that, knowing that this plaintiff contemplated suing for a divorce for cause then existing, James Bamford, Sr., without consideration, and for the purpose of fraudulently preventing her from obtaining a share of said property by such suit, transferred the property to the defendant, James Bamford, Jr., his son by a former wife. That the said property was thus taken by said Bamford, Jr., in trust for said Bamford, Sr., for the fraudulent purpose aforesaid. That on October 2, 1869, said Bamford, Jr., conveyed said property to the defendant, G. W. McBride, the said McBride having notice of the nature and purpose of the former conveyance. That all said property was acquired by the joint labor of the said Bamford, Sr., and this plaintiff during their marriage. That no provision has been made for her, nor for her four children, the issue of said marriage. That at the time of commencing and prosecuting the said suit for a divorce, "the situation of said property was such that she could not successfully claim and enforce her rights to a share of it in said suit."

It was shown in evidence on the trial, although not specifically alleged in the complaint, that the consideration for the transfer from Bamford, Jr., to McBride was five promissory notes payable to Bamford, Sr., four of them for $450 each, being payable in seven, nine, eleven and thirteen years respectively, and one of them for $900, payable in seventeen years, the notes being secured by a mortgage on the premises; and that Bamford, Sr., is still in possession of the said parcels of land.

The appellant asked a decree setting aside the transfers above named as fraudulent; that a partition of said lands be decreed, giving her one-third thereof, and for a decree against Bamford, Sr., for her support.

The court below denied the relief prayed for.

F. A. Chenoweth, for Appellant.

It is never necessary, and not always proper, to settle alimony at the time the divorce is decreed. (2 Bish. on Marr. and Div., §§ 497 and 490, and note 4, § 487.) Appellant was prevented by the fraudulent conduct of respondents from procuring alimony at the time the divorce was decreed, and she ought not lose thereby her right to such alimony. (2 Bright. Hus. and W. 360; 2 Story Eq. Jur. 14; 6 Johns. Ch. R. 25.)

When the divorce was granted appellant had (Civ. Code, § 495) a title in and to one-third of the land of respondent Bamford, Sr., and there could be no discretion in the Court as to this third, nor as to the personal property of such respondent, so long as it was covered up. (2 Bish. on Marr. and Div., §§ 514, 524.)

Courts of equity will entertain original jurisdiction in suits for alimony after the divorce suit has terminated. (2 Barb. 377; 2 Bish. on Marr. and Div., §§ 357, 358, 359, 381, 382, 350, 737, 738; 2 B. Monroe, 142; *Galland v. Galland,* Law. Reg. Aug. 1870.)

The facts stated are sufficient to entitle the plaintiff to a review and modification of the decree in the divorce suit. (Civ. Code, § 377.)

The prayer for general relief is sufficient. If the complaint was defective, the objection should have been made before the issues of fact were made up. (33 Barb. 238; 6 Barb. 557.)

W. Lair Hill, for Respondents.

1. So far as the plaintiff seeks relief in the nature of a decree of alimony, the relief sought is merely incidental or collateral to a subsisting relation of husband and wife, or a proceeding to dissolve that relation, and was wholly within the jurisdiction of the Court in the divorce suit. (Civ. Code, §§ 496, 497; Bish. Marr. and Div., § 350 *et seq.*)

So, also, might that court have investigated the conveyances of property, claimed in this suit to have been fraudulent; because such an investigation would have been a

necessary step in the inquiry concerning the faculties of the husband, which must precede the decree of alimony. And since the Court had jurisdiction in the whole matter, it had power to bring before it all parties necessary to a final determination of all the questions involved. (Civ. Code, § 380; Story Eq. Pl., § 72 *et seq.*)

It is difficult to perceive, upon principle, why a suit for divorce should be an exception to this rule; and we have been unable to find any decision of a case denying its application to such suits. Courts of equity do not administer justice by halves.

2. If the appellant has any title to the land in controversy, she acquired it by virtue of the peculiar statute of this State, and it is a legal title (Civ. Code, § 495, as amended in 1855), and the appellant had a plain, speedy, and adequate remedy at law; for she could bring ejectment for her undivided share. (Civ. Code, § 313; *Carpentier v. Webster*, 27 Cal. 524.)

And in her action of ejectment she could attack the alleged fraudulent conveyances. (*Jackson ex dem. Van Buren*, 18 Johns. 425; *Chautauqua County Bank v. Risley*, 19 N. Y. 369; *Dallam v. Renshaw*, 26 Mo. 583; *Picker v. Ham et al.*, 14 Mass. 137.)

3. Nor can this suit be maintained as a suit to remove a cloud from appellant's title; for such suit cannot be maintained except by a person *in possession*. (Civ. Code, § 500; *Meade v. Black*, 22 Wisc. 241.)

And for the same reason the case must fall, as to the prayer for partition. (Civ. Code, § 419.)

4. But passing over all these jurisdictional objections, there is no cause of suit stated in the complaint. At the time of the conveyances by Bamford, Sr., appellant had no legal or equitable interest in the premises, except her inchoate right of dower, which was not in any way affected by the transaction. And there is no allegation that the grantee, or even the grantor, had any knowledge that she contemplated proceeding to obtain a divorce. The mere general allegation that the transaction was fraudulent, without specifying the particular circumstances making it fraud-

ulent, was no sufficient charge of fraud. (*Butler v. Viele*, 44 Barb. 166.)

And even, this general charge, the referee finds, is not proved. So that even if the judge of the Court below had not found that the complaint did not state facts sufficient to constitute a cause of suit, the decree must nevertheless have been the same; for there was a trial upon the issue of fact, and the report of the referee (which is the same in this respect as a verdict—Civ. Code, § 226) shows that there was no proof of fraud; and it is well settled that mere want of consideration is not a sufficient ground for setting aside a *bona fide* conveyance. (*Beale v. Warren et al.*, 2 Gray, 447.)

Upon either of these grounds, the suit might properly have been dismissed.

By the court, UPTON, J.

The principal questions presented in this case arise from the omission of the plaintiff to present the facts in the suit for divorce and to ask in that suit for the relief now demanded.

Section 496 of the Code, as amended in 1865, is as follows:

"Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall, in all such cases, be entitled to the one undivided one-third part in his or her individual right in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in § 497 of this Act; and it shall be the duty of the Court in all such cases to enter a decree in accordance with this provision."

The provision is comparatively new, and has not previously been before this Court for construction. It is claimed by the appellant, that the last clause of this section may be complied with, in any case, whether the complaint states facts in regard to property or not, by inserting in the decree a clause, general in its character, to the effect that the prevailing party is entitled to one undivided third part of the real property owned by the other at the time of

the decree. That it is, therefore, no longer necessary to state in the complaint what lands the defendant owns, or that the defendant owns real estate, the Court being in duty bound to insert such clause in regard to real property in every decree by which "a marriage is dissolved or declared void." And that, since equity will treat that as done which ought to have been done, upon the rendition of the decree the party at whose prayer it is granted becomes entitled if not in law at least in equity to one-third the real property of the wrongdoer.

I cannot think this was the intention of the Legislature, and I am unable to agree with the plaintiff's counsel in his attempt to deduce that conclusion from the last clause of the section. If that clause had been omitted the construction contended for would be less difficult to maintain. I think this provision as to the duty of the Court, was intended to prevent such construction, and was added for the purpose of preventing uncertainty and inconvenience to the public which would be likely to result from a mode of adjudication that would leave such indefiniteness in a record affecting the title to real property. If it was the design that granting a decree of divorce should, in every case, have the effect to transfer one-third the real estate of the party in fault, without specifying particular parcels, there would be no necessity for requiring the Court to enter anything in the decree on that subject. The desired result would be produced by the law and not by the formal words entered in the decree. If that is the construction, the last provision may be stricken out without altering the effect of the statute. In an ordinary action, a party becomes "entitled," and it is "the duty of the Court in all such cases to enter" a judgment for the relief to which the party becomes entitled. But if the party permits a judgment, which does not afford all the relief he was entitled to claim in the action, to become final, the party suffers by the omission; and a Court can only grant such relief as is warranted by the facts stated in the pleadings. Since in a divorce suit the Court is required to enter a decree for the property, it does not seem consistent to

hold that a party obtains property by the suit that is not mentioned in the decree.

The statute, before the amendment, did not provide for transferring real property by means of the decree, to the prevailing party, *in fee*; and it seems to be the leading object of the amendment to provide for making such transfer. As the decree is to have the effect to transfer real estate from one person to another, and is to be one of the muniments of title from its entry, it seems entirely reasonable that it, or the judgment-roll, of which it forms a part, should contain a description of the land thus transferred. And this is necessary if we would make the record in this class of cases analogous to records made in other suits affecting the title to real estate. I cannot doubt but that it was the intention of the Legislature, in making it the duty of the Court "to enter a decree in accordance with this provision," to require as great degree of certainty to be expressed in the record in regard to the particular parcels of property thus transferred as is required in ordinary conveyances. The object of the section as amended is to enable a party to obtain certain rights through the medium of a Court.

To enable the court to act judicially on the subject of property, it must appear in the complaint that the party has property; otherwise, there being nothing alleged, there is nothing to determine in respect to property, and nothing before the Court upon which to base a decree in this particular. If nothing is stated concerning property, or if, as is frequently the case, for the purpose of affecting the subject of custody of children, it is alleged in the complaint that the defendant has no property (it being in fact true), it can hardly be deemed a case within this section. Certainly, in the latter case, the construction contended for would require the Court to decree concerning that which does not exist, in contravention of the maxim, that the law does not require a vain thing.

If these views are correct, the plaintiff has not acquired either a legal or equitable right to the property by the decree of divorce.

The authorities cited to show that alimony is not always settled at the time the divorce is decreed, do not go to the extent that is claimed in this case. None of them go further than that the Court may first pass upon the question of granting or denying the divorce, and afterwards, *in the same suit,* investigate and determine the issues concerning property. The present proceeding must be treated as an original suit; the decree in the suit for divorce having become final, cannot be disturbed, nor can any further proceedings be had in that suit, unless by a suit in the nature of a bill of review. The facts stated in this complaint do not authorize the Court to review that decree. It is not shown that the alleged fraud has been discovered since the trial of the divorce suit, nor that the plaintiff has discovered proof since that time. The plaintiff should have shown some sufficient excuse for not claiming the property at that time. When one seeks to open a judgment or decree, it should be shown by a statement of facts that the party applying is without fraud, or that the neglect is excusable.

The statement that "the situation of the said property was such that she could not successfully claim or enforce her rights to a share of it in said suit," is relied upon in this particular, and more especially inasmuch as the defendant filed an answer without objecting to the form of the allegation in the complaint. But this statement contains no allegation of fact. There is nothing in it upon which the defendant could, by his denial, present an issue of fact. If the situation of the property is shown, it is shown by other allegations of the complaint and not by this. This simply states the opinion or conclusion that the facts could not be set up in the divorce suit. In other words, it is an attempt to state the law, and I think it states the law incorrectly. As between the plaintiff and her husband, she had a right in her complaint to make an exhibit of her husband's pecuniary condition in order to lay the foundation for obtaining alimony. And if that proceeding raised issues that could not be determined "without prejudice to the rights of others," by § 40 of the Code the Court had power to "cause them to be brought in." And by §§ 242 and 397: "In an

action [or suit] against several defendants the Court may in its discretion render judgment [or decree] against one or more of them, whenever a several judgment [or decree] is proper, leaving the action [or suit] to proceed against the others."

It necessarily follows either that the wife may proceed against the husband *alone,* in the divorce suit to obtain alimony, on the ground that those who have purchased are not necessary parties, or that she may compel them to appear in that court to defend. If it be true that their claim to the land is fraudulent and void she would have been entitled, if successful in her suit for divorce, to obtain a share of the land and to have it decreed to her in the divorce suit. If she believed their claims void she had a right to proceed against the husband, treating the land as his property, and if issue was taken on the point whether or not it is the husband's property, no reason can be perceived why that issue may not be tried in a suit for divorce. The question whether third parties claiming as purchasers are necessary parties is not important in this connection. It is sufficient that, if they are necessary parties, they may be joined.

It appears from the transcript that the questions of fact relating to the rights of the parties were investigated on the trial of this cause in the Circuit Court, and it is claimed that defects in the pleadings should be disregarded as not affecting substantial rights. I am of the opinion that the defect is such as cannot be disregarded under that rule, and that the complaint cannot be sustained without amendment. The power to permit amendments to pleadings is deemed a discretionary power vested in the Circuit Court. It does not appear that leave to amend has been applied for in the Circuit Court, and it certainly would not be in harmony with the spirit of our system of jurisprudence for this Court to retry the cause upon issues that have never been presented in the Circuit Court.

This Court is clearly of opinion that the facts set forth in the complaint are not sufficient to enable the Court to pass finally upon the merits of the case sought to be pre-

sented, and that it is not within the province of this Court, upon an application originating here, to permit such amendments as would bring the merits of the case before us for adjudication. It is also thought by a majority of the Court that the contrariety of opinion that has prevailed as to the construction and effect of § 495 of the Code as amended, to some extent excuses failure to apply before trial in the Circuit Court for leave to amend; and since the dismissal of this suit on the ground that the complaint does not state sufficient facts, would leave the real controversy undetermined, and probably open to another proceeding, it is deemed proper, under the peculiar circumstances of the case, to direct the case to be remanded to the Circuit Court for further proceedings, in order that the appellant may apply to the discretion of that Court for leave to amend her complaint.

JOHN TORRENCE, Respondent, v. WILLIAM STRONG, Administrator of the Estate of AMORY HOLBROOK, Deceased, Appellant.

DEFENSE WHEN CANNOT BE DEMURRED TO.—When a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be demurred out. It may, if false, be stricken out on motion.

STATUTE OF LIMITATIONS.—A payment by an attorney of the principal or interest on demands collected by him for his client prevents the operation of the Statute of Limitations to bar the client's right of action against such attorney for collections retained by him.

JURY ARE PRESUMED TO FIND.—The jury are presumed to find every material allegation in the complaint in favor of the plaintiff, where a general verdict has been rendered in his favor in the Court below.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Strong & Trimble, for Appellant.

A party payment of a debt to take it out of the Statute of Limitations must be on account of the particular debt for which the action is brought and must be made only as a part payment of a larger debt. Unless it amounts to an ad-

mission that more is due, it cannot be regarded as an admission of a still existing debt; and in the absence of conclusive testimony it will not be regarded as an admission of any more debt than it pays. (3 Parson on Con. 67, 69, 71; 2 Greenl. on Ev., § 445; Ang. on Limit., § 244.) The payment of money on an account is no admission of an unsettled account beyond the amount paid. (3 Parson on Con. 67, and note 1.)

The statute (Civ. Code, § 25) fixes the time when the Statute of Limitations commences running in case of payment of *principal* or *interest*, and shows that it has reference to the part payment of a *debt* as contradistinguished from an open or unsettled account. The demand of respondent against Holbrook was not a debt and the payments made by the latter were not payments of either principal or interest of a debt.

Moneys collected on debts of another are not matters of open and running account within the statute. (*Maury v. Mason*, 8 Porter, Ala. 211; 2 U. S. Eq. Dig. 264.) To constitute mutual accounts there must be items within the period limited by statute on both sides of the account. (*Gulick v. Turnpike Co.*, 2 Green, 545; 5 U. S. Dig. 365.) Where one receives several debts of another for collection and collects them at different times, the amounts received on the respective debts are distinct debts from the collector to the owner, and the fact that one debt so collected has been paid to the owner does not prevent the collector from setting up the statute in bar of an action for the recovery of the others; nor will the payment of one debt to the owner constitute an admission of another. (8 Porter, 211; 2 U. S. Eq. Dig. 264.) Where payments on account are made by one party, for which the other gives credit, it is an account without reciprocity, and only upon one side. Payments do not constitute a part of a mutual account. (Ang. on Limit., § 149; 7 Halst. R. (N. J.) 339; *Bennett v. Davis*, 1 N. H. 19; *Kimball v. Brown*, 7 Wend. R. 322; 35 Cal. 122. Mere disconnected accounts are not such running accounts as will take a case out of the Statute of Limitations. (*Green v. Caldeleugh*, 1 Dev. & Bat. 320.)

It is contended by respondent that the relation of *trustee* and *cestui que trust* existed between Holbrook and respondent and that the Statute of Limitations does not apply in such a case. Constructive trusts, resulting from agencies, partnerships and the like, are subject to the Statute of Limitations. (*Farman v. Brooks,* 9 Pick. 243.)

The trusts intended by Courts of equity not to be reached or affected by the Statute of Limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the exclusive jurisdiction of a Court of equity. (*Murray v. Coster,* 20 John. R. 583; *Finney v. Cochran,* 1 Watts & Serg. 112; 5 U. S. Dig. 349; 48 Penn. 518.)

The Statute of Limitations may be pleaded by an attorney in a suit brought against him by his client. (*Hicox v. Hicox,* 13 Barb. 632; 7 Greenl. on Ev. 298; 5 Hill, 398; 48 Penn. 518, 524.) Such action must be brought within six years after the money is received. The fact that a demand was not made within six years before suit is brought will not save the statute. (*Stafford v. Richardson,* 15 Wend. R. 392; 1 Am. Leading Cas. 707; 5 Hill, 398; 31 Ill. 398.)

The Circuit Court has no power to appoint a guardian *ad litem* in the case of lunatics. This control is vested exclusively in the County Court. (Civ. Code. § 869.)

Page & Thayer, for Respondents.

The facts set out in the complaint show that the statute could not have run and the plea admits those facts. (Strong Eq. Pl., § 754.)

Pleadings in such cases should conform to equity pleadings at common law. (36 Barb. R. 628; 19 Cal. 476.)

The transaction described in the complaint was in the nature of a continuing trust, and the statute would not begin to run until after a demand was made. (19 Cal. 173; 7 Wend. R. 322; 5 Barb. R. 585; 5 Hill, § 398; 2 Sandf. R. 142; 36 Barb. R. 662; 39 Barb. R. 634; Ang. on Limit. 170, 175, 176, 177.) Defendant's liability was upon an existing contract upon which partial payments had been made, and in such cases the period of limitation is from the time those payments are made. (Civ. Code, § 3.)

The plaintiff's plea, if true, is still no bar. He says the cause of action and each of them "accrued" to the plaintiff more than six years before the death of said Holbrook and the commencement of this action. This is bad in form. (Ang. on Limit. 303; 2 Hill, 59; 15 Pick. 302; 20 How. U. S. 149.) But if correct in form the action may be maintained, as having accrued only from the time of the presentment of the claim and the refusal of the administrator to allow it. (27 Cal. 274.)

By the Court, THAYER, J.:

This is an appeal from a judgment recovered in the Circuit Court, Multnomah County. It was an action to recover money. The plaintiff, John Torrence, alleged in his complaint that Amory Holbrook died intestate on the 26th day of September, 1866, and that William Strong was, on the 1st day of October, 1866, duly appointed his administrator and had duly qualified, etc., and as such administrator was made defendant.

It was also alleged that on the 30th day of November, 1858, in the lifetime of said Holbrook, the plaintiff retained and employed him, as his general attorney, for certain fees and rewards, to do and perform such business appertaining thereto as plaintiff might thereafter request, and that said Holbrook undertook and promised to fulfill his duty in relation thereto. That said Holbrook, in pursuance of such retainer and employment, received for collection certain notes and obligations belonging to plaintiff and which were placed in his hands. That a part of the notes, etc., Holbrook has returned to plaintiff; others he had collected, a part of the proceeds of which he had not paid over. The plaintiff filed with his complaint an exhibit which he alleged to be a correct statement of the transactions, in which he charged Holbrook for the notes delivered and moneys collected thereon and money placed to his credit, and credited him with the notes returned and moneys paid over, and which contained the dates of the several transactions. Plaintiff also alleged that there was a balance due him thereon of $4606.26, and that he had regularly pre-

sented the claim to the defendant as administrator and payment had been refused by him.

The defendant filed an answer denying some of the allegations in the complaint; also claimed payment; admitted the payments credited Holbrook in complaint; set up certain counter claims, and interposed as a defense the Statute of Limitations.

Plaintiff demurred to the defense or plea of the Statute of Limitations, and the Circuit Court sustained the demurrer; he then filed a reply denying the other matters of defense and counter claim set forth in the answer.

The case afterwards came on for trial before the Court and a jury duly empaneled. When the cause was called for trial, the defendant filed an affidavit setting forth that the plaintiff was insane, and insisted that the trial should be postponed. The plaintiff's counsel thereupon applied to the Court for the appointment of a guardian *ad litem* for plaintiff, and the Court appointed one accordingly. The trial then proceeded, and the jury returned a verdict of $3092.62 in favor of the plaintiff, upon which judgment was afterwards entered against the defendant generally, with costs of action.

The appellant claims that the judgment of the Circuit Court is erroneous in several particulars, which he specifies in his notice of appeal. They are principally as follows:

That the complaint does not contain facts sufficient to constitute a cause of action;

That the Court erred in sustaining the plaintiff's demurrer to the part of the defendant's answer which avers as a defense the Statute of Limitations;

That the Court erred in rendering judgment generally against the defendant; and,

That the Court erred in proceeding to try the action when it appeared that the plaintiff was insane.

Only two of the points assigned as error were earnestly insisted upon in the argument, and in the opinion of this Court they are the only questions in the case that raise any doubt as to the legality of the proceedings in the Court below. The complaint unquestionably contains facts suffi-

cient to constitute a cause of action, and we can see nothing in the question regarding the insanity of the plaintiff which can affect the judgment. Questions of that character must be raised by a plea in some form. The defendant certainly could not take advantage of it by objection or motion. The order appointing a guardian *ad litem* was an unnecessary proceeding, and perhaps not warranted by law, but it could not have affected any substantial right of the defendant. The question of plaintiff's insanity was not really before the court, and when suggested in the proceeding should have been disregarded.

The defendant's plea of the Statute of Limitations was not demurrable; as a matter of strict legal right, the defendant was entitled to the plea.

The Code provides that a defendant may set forth by answer as many defenses and counter-claims as he may have; and when a defense is set forth in proper form, containing facts within itself sufficient to constitute a defense, it cannot be got rid of by demurrer.

It may be stricken out on motion if false, but cannot be demurred out. The respondent's counsel, however insists that it affirmatively appears that the plaintiff's cause of action was not barred by the Statute of Limitations, and that if the defendant's plea of the statute had been permitted to stand it would not have availed him. There has been no statement or bill of exceptions in the case returned, and this Court can only examine the ordinary record proceedings.

It appears from the complaint that the plaintiff's cause of action arose out of the contract made with Amory Holbrook, November 30, 1858; that at that date the plaintiff placed in Holbrook's hands, who was an attorney-at-law, the notes and obligations referred to, and had deposited with W. S. Ladd & Co., bankers, $1500 gold coin, to the credit of Holbrook, which had been drawn and used by him.

That Holbrook had, from time to time, between that date and the time of his death, returned to plaintiff certain of the obligations, and paid him certain sums of money in payment of the proceeds of the obligations collected by him,

the last of which payments was made by him on the 14th day of April, 1866. The defendant in his answer admits the payment of the money and return of the obligations. The language of that part of his answer is as follows:

"That he does not deny that said Holbrook paid over and deposited to the use of the plaintiff the money, notes, etc., credited to the defendant in the complaint, amounting to $3565.75, besides the Abernathy & Co. notes, and also $300, which plaintiff admits was paid April 14, 1866, but says the amount was $500," etc.

Hence taking the complaint and answer together, this Court is of opinion that the Statute of Limitations had not run when the action was commenced, to wit, on January 10, 1868. A payment in such case of principal or interest prevents the operation of the statute until the full time has elapsed after the payment. (Civ. Code, §§ 24, 25.) The plaintiff, under the circumstances, had six years after the payment in which to commence the action. We are unable to perceive how the defendant could have been benefited by the plea in question.

The jury are presumed to have found every material allegation in the complaint in favor of the plaintiff, and would have been compelled, as the issues were framed, to find that the payments had been made by Holbrook, as credited in the complaint, and could not have found that the Statute of Limitations had run, if the issue tendered upon that point had been tried. The rule is that an error in the Court below, which on its face and by legal necessity could do no injury, is not cause for reversing a judgment. We think the error in this case comes within the principle of this rule.

That, under the circumstances, it was only technical and could not have prejudiced the defendant, and is, therefore, no cause for reversing the judgment.

The judgment, however, as entered, was irregular. It should have been entered against William Strong, as administrator of the estate of Amory Holbrook, so as to establish the claim of Torrence against said estate for the amount of the judgment and costs recovered in the Circuit Court. The judgment must be modified in that particular; in all other

respects it is affirmed. But the appellant is entitled to recover the costs of this Court.

The case is remanded to the Court below for further proceedings, in accordance with the foregoing decision.

Mr. Justice MCARTHUR did not sit in the cause.

JOHN A. JOHNS, Appellant, v. MARION COUNTY, Respondent.

RETURN FORMS PART OF JUDGMENT ROLL.—The return made in obedience to a writ of review forms part of the judgment-roll, and is properly included in the transcript without a statement or bill of exceptions.

MUST SHOW JURISDICTION.—The return should show that the tribunal had jurisdiction. It is a general rule that Courts of limited and general jurisdiction, when exercising a special limited power, conferred by statute, must show affirmatively that jurisdiction has been acquired.

PETITION AND PROOF OF NOTICE NECESSARY TO GIVE JURISDICTION.—The County Court is a Court of record, but its general jurisdiction is to be defined, regulated and limited by law. The statute prescribes its powers and its mode of proceeding in laying out roads. It has no power over the subject until the prescribed petition and proof of notice is presented.

IRREGULARITIES THAT GO TO THE JURISDICTION.—The rule that a judgment should not be reversed for errors not affecting a substantial right, does not apply to irregularities that go to the jurisdiction of the Court.

MUST DESCRIBE TERMINAL POINTS.—A petition for the alteration of a road that does not describe the terminal points with certainty, is insufficient to give the County Court jurisdiction.

APPEAL from Marion County.

The appeal is from a judgment of the Circuit Court dismissing a writ of review and affirming the action of the County Court of Marion County in the matter of a petition for an alteration of a road.

It appears from the return made in obedience to the writ of review, that on the 9th of March, 1870, a petition, signed by twelve persons, was filed in the County Court, the petition being in the following form:

"*To the Honorable County Court of Marion County, Oregon*:

"The undersigned, your petitioners, would respectively re-

quest your honorable body to take such steps as would lead to the opening of a county road, to commence at a point on the stage road north of the residence of D. A. Miller, to run thence west to the flour mill of Moores, Witten & Miller, thence southerly to intersect the county road near the foot of the Nevil Hill, near the south line of John A. Johns' land claim; also, to vacate the old road from the intersection near the Nevil Hill to its intersection with stage road north of John Crimes."

On the same day, one hundred and twenty-eight persons, styling themselves "householders living in the vicinity" of said road, filed their remonstrance against the alteration of said road. Thereupon a supplemental petition in favor of the proceeding was filed, containing additional names.

The appellant moved the County Court to strike out the supplemental petition; and thereupon the County Court made an order directing "both the petitioners and remonstrators to procure new and additional signers for or against said road," and continued the cause. Other supplemental petitions and remonstrances were afterwards filed; and in May, 1870, the proposed road having been viewed and surveyed, the County Court made an order locating the proposed road, but made no order granting the proposed vacation. Among the many assignments of errors are the following:

1. The petition and notices were defective in not specifying the place of beginning and of termination.

2. Posting one notice at the court-house, one on the proposed road and two on the road proposed to be vacated, was not a compliance with the statute.

3. It is not competent, in the same proceeding, to vacate one road and locate another the termini of the two not being common.

4. Permitting a supplemental petition to be filed.

5. Granting the petition in part and not in whole.

6. Persons were counted as petitioners who were not householders of the county or residents of the vicinity.

B. F. Bonham and G. W. Lawson, for Appellant.

Williams & Willis, for Respondents.

By the Court, UPTON, J.:

This case was presented in the Circuit Court by a petition for a writ of review. The transcript presents the petition, the writ and the return made by the clerk of the County Court.

The respondent makes a point of objection to reviewing the proceedings of the Circuit Court; that there is no statement of the case or bill of exceptions; that the return to the writ is evidence and not a pleading, and consequently cannot be regularly embodied in the transcript, unless in the form of a statement or bill of exceptions.

The return of an officer, properly made in obedience to a writ of review, forms a part of the record. The statute which directs the manner of making up the judgment-roll does not mention this particular class of returns by name, but since the return is the only means by which issue can be taken upon what is alleged in the petition, unless it is treated as a pleading in preparing the judgment-roll in pursuance of § 269 of the Code, it would be impossible to make up an intelligible record. At common law, the return brought up only the record (*People v. Vermilyea,* 7 Cow. 108), and the record was reviewed only upon questions affecting the jurisdiction. Where the office of the writ has been enlarged by statute, so as to authorize a review for error, as well as for irregularity affecting the jurisdiction, it sometimes becomes necessary to embody in the return matters that are not part of the record in the strict sense of the term, in the tribunal to which the writ is directed. But by being embodied in the return, they become necessarily a part of the record of the Court in which the return is filed, and are so treated. (*Morewood v. Hollister,* 2 Seld. 309.) The return is properly made a part of the transcript in this case.

It is not sufficiently full to enable either the Circuit Court or this Court to pass upon all the questions suggested in

the assignment of errors. For instance, the return does not disclose what course was taken to ascertain who of the petitioners and remonstrators were householders of the county, residing in the vicinity; nor what was decided in regard to any one or more of them. But, under the view taken by this Court, it will be unnecessary to pass upon all the points that are presented by the record. The case turns upon the question whether the County Court had acquired jurisdiction. "The return should show that the tribunal had jurisdiction." (*Starr v. Trustees of Rochester,* 6 Wend. 564.) It is a general rule that Courts of limited jurisdiction, and Courts of general jurisdiction when exercising a special limited power conferred by statute, must show affirmatively that jurisdiction has been acquired. When this is shown, error will not be presumed, but must be affirmatively shown. (*Stanton v. Ellis,* 2 Kern. 575.) The sound rule in regard to such tribunals is, "to be liberal in reviewing their proceedings as far as respects form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute." (*Jones v. Bird,* 1 Caine R. 594.)

The County Court is a Court of record, but its general jurisdiction is to be defined, limited and regulated by law in accordance with the Constitution. Besides the general jurisdiction in specified matters conferred directly by the Constitution, it may exercise other powers to be prescribed by law. The statute (General Laws, p. 857) prescribed its powers and its mode of proceeding in laying out, altering or locating county roads. Under the statute, the Court has no power over the subject until a petition of the prescribed character and proof of notice is presented, and it is necessary that the record should show affirmatively that jurisdiction has been thus acquired, or the proceeding cannot be sustained.

One of the requisites of the petition is, that the petition should "specify the place of beginning, the intermediate points, if any, and the place of termination" of the road.

It is the opinion of the Court that the petition presented in this case does not comply with this requirement of the

statute. The language used to define the point of beginning is susceptible of two constructions, one of which leaves the point indefinite. If we assume, in aid of the record, that "Stage Road" is a proper name, applied to a particular road, and that there is but one stage road in the vicinity, it may be inferred that the word "North" is used to signify that the point of beginning is in that road and directly north of D. A. Miller's dwelling-house. But the description of the place of termination is entirely too indefinite to be deemed a compliance with the statute. The last course and the point of termination are described by the words, "thence *southerly* to intersect the county road *near* the foot of the Nevil Hill *near* the south line of John A. Johns' land claim."

It is evident from the provisions of the statute that the Legislature intended the petition and notice should place the proposed enterprise before the public in a manner to enable parties interested to ascertain, from an examination of the petition, how their interests would be affected by the proposed change. This intent of the Legislature cannot be carried out if a petition is worded so vaguely as to make the selection of the particular route a subject of future determination. There is nothing in the petition by which the point of termination can be rendered certain, no matter what geographical facts are assumed as being within the knowledge of the Court, because it is impossible to tell how near to Nevil Hill or the south side of the land claim the point of termination is to be.

The proposed vacation not having specified *termini* common with those of the proposed new road, does not aid the description of the latter.

It is true that it does not appear on the record that any one was misled; for aught that appears, every person interested may have known from other sources precisely what alterations were intended, but the sufficiency of the petition is a question that affects the jurisdiction, and until a sufficient petition is presented in such a case, the County Court acquires no power over the subject. (*Staple v. Fairchild*, 3 N. Y. 41.)

If the vagueness of description had occurred in some proceeding after the Court had acquired jurisdiction, it is possible the presumption of regularity might prevail, notwithstanding the defect, or the Court might be justified in sustaining the judgment on the ground that it should not be reversed for mere error that is not shown to have affected a substantial right, but there is no such rule applicable to defects that go to the jurisdiction of the Court, because in a Court of limited jurisdiction there is no presumption in favor of the regularity of the proceedings until it is shown that jurisdiction has been acquired. (*Turner v. Bank of North America,* 4 Dallas, 8; *Bigelow v. Stearns,* 19 John. 39.) And even if we could apply a more liberal rule and hold that there is a presumption that a cause is within the jurisdiction of the County Court until the contrary appears, it would not avoid the difficulty, for it affirmatively appears by the record that the Court assumed to act upon this petition. And yet the Court had no power to act until such petition is presented as the statute designates. (*Bloom v. Burdick,* 1 Hill, 140.)

The question is raised whether the appellant, who filed a claim upon which damages were awarded in his favor by the County Court, can object to the jurisdiction. If he had received and accepted the award the proposition would be of more force. His disability to make the objection must be either because it would be inequitable to permit him to allege the truth, or because by his action in the County Court jurisdiction was acquired. It will not be claimed that he is estopped, he not having accepted the award, and personal appearance in a case of this kind does not confer jurisdiction. The County Court can only acquire jurisdiction in the particular mode pointed out by statute, and a question to the jurisdiction is not thus wavered. (Civ. Code, § 70.)

Where such irregularities are discovered, pending a proceeding to lay out a road, it is better that the error should be obviated by commencing anew than that the matter should be left to embarrass the county after public funds have been expended in constructing the road.

It is not necessary in this case to pass upon the other objections to the petition and notice, nor upon the validity of the subsequent petition, or the regularity of granting the order to lay out without the words to vacate.

The judgment of the Circuit Court should be reversed for want of jurisdiction in the County Court.

S. C. STONE, Respondent, v. THE OREGON CITY MANUFACTURING COMPANY, Appellant.

CONTRIBUTORY NEGLIGENCE.—A person employed to work with or around dangerous machinery, is bound to exercise his thinking faculties and give careful attention as to how he passes around it; and if he fail to do so, and is injured in consequence, he is guilty of contributory negligence, which will prevent his recovery for such injury.

RESPONSIBILITY OF AN EMPLOYER.—An employer who provides machinery and controls its operations, must see that it is suitable; and if an injury to the workmen happen by reason of defect *unknown* to the latter, and which the employer by use of ordinary care could have cured, such employer is liable for the injury.

EMPLOYEE TAKES THE RISK INCIDENT TO HIS EMPLOYMENT.—If an employee works with or near machinery which is unsafe, and from which he is liable to sustain injury by reason of its condition, he takes the risk incident to the employment, and cannot maintain an action against his employer for injuries sustained by reason of the defective condition of the machinery.

APPEAL from Clackamas County.

This was an action to recover of appellant, a corporation, damages sustained by respondent while engaged in performing certain work in appellant's woolen mills at Oregon City.

The complaint alleges that he was injured in consequence of the negligence of appellant in allowing a portion of the machinery of the mill to be in an unsafe and insecure condition, of which appellant had notice.

The answer denies the allegation of negligence and notice, and claims that respondent was injured in consequence of his own negligence.

These issues of fact were submitted to a jury, and a verdict returned in favor of respondent in the sum of $5000.

The circumstances of the injury were substantially as fol-

lows: The respondent and one Newell, a laborer who had previously worked at the business, were engaged in carrying rolls of wet cloth from a machine called an extractor, to the outside of the building to a hoisting apparatus. In passing from the latter place to where the rolls of wet cloth were, they had to pass through a passage-way, on one side of which were the extractor and shaft propelling it, and on the other side of the passage was a fan and a shaft upon which the fan revolved. The fan was used for drying wool, and revolved about seven hundred times per minute, running in such a manner as to present the appearance of an object at rest. The extractor was less rapid in its revolutions than the fan, but ran with much more noise, and in a manner much more likely to attract the attention and excite the fear of one not familiar with such machines. This passage-way was about four and a half feet in width.

After he had been employed in this business about two days, respondent was passing in from the hoisting apparatus, to the back side by the extractor, through this passage-way between the two machines, having under his right arm, on the side next to the extractor, his hand-barrow; and in his left hand, next to the fan, a handful of ropes used in binding rolls of cloth together for hoisting. Both of these machines were in motion at the time. As respondent was thus passing along, the rope he was carrying caught and wound around the shaft of the fan and he was suddenly drawn down and wounded in his hand and arm, so as to make amputation just below the elbow necessary. The shaft of the fan was not boxed. There was evidence tending to show that respondent had seen the shaft of the fan immediately before the accident and knew that it was revolving with great rapidity; that he was not thinking of it and was not conscious of danger. There was also evidence tending to show that respondent's attention had been called to the danger that existed from the shaft by a fellow-operative, some time prior to the accident, and that if he had wound up the ropes into a closer body, or had lifted them a little higher, they could not have caught on the shaft.

Logan & Shattuck and Johnson & McCown, for Appellant.

The plaintiff was not relieved from the duty of exercising ordinary prudence, though defendant was guilty of negligence. (*Baxter v. Troy & B. R. R. Co.,* 41 N. Y. 502; *Hunt v. Erie R. R. Co.,* Id. 296.) Plaintiff must not only prove negligence on the part of defendant, but ordinary care and diligence on his own part. (26 Ill. 373; 20 Ill. 478; 12 Pick. 177; 13 Ill. 585; Am. Law Reg., Mar. 1869, 154.) If defendant knew the character and position of the machinery, and could have avoided danger by raising the rope he was carrying, but did not do so because he did not think, he is guilty of negligence, and cannot recover. (6 Iowa, 443; *Hanlon v. City of Keokuk,* 7 Iowa, 488; *P. & C. R. R. Co. v. McClurg,* Am. Law Reg., Mar. 1868, p. 277; *Railroad v. Evans,* 3 P. F. Smith, 225.)

S. Huelat and Benton Killen, for respondent.

In actions of this kind, it will depend on the circumstances of each case whether the plaintiff must show affirmatively that he was not guilty of negligence. His freedom from fault may be inferred from circumstances. (20 N. Y. 65; 5 N. Y. 21; 19 How. Pr. R. 370; 34 Cal. 153.) An employee who knows nothing of the dangers of the business in which he is engaged has a right to rely upon the superior knowledge of his employer, and upon his care and prudence that he will insure him against all harm. (41 Barb. 367; 13 Pick. 98; 6 Allen, 39; 8 Allen, 441; 10 Gray, 274; 15 U. S. Dig. 401.) It is sufficient if it is fairly inferable from all the facts and circumstances in the case that the plaintiff was free from negligence contributing to the injury. (35 N. Y. 9, 10, 39, 40, 41; 8 Minn. 154; 40 Barb. 193, 211; 20 N. Y. 65, 73, 76; 22 N. Y. 209; 6 Iowa, 453.) The Court has no right to instruct the jury that a particular fact constitutes negligence. (40 Me. 151.)

By the Court, PRIM, C. J.:

At the trial of this case, the Court below was asked by appellant's counsel to instruct the jury "that if they be-

lieved from the evidence that respondent Stone knew the position and character of the machine by which he was injured, and could have avoided all danger by raising the ropes which he was carrying a few inches higher, and did not do so because he did not think, then respondent was guilty of negligence, and cannot recover."

In refusing this instruction, we think the Court below erred. The respondent having been injured while engaged in the performance of certain work in the woolen mill of appellant, which required him to pass constantly around and about the machinery thereof, it was his duty to exercise ordinary care and watchfulness in doing so.

The degree of care necessary to be exercised by an employee in working with or around such machinery, should be proportional to the danger usually and necessarily incident to the particular work being performed.

There is very little machinery in a woolen mill but what is dangerous to careless and thoughtless operatives; consequently, we hold that it was the duty of respondent while engaged in working in the vicinity of such machinery to exercise his *thinking faculties,* and give careful attention to the business in which he was engaged. If he failed to do so, and was injured in consequence thereof, it was such negligence as contributed to his own injury and would prevent his recovery in this action. This proposition is sustained by the following authorities: *The Pittsburg & Connellsville Railroad Co. v. McClurg,* decided Jan. 7, 1868, in Supreme Court of Penna., reported in Am. Law Reg., Mar. 1868, p. 277; *North Penn. R. R. Co. v. Hulman,* 13 Wright, 60; *Railroad v. Evans,* 3 *P. F. Smith,* 255. The last was a case of injury because the plaintiff did not "think or look," and was unconscious of danger. The Court says, "On approaching the road it was his duty to look and listen for an approaching locomotive, and if he saw or heard one coming, to get himself out of the reach of it. * * "If he might have heard or seen the train approaching, or if he saw it and mistook the track it was on, it was negligence in him not to exercise his senses correctly and place himself out of danger." (See, also, *Rush v. City of Davenport,* 6 Iowa,

443; *Mobile & Ohio R. R. Co. v. Thomas,* reported in Am. Law Reg., March, 1869, p. 154.)

The Court below was also asked by counsel for appellant to instruct the jury that "if they were satisfied from the evidence the machine in question was in the same condition at the time of the accident that it was in at the time plaintiff commenced work for appellant, and that the danger was open and readily discoverable by an ordinarily careful person, the jury may take that fact as evidence that the risk assumed by respondent was such as was incident to the employment in which he was engaged. This instruction the Court refused to give as asked, but modified the same by adding the following: "But if the machinery was of itself improper, or improperly placed by the defendant's neglect, and that impropriety or neglect caused the injury, the plaintiff will not be presumed to have contracted to work with and take the risk of improper machinery."

We think this instruction should have been given as asked, because the evidence reported in this case tends to show that the "machine in question was in the same condition at the time respondent commenced work for appellant that it was in at the time of the accident; and also, that respondent knew the position and character of the machine, or at least had the means of such knowledge. It was in open, plain view, and respondent had been working in its immediate vicinity for two days prior to the happening of the accident. It also appears that the attention of respondent had been called to this machine prior to the accident, by one of the operatives.

The general rule, which is well established by all the cases in this subject, is "that an employer who provides the machinery, and oversees and controls its operations, must see that it is suitable; and that if an injury to the workmen happen by reason of a defect *unknown* to the latter, and which the employer by the use of ordinary care could have *cured,* such employer is liable for the injury." Hence, under this rule it will be seen that it does not necessarily follow, that the employer is liable to his employee for every injury which he may sustain by reason of defective

or improper machinery. But his liability depends, first, upon the fact whether the defect is such a one as could have been cured by the "use of ordinary care" by the employer, or by those appointed by him to superintend and control the machinery; and, secondly, upon the fact whether *such defect was "unknown"* to the employee. By a careful examination of all the authorities, it will be seen that this rule is not only well established, but they go still further, and hold that the employee is accountable for his *means of knowldege. McGlynn v. Brodie,* reported in 31 Cal. 376, is a very ably considered case, and that, and the cases cited and reviewed by the Court in delivering the opinion, fully sustain the proposition.

The case in California is very similar to the one under consideration. The plaintiff had been engaged in working in the vicinity of a dangerous piece of machinery called a "cupola," in repairing it, and after he had been so engaged for two days, it fell down and injured him. The Court held that he could not recover of the owners for the injury sustained, on account of his knowledge of the condition of the machinery at the time. The Court says that "when a party works with or in the vicinity of a piece of machinery insufficient for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from the defective condition of the machinery." (*McGutrick v. Mason,* 4 Ohio St. R. 569; *Hayden v. Smithville Manufacturing Co.,* 29 Conn. 558; *Williams v. Clough,* 3 Hurl. & Norris, 258; *Griffiths v. Gidlow,* Id. 648; *Dynen v. Leach,* 40 E. L. and E. 492; *Skipp v. Eastern Co. Railway Company,* 9 Ex. 223; Story on Agency, sixth edition, § 453, and notes and cases cited.)

The Court below, in refusing the instruction last referred to, refused to submit to the jury the question of fact, whether the respondent had knowledge or the means of knowledge of the dangerous condition of the machine in question at the time of the accident. If this machine was

improperly set up through the carelessness of appellant, or those employed to manage and superintend the work, and respondent was injured in consequence thereof, the only other question of fact to be ascertained in order to fix the liability of appellant, was whether the dangerous condition of the machine was unknown to respondent. That was a question of fact which should have been submitted to the jury, as it appears there was some evidence on that point.

The refusal of these instructions may have prevented a verdict in favor of appellant in the Court below. Therefore, the judgment is reversed and the case remanded to the Court below for a new trial.

R. H. DEARBORN, Administrator of the Estate of R. E. STRATTON, Deceased, Appellant, v. JAMES J. PATTON, JOHN C. SMITH and D. C. UNDERWOOD, Respondents.

FILING TRANSCRIPT OF JUDGMENT.—Where a judgment was obtained before a Justice of the Peace for more than ten dollars, exclusive of cost, under the statutes of 1855, it was necessary to file a *certified transcript* of such *judgment* in the office of the Clerk of the District Court, in the county where the judgment was rendered, in order to acquire a judgment lien upon real estate. Filing a *mere abstract* of such *judgment* is a failure to meet the requirements of the statute.

APPEAL from Douglas County.

This suit was commenced by the administrator of the estate of R. E. Stratton, to foreclose a mortgage executed by Patton to secure the payment of a certain promissory note given by him to Stratton for $591 and interest. Smith filed a separate answer, in which he claims to be the assignee of a judgment against Patton in favor of Marks & Co. for $69.50, with interest at two per cent. per month from June 17, 1869, and that a certified transcript of this judgment was filed in the office of the Clerk of the District Court of Douglas County, on the 5th day of July, 1861, and was then and there entered in the judgment docket of said Court, by virtue of which it is claimed it then and there became a lien

upon the land embraced in the mortgage to Stratton. These allegations were denied by the replication. A certified copy of the Justices' docket was read in evidence, and also a paper purporting to be a certified transcript of the judgment on file in the Clerk's office under which the judgment lien is claimed, which paper consisted of a statement of the title of the cause of *Marks & Co. v. Patton,* with an entry thereunder as follows:

"Judgment rendered for the plaintiff against the defendant, June 17, A.D. 1861, for $58 90
Cost 9 95

Total amount $68 85
Fee for transcript, to be added 75
Interest on judgment at two per cent. per month."

The other transcript of the Justice's docket, read in evidence, shows that a complaint was filed and summons issued, returnable on the 17th day of June, 1861; that Patton appeared on that day before the Justice and confessed judgment for the amount demanded in the complaint; and that judgment was duly entered in the docket of the Justice for the amount and costs of suit, which were taken up by items. Nothing appears in this transcript about interest. The Circuit Court held that respondent Smith had a valid subsisting judgment lien on the mortgaged premises, and that it was prior to that of appellant.

Williams & Willis, for Appellant.

W. R. Willis and J. F. Watson, for Respondent.

By the Court, PRIM, C. J.:

One of the respondents (J. C. Smith) in this appeal is the assignee of a judgment rendered in Douglas County by a Justice of the Peace in favor of the firm of *S. Marks & Co. v. J. J. Patton,* for sixty-nine and fifty hundredths dollars. The only question here is, did this judgment become a lien upon the land embraced in the mortgage executed by Patton to R. E. Stratton; because if it became a lien at all

there can be no question but that it was prior in time to that of the mortgage.

We think it did not become a lien upon the land in question, for the following reasons: Under the statute in force at the time this judgment was rendered, any person obtaining a judgment in his favor before a Justice of the Peace for more than ten dollars exclusive of cost, and wishing such a judgment to become a lien upon the real estate, was required to file a certified transcript of such judgment in the office of the Clerk of the District Court of the county in which the judgment was rendered. The statute then provides that "every such judgment from the time of filing the transcript thereof shall have the same lien on real estate of the defendant in the county as a judgment of the District Court of the same county." (Statutes of 1855, §§ 78, 79, p. 304.)

It will be noticed that a *certified transcript* of the *judgment* is required to be filed in order to become a lien upon the real estate; and a transcript is defined by the authorities to be a *copy* of an *original record.* (Burrell's Law Dictionary.) It appears, from the facts developed in this record, that the paper purporting to be a certified transcript of the judgment rendered by the Justice and placed on file in the office of the Clerk of the District Court, was a mere abstract of the judgment rendered by the Justice, instead of a *certified copy* thereof as was required by the statute in force at the time. The filing of a *mere abstract* of the judgment, instead of a certified copy thereof, was an entire failure to meet the requirements of the statute in this respect, and therefore amounted to nothing.

The abstract fails to show upon its face that the judgment debtor was either served with process, appeared in Court, or had any notice whatever of the commencement of the action. In fact, it does not even show that a complaint had been filed. Then, so far as this abstract shows, the Justice had no jurisdiction whatever to render such a judgment, and it was therefore void upon its face. But it was insisted in the argument of this appeal by counsel for respondent, that this abstract was a substantial copy of the

judgment rendered by the Justice, as appears from a copy of his docket read in evidence at the hearing of this case in the Court below; but in this we think they were mistaken. The variance was not only substantial but material, as will plainly appear by an inspection of the two papers. The certified copy of the Justice's docket not only shows that a complaint was filed and that a summons was issued returnable on the 17th day of June, 1861, the very day on which the judgment was rendered; but it also shows that upon that very day the defendant appeared before the Justice and confessed judgment on plaintiff's demand, which judgment was then and there entered upon the docket of the Justice.

If such a transcript as this, properly certified, had been filed instead of a mere abstract of the judgment, it would have met the requirement of the statute and consequently secured the lien; because such a transcript would have shown upon its face not only that such a judgment was rendered and the amount of it, but the authority and jurisdiction of the Court.

No certified transcript of respondent's judgment having been filed in the office of the Clerk of the District Court, he acquired no judgment lien upon the premises embraced in appellant's mortgage: therefore we hold that the decree of the Court below is erroneous and should be reversed and modified, so as to give appellant the prior lien upon the land in question.

JAMES FULTON, Administrator of the Estate of WILLIAM LOGAN, Deceased, Appellant, v. R. P. EARHART, Administrator of the Estate of J. W. P. HUNTINGTON, Deceased, Respondent.

REVIEW OF FINDING OF FACT.—A finding of fact is not open to review, simply on a question as to the preponderance of evidence.

SETTING ASIDE FINDING.—When there may be ground for setting aside a finding or verdict, an appellate Court will proceed with caution if no motion was made in the Court below for a new trial.

ATTORNEY'S CERTIFICATE.—The attorney's certificate should not only show that the judgment is erroneous, but in what particular.

WHEN FINDING IS AN ERROR OF LAW.—If the allegations of a complaint are fully proved and there is no conflict of evidence, it is an error of law to find the contrary.

INTENDMENTS ARE IN FAVOR OF THE JUDGMENT.—Every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction.

IDEM—EVIDENCE PRESUMED.—The law will presume there was evidence to support a finding unless the contrary affirmatively appears.

APPEAL from Marion County.

This was an action for the recovery, as alleged in the complaint, of the agreed price of a number of horses, mares and colts, and of an undivided interest in a band of mares and colts sold by appellant to Huntington. While the action was pending in the lower Court, Huntington died, and Earhart, the administrator of his estate, was made defenadnt therein.

The answer denies that any sale was made except of an undivided one-third interest in a band of mares and colts to Huntington *and one Morgan Reeves*. It alleges that the purchase price at such sale was $333.33, and no more; that it was agreed that Huntington should pay $166.16, and no more, and that he made such payment; and it denies that he ever promised to pay any other sum.

A replication was filed denying the allegations of the answer, including that of payment.

The cause was tried without a jury, and the Court found that the evidence did not support the allegations of the complaint; that if any contract was made, it was between appellant, as administrator of the estate of Logan, and Huntington and Reeves. The cause was ordered dismissed. A statement containing the evidence of certain witnesses accompanied the appeal.

The assignment of errors was as follows: Error (1) in not finding that the preponderance of evidence was in favor of the plaintiff; (2) in finding that the evidence did not support the complaint; (3) in finding that if any contract was made, it was with Huntington and Reeves—the preponder-

ance of evidence being to the contrary; (4) in finding that the proof did not agree with the allegations of the complaint; (5) in ordering the cause to be dismissed at plaintiff's costs; (6) in not finding a verdict and entering a judgment for plaintiff.

Bonham & Lawson, for Appellant.

Williams & Willis, for Respondent.

By the Court, UPTON, J.:

The cause was first before the Court on a motion to dismiss the appeal, on the ground that there is no error assigned which is reviewable by this Court. On that motion the following opinion was expressed:

The first and third assignments simply assert that the Court erred in determining the *preponderance* of evidence. This is not an error of law. If there is no evidence *tending* to support a finding, and it so appears by the record, that may be a matter to be reviewed, but a finding of fact is not open to review simply on a question as to the preponderance of evidence. (Civ. Code, § 533; *Borst v. Spellman*, 4 Comst. 284; *Western v. Genesee M. Ins. Co.*, 2 Kern. 258; *Dain v. Wyckoff*, 18 N. Y. 46.)

The statute in regard to what shall be reviewed in actions at law is no innovation upon the practice at common law. The rule is similar to that; the common law applies on writs of error and on reviewing the verdict of a jury. If there is no evidence to support the verdict it will be set aside; but if the questions turn wholly upon the preponderance of testimony and there is no other error complained of, the verdict will not be disturbed. Even when there may be ground for setting aside a finding or verdict, an appellate Court will proceed with caution where no motion was made in the Court below for a new trial.

The fifth and sixth assignments point to no particular ruling or action of the Court. It is not sufficient to declare that a judgment is erroneous, but the statute (Civ. Code,

§ 527) requires that the certificates of the attorney should show that it is erroneous, *"and in what particular."*

The second and fourth specifications are sufficiently definite, and the cause cannot be dismissed for want of assignment of errors. We are not now inquiring whether the errors exist, but whether they have been assigned. If the allegations of the complaint are fully proved and there is no conflict of evidence, it is an error of law to find the contrary, and the second assignment is sufficient to raise the question.

The same is true of the fourth assignment. If the proof did agree with the allegations of the complaint and the Court held the contrary, it was error, and is well assigned.

For the above reasons the motion to dismiss the appeal was overruled, and the cause is now submitted on its merits.

The appellant claims that by the admissions of the pleadings the plaintiff is entitled to a judgment for $166.16, unless the defendant has proved that he paid that amount; and he claims that there was no evidence tending to show such payment.

There is a fault in this position. It disregards the rule that every intendment is in favor of the regularity and correctness of a judgment of a Court having jurisdiction.

The record brings before us some of the evidence adduced on the trial, but there is nothing in the record to show whether or not all the evidence is before us. The law will presume there was evidence to support a finding unless the contrary affirmatively appears (*White v. Abernethy,* 3 Cal. 426; *Nelson v. Lemmon,* 10 Cal. 49.)

THE STATE OF OREGON, Respondent, v. GEORGE DODSON, Appellant.

FORM OF INDICTMENT.—The form of indictment referred to, section 71 of the Criminal Code, is sufficient.

WHAT BILL OF EXCEPTIONS SHOULD SHOW.—A bill of exceptions should show that the same point presented in the appellate Court was raised in the Court below.

EVIDENCE OF THREATS.—In a trial for murder where the defense is

justifiable homicide, it is competent to prove the language and conduct of deceased towards defendant some days prior to the killing; the testimony showing that defendant was in fear of deceased at such time, and tending to show that he was in imminent peril of an attack from deceased at the time of the killing.

APPEAL from Union County.

The indictment charged the defendant "with the crime of murder, committed as follows: The said George Dodson, in the county aforesaid, on the 24th day of February, 1870, purposely and maliciously killed William Cochran by shooting him, the said William Cochran, with a pistol."

The defendant demurred on the ground that the facts stated do not constitute a crime; particularly specifying that the words "purposely and maliciously" state a conclusion and not facts; that the word "shooting" is not qualified by the words "purposely and maliciously," and that the words used in describing the offense are not equivalent to the words in the statute which define the offense. The demurrer was overruled, and the defendant, having excepted to the ruling, entered a plea of not guilty. Other grounds of error relied upon by the defendant are stated in the opinion of the Court. The defendant was convicted of murder in the second degree. A motion for a new trial having been overruled and judgment pronounced, he appeals to this Court.

Bonham & Lawson, for Appellant.

W. B. Laswell, District Attorney, and J. W. Baldwin, for Respondent.

By the Court, UPTON, J.:

The first point presented in this case is the sufficiency of the indictment. It literally conforms to the precedent published with the Code. Sec. 71 of the Criminal Code declares, in regard to "stating the acts constituting the crime," that the manner "as set forth in the appendix to this Code is sufficient." It is urged that the appendix is no part of the statute, and had no existence prior to the passage of the

statute; that this provision of § 71 should be disregarded; that the shooting, or firing the pistol, being one of the facts necessary to constitute the offense, and the principal act, should be charged in a direct manner; and that the shooting should be charged to have been done purposely and maliciously.

Many reasons against so indefinite a mode of pleading are pressed upon our attention. We do not think the practice can now be questioned on the ground of public policy, but think the doctrine *stare decisis* should prevail. Whatever consideration these objections might have deserved if they had been presented before the Act received judicial construction, the subject is not in the same position now. Inasmuch as the body of the Act and the appendix seem to have been considered by the Legislature as component parts of the same statute and were published together as such; and as the appendix has been for several years invariably treated by the Courts as a part of the statute; and the use of this form not being deemed subject to constitutional objection; either the departure from the prescribed mode, if there be any in the enactment, should be deemed an informality only, and not a substantial deviation from the requirements of the Constitution, or such forms as have grown into general use should be held to be sufficiently established by the practice of the Courts until the Legislature direct a change.

The indictment charged shooting with "a pistol;" the defendant objected to proof of shooting with a *revolver*. The objection was properly overruled. (Roscoe Cr. Ev., 649.)

It is shown by the bill of exceptions that the defendant had proved that about ten days before the homicide, the deceased had threatened to kill the defendant, and that the threats had been communicated to the defendant; that the deceased was a man of great physical strength, who "usually went armed," and "was a *desperado*," and was "at the time of the shooting alleged in the indictment advancing on the defendant with the threat that he would beat the defendant to death;" and that on the said occasion,

ten days previous to the homicide, the defendant was obliged to leave his place of business to evade an attack made by the deceased. The defendant offered to prove by one Minor that on the occasion last mentioned, "the said deceased broke open the door of the said business-house of the said defendant and entered the same, saying, 'I will get the damned rascal yet;' and when he had so entered said place of business, the deceased then and there destroyed the property of said defendant therein." This evidence was rejected and the defendant excepted. The defendant also offered to prove by James Wilson that one week before the homicide the deceased threatened to kill the defendant, the threats not being communicated to the defendant before the homicide. The evidence was rejected and the defendant excepted.

It is not disclosed by the bill of exceptions whether the testimony of Wilson was offered as circumstantial evidence tending to prove the actual existence of imminent danger, or whether it was offered solely for the purpose of showing that the appearances were such as to lead a reasonable man to believe that he was in imminent peril and that there was, no other mode of saving his own life. In the latter case, threats previously made and not communicated are not pertinent. "Such threats without an overt act, when sought to be introduced by a defendant in justification of a homicide, must be shown to have been communicated to him." (*Keener v. State,* 18 Geo. 149.)

We are not called upon to say that no case can arise where previous threats not communicated would be received. The question before us is, whether refusing to receive the evidence in this case was error, and if that depends upon the purpose for which it was offered the exception should disclose the purpose or at least show that the same point that is presented here was raised in the Circuit Court. (*Dunning v. Rankin,* 19 Cal. 643.) "Errors cannot be relied on in the appellate Court, which are not taken advantage of and raised at the trial." (*Morgan v. Hugg,* 5 Cal. 409.)

Every intendment is in favor of a judgment of a Court of

record that has once acquired jurisdiction, and until the contrary be made clearly to appear, the appellate Court is bound to presume that the ruling is correct and founded upon sufficient reasons. It is possible that one of the grounds upon which the appellant now relies might have been obviated at the trial had it been stated. It is probable that the Court rejected the testimony of Wilson because the defendant claimed the right to use it to add weight to the evidence already given tending to excuse the act on the ground of *appearances* of imminent peril. If this was the avowed purpose, the Court was right in rejecting it, for to admit it solely for such an avowed purpose would tend to mislead the jury. (*Jackson v. Caldwell,* 1 Cow. 622; *Waters v. Gilbert,* 2 Cush. 27)

We say this is the probable purpose, because it is argued by counsel in this Court that the defendant was entitled to it for the purpose last mentioned. We cannot therefore say from what is before us that the Court erred in rejecting the testimony of the witness Wilson. A part of the proposed testimony of the witness Minor was material, and there was a portion of it that the defendant was not entitled to introduce. If it was offered and claimed as a whole the objection to the evidence would be well taken. Had no motion for a new trial been made, and had the case been argued in this Court on the assumption that the defendant claimed to be equally entitled to each part of Minor's proposed testimony, I think this Court would be in duty bound to sustain the ruling of the Circuit Court. But it appears from the argument on behalf of the State, that it was held in the Circuit Court that neither proposition offered was admissible and in favor of a defendant in a criminal case, we may be justified in treating the two propositions as severally offered.

The latter statement to the effect that after the deceased had entered the premises of the defendant, the defendant having gone away, the deceased "destroyed the property of the defendant," was not a circumstance directly tending to show that he was seeking to make a personal attack on the defendant. Had the cross-examination sought to call out

such facts to *disprove* such intent, I can see no objection; but to allow a defendant to draw them out against the objection of the State would tend to indicate to the jury that a previous injury to the defendant's property in some way palliated or justified the killing. Although so monstrous a doctrine would seem to carry its own refutation on its face, yet if a judge should deliberately permit a defendant to introduce such evidence after objection it would tend to create confusion in the minds of jurors, and there is some danger that unprofessional and inexperienced men might through such means imbibe errors extremely prejudicial to the cause, to themselves and to the public.

But in relation to the threats which the witness Minor was called to prove, I think there can be no doubt of their admissibility. It was already in proof that the defendant was put in fear of the deceased on that occasion, and had left his place of business to evade an attack by the deceased, and he must have been cognizant of the transaction. The evidence offered tended to show the acts and the manner of the deceased when he was in pursuit of the defendant, and to show what and how great cause there was for the fear which the defendant entertained. It was in this respect evidence of the same class as evidence of threats previously communicated to the defendant. It would therefore be material under the theory of defense that the defendant acted upon well-grounded apprehension that he was in such imminent danger that there was no other means of escape. And under the theory of defense, that the peril and necessity was real and actual, and that in fact the defendant was without fault, and was in such imminent danger from an attack then being made, that there was no way for him to escape great bodily harm but by slaying his assailant, this was competent as circumstantial evidence tending to show the motives and purposes of the deceased in making the present attack. If it was competent to show the threat implied in the words, "I will get the rascal yet," it was competent to show the circumstances under which the words were used. And as it appears from the record that this transaction had come to the knowledge of the defendant and

had put him in fear, and as part of the transaction was already before the jury, it was important, in order to a full understanding of the defense offered, that these circumstances should be admitted in evidence. (Whart. on Hom. 417; *Shorter v. People,* 2 Comst. 197.)

For the error in excluding this evidence, the judgment should be reversed and a new trial granted.

S. M. SMITH, T. A. DAVIS and P. C. SCHUYLER, Respondents, v. THE ELLENDALE MILL COMPANY, Appellant.

JUDGMENT FOR WANT OF ANSWER.—Under the Code a judgment for want of an answer cannot be appealed from.

WHEN JUDGMENT FOR WANT OF AN ANSWER CAN BE TAKEN.—A judgment for want of an answer can only be take when it appears that defendant has been *duly served with summons* and has failed to answer the complaint within the time allowed by law.

WHAT CONSTITUTES DUE SERVICE.—To be duly served with a summons implies that the defendant has been duly served with a summons, *notifying him to appear and answer in the Court where the judgment is sought to be taken.*

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Williams & Willis, for Appellant.

Mitchell & Dolph, for Respondents.

By the Court, PRIM, C. J.:

This was an action at law to recover money on account for drugs, dyes, etc., sold by respondents to appellant, on request. Judgment was rendered against defendant in the Circuit Court of Marion County for the amount claimed in the complaint, there being no answer filed thereto by appellant.

The summons served on appellant is entitled, "In the Circuit Court of the State of Oregon, for the County of Multnomah," and required appellant to appear and answer

in the Court above mentioned, instead of that for the county of Marion, where the judgment was rendered. This summons was served on R. P. Boise, the President of the Ellendale Mill Company, in the county of Marion, by the Sheriff of said county. Appellant appeals from this judgment, and alleges as error that the Court had no jurisdiction of the defendant, for the reason that there was no summons served on it to appear in said Court, the summons being to appear in the Circuit Court of Multnomah County.

The respondents admit the judgment to be erroneous in this respect, but claim this Court has no jurisdiction to entertain this appeal, for the reason that the judgment was rendered in the Court below for want of answer, from which, it is claimed under the Code, no *appeal lies*. The Code provides that "any party to a judgment or decree other than a judgment or decree given by confession or for want of answer may appeal therefrom." (Civ. Code, § 526.) It further provides (Civ. Code, § 246), that a judgment for want of answer can only be rendered when "it *appears* that the defendant has been *duly served with the summons*, and has failed to answer the complaint" within the time allowed by law.

Under the Code any judgment other than one given by confession or for want of answer may be appealed from. It is not claimed that this judgment was given by confession. The only question then to be determined here is, whether it is such judgment as could be taken under the Code for want of answer. If so, no appeal lies and the motion of respondents to dismiss should prevail. The language of the Code is when "it appears that the defendant has been duly served with the summons," etc. This language, we hold, implies not only that it should appear that defendant has been duly served with a summons, but that the summons served should notify him to appear and answer in the Court where judgment is sought to be rendered against him. To hold otherwise would not only defeat the object of the statute, but open a wide door to fraud. The object of requiring a summons to be served on the defendant is not only to notify him that he is sued, but to

inform him of the nature of the action and in what Court he is required to appear and answer. And when it appears that such a summons has been duly served on him and he fails to answer within the time allowed by law, a judgment for want thereof may be rendered against him; and from such judgment the Code provides no appeal can be taken.

The motion of respondents to dismiss this appeal is overruled and the judgment of the Court below reversed.

ARTHUR WARNER, Respondent, v. JOHN MYERS, Appellant.

MANDAMUS.—The writ of mandamus is the proper remedy to compel the incumbent of an office to deliver to his successor the appurtenances, etc., thereof.

IDEM.—The proceeding under the writ cannot be used as a means of determining the ultimate rights of the parties to the office.

WHAT MAY BE INQUIRED INTO UNDER THE WRIT.—The principal fact to be ascertained is, to whom did the Board of Canvassers award the certificate of election? It being the duty of the Board to determine this question in the first instance, the correctness of its decision cannot be inquired into in this form of proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed or set aside by a competent tribunal and in a proceeding where its correctness may be inquired into.

APPEAL from Clackamas County.

Respondent filed a petition in the Circuit Court of Clackamas County, praying for a writ of mandamus to compel appellant to deliver to him the jail of the county, with its appurtenances and property therein belonging to the county.

The petition alleges that Warner was duly elected Sheriff of said county on the 6th day of June, 1870; and that since said election he has duly qualified and entered upon the duties of said office. That Myers was the acting Sheriff of said county prior to the election and qualification of said petitioner. Myers, in his return to the writ, alleges that he had received a majority of all the legal votes cast in Clackamas County for said office of Sheriff; and that a proceeding was then pending in Court wherein he is contesting

the right of respondent to hold said office. This portion of the return was stricken out on motion as irrelevant matter, to which ruling of the Court appellant excepted.

At the trial respondent produced in evidence the certificate of election issued to him upon the canvass of the votes and his oath of office indorsed thereon; his official undertaking with affidavits of justification of sureties, together with its indorsement of approval and filing. He then produced a certificate from the County Clerk, showing that he had qualified as Sheriff on the 5th day of July, 1870. Appellant then proved that he had been in possession of the county jail continuously during the past year.

On final hearing the writ was made peremptory by the Court as prayed for in the petition.

Myers appealed.

Kelly & Reed, for Appellant.

Johnson & McCown, for Respondent.

By the Court, PRIM, C. J.:

This was a proceeding in the Circuit of Clackamas to compel appellant by a writ of mandamus to deliver to respondent the county jail with its appurtenances and property therein belonging to the county. Under the provisions of our Code the office of this writ is precisely the same as it was at common law. It may be issued to any inferior court, corporation, board, officer or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station. (Civ. Code, § 583.)

Two questions are raised by appellant on this appeal:

First. He claims this writ was improperly issued, for the reason that respondent had a plain, speedy and adequate remedy in the ordinary course of law.

Second. That the Court erred in striking from his return to the writ that portion which alleges that he had received a majority of all the legal votes cast for the office of Sheriff in the county of Clackamas; and that a proceeding was

then pending in the Court wherein he was contesting the right of respondent to hold said office of Sheriff.

We will first consider the question whether respondent had a plain, speedy and adequate remedy in the ordinary course of law. If he had, the same section of the Code just referred to provides that this writ shall not issue.

The only remedy pointed out by counsel for appellant is that provision of our statute which provides how the election of any person to any county or district office may be contested. (Mis. Laws, ch. 14, §§ 41, 42.) Sec. 41 provides that "any person wishing to contest the election of any person to any county or district office may give notice in writing to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected." The next section provides that "such notice shall be served as a summons ten days before the hearing of said contest, and that if the Circuit Court cannot hear it in term time within one month of the termination of such election, the Circuit Judge may hear and determine it at chambers as soon thereafter as may be practicable, and shall make all necessary orders for the trial of the case." It further provides that "the County Clerk shall issue a certificate to the person declared to be duly elected by said Court." Here this proceeding ends. All the Court can do in a proceeding of this nature, is to determine who was duly elected, and order a certificate to be issued by the Clerk to the person so declared duly elected. Respondent had no occasion to resort to this remedy, as he was already in the possession of a certificate of election duly issued by the County Clerk in pursuance of the decision of the Board of Canvassers, whose duty it was under the law to canvass the votes and determine who had received a majority of all the legal votes cast. If he had resorted to this proceeding, all the Court or Judge could have awarded to him at the end of the proceeding would have been a certificate of election. With such a certificate in his possession he could not have entered upon the duties of the office until he had qualified by taking the oath of office and

filing his official undertaking. This is precisely what he could have done, and in fact had done under the certificate which he already had at the commencement of this proceeding. But appellant having been the former incumbent of the office, refused to recognize respondent as Sheriff, and refused to deliver to him the county jail with its appurtenances and property therein belonging to the county, to the possession of which the Sheriff is entitled by virtue of his office. Thus it will be seen that the remedy pointed by respondent is entirely inadequate to meet the emergency of this case. What appellant desires is, to be placed in the actual possession of the county jail and its appurtenances; and we know of no other plain and speedy remedy, in the ordinary course of the law, by which this object can be obtained.

The statute concerning elections (Mis. Laws, ch. 14, § 35) "makes it the duty of the county clerk, when the votes are canvassed, to make out a certificate of election, to each of the persons having the highest number of votes," etc. By § 9, General Laws (p. 692), "the sheriff must qualify by filing with the county clerk of the county wherein he is elected, his certificate of election, with an oath of office indorsed thereon, * * * and also give and file the undertaking hereinafter provided." By § 983 (Civ. Code): "When a new sheriff is elected or appointed, and has qualified, the county clerk shall give him a certificate of that fact, under the seal of his office." "Whenever thereafter the new sheriff is authorized by statute to enter upon the duties of the office, he shall serve such certificate upon the former sheriff, from which time his powers cease, except when otherwise specially provided." By § 984: "Within one day after the service of the certificate upon the former sheriff, he shall deliver to his successor the jail of the county with its appurtenances and the property of the county therein."

Under the provisions of the Code just cited above, and under the facts appearing in this record, it was the duty of appellant to deliver to respondent the county jail with

its appurtenances and property therein belonging to the county.

The next question to be determined is whether that portion of appellant's return to the writ should have been stricken out by the Court, which alleges that he had received a majority of all the votes cast and that a proceeding was then pending in Court in which appellant was contesting respondent's right to hold said office. We think it is well settled by authority, and conceded to be law by both parties, that this proceeding cannot be used as a means of determining the ultimate rights to the office.

The principal question of fact to be ascertained in this proceeding is, what was the decision of the Board of Canvassers? To whom did that Board award the certificate of election? It was the duty of that Board to decide that question in the first instance, and the correctness of its decision cannot be enquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal and in a proceeding where its correctness may be enquired into. (*Lawrence v. Houghton*, 5 Johnson, 128; 6 Hill, 114; 4 Renmen, 329; 2 Seldon, 187.) The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed. (49 Barb. 166.)

The Court acted correctly in striking out that portion of the return in question, for the reason that it presented matter irrelevant and not pleadable in this proceeding.

Judgment affirmed.

Mr. Justice MCARTHUR did not sit in the cause.

THE TRUSTEES OF THE M. E. PROTESTANT CHURCH, AT JEFFERSON, Respondents, v. S. B. ADAMS, Appellant.

UNINCORPORATED SOCIETIES MAY BECOME BENEFICIARIES OF A SPECIFIC TRUST.—Unincorporated societies, created for religious or benevolent purposes, when organized so as to entitle them to become incorporated under the laws of the State, are capable of becoming the

beneficiaries of a specific trust created for their benefit, and our Courts will, in the exercise of a chancery jurisdiction, enforce such trusts.

TRUSTEES OF SUCH SOCIETIES MAY SUE.—The trustees and agents of such societies have legal capacity to sue, when the suit is brought for the benefit of the association.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Mallory & Shaw, for Appellant.

There was no society in existence at the time the grant is alleged to have been made. There was therefore no one to take the grant and it is void. (*Trustees of Baptist Association v. Hart's Executors,* 4 Wheat. R. 1.) If the grant was not good at law, it cannot be sustained in equity; nor will it be favored as a charity. The law applicable to grants to charity is the same in this country as that applicable to other grants. (Id. 333-344; *Owens v. Missionary Society,* 14 N. Y. 406, 407, 408; *Bascom v. Albertson,* 34 N. Y. 585-621; *Fontain v. Ravenel,* 21 Curtis, 563.) A grant or device to a voluntary unincorporated association cannot be sustained. (14 N. Y. 407; *Jackson v. Carey,* 8 John. Ch. R. 385; *Hombeck v. Westbrook,* 9 John Ch. R. 73; 21 Curtis, 563.) A voluntary association cannot confer upon itself corporate power and give to itself the quality of perpetual succession. (*Austin v. Leasing,* 16 N. Y. 118-123; 4 Curtis, 339.) The statute of charitable uses is not in force in this country; nor is the prerogative or *cy-pres* power, conferred upon the Chancellor of England, possessed by Chancellors in America. (4 Wheat. R. 1; 4 Curtis, 336-340, 343; *Bascom v. Albertson,* 34 N. Y. 612-616; 17 How. (S. C.) 387; 21 Curtis, 558, 565, 566; Mis. Laws, ch. 3.)

Williams & Willis, for Respondents.

A conveyance of land to certain persons and their successors in office as trustees for an unincorporated religious society is good, and a bill in equity may be maintained for the benefit of such society, in the names of those persons, members of such society, selected by such society as the

successors in office of those trustees named in the deed, to correct a mistake in the deed in the description of the land, or to compel the specific performance of a contract to convey. (2 Pet. R. 578; 8 Curtis, 212; 1 Hoffm. Ch. R. 42; 3 Pet. R. 114; 2 Hoffm. Ch. R. 202, 238, 264; 7 Vermont, 241.) A bequest of property to trustees, to be paid by them to an unincorporated society, to be by such society expended, is good. (45 Maine, 122.) A device will be held good made to the minister and wardens, and their successors in office, of a church, without naming them, and an action may be maintained, in the name of the successors, for injury to the property. (9 Mass. 501.)

The case of grants and dedications to public and religious uses, forms an exception to the general rule applicable to private grants, which requires a grantee capable of taking the estate; whereas, in the former, the grant may take effect, although there be no grantee *in esse*. (45 N. H. 98; 6 Pet. R. 431; 9 Cranch, 292.)

By the Court, THAYER, J.:

It is alleged in the complaint in this suit—

That the plaintiffs are the regularly elected and acting trustees and agents of the Methodist Protestant Church of the town of Jefferson, in Marion County, in the State of Oregon.

That on the 5th day of June, 1857, one James Bates, being then the owner and in possession of the following described premises, to wit: Commencing at the southwest corner of the Institute lot on the land claim of James Bates, in the town of Jefferson, in Marion County, Oregon; thence running south on the section line eighty-six feet; thence west eighty-six feet; thence north eighty-six feet; thence east eighty-six feet, to the place of beginning—gave the same to the Methodist Protestant Church. And the said Bates, and Margaret, his wife, for the purpose of securing said land to said church, the same not being then organized, executed and delivered to one E. E. Parrish, who was at that time a member of said church, a deed duly executed, supposed to be and intended as a deed of

conveyance thereof; and said Parrish received said deed for the purpose of holding and securing said land to said church, the members thereof consenting to the same.

That subsequently, and on the 20th day of July, 1858, the said church being then duly organized, said Parrish, and Rebecca, his wife, intending to carry out the intention and understanding with said Bates and the members of said church, undertook, by their deed duly executed, to convey said land to Henry Martin, S. W. Knox, Lewis Jones, B. B. Cox and Jabez Terhune, the then trustees of said church, and to their successors in office, for the use and benefit of said church.

That at the time of the delivery of said deed to said Parrish, he and the other members of said church took the possession of said land, and erected thereon a house for the use of said church and the members thereof, as a place of worship, at great trouble and expense.

That at the completion of said house, the same was regularly dedicated, and that the trustees of said church, and the members thereof, have continuously ever since held, used, occupied and enjoyed said house and land as a place of public worship for the use of said church and the members thereof.

That said Bates at the time advised and assisted in the construction of said house, and has ever since, to within a very short time, consented to the maintenance of said building upon said premises for the use aforesaid.

That there is a mistake in the deed from said James Bates and wife to said E. E. Parrish, and in the deed from said Parrish and wife to the said Henry Martin and others, trustees as aforesaid, in that said land as described in said deeds is described as commencing at the northwest corner of the Institute lot, when the same should have been described as commencing at the southwest corner of said lot.

That said mistake was made by the parties who wrote said deeds, and was not discovered by the parties thereto until long after the execution thereof.

That on the 29th day of January, 1870, the defendant, S. B. Adams, for the purpose of cheating, wronging and

defrauding plaintiffs, and the other members of said church, out of said lands and the said buildings, fraudulently colluded with said Bates and wife, and, without consideration, procured from said Bates and wife a deed of said premises.

That said defendant knew at the time of, and prior to his obtaining said deed from said Bates and wife, all the facts in relation to the ownership and possession of said premises charged in the complaint.

Plaintiffs prayed relief; that the defendant execute and deliver to them, as such trustees, a conveyance of said premises for the use and benefit of said church, and that the defendant be barred and estopped from ever after setting up any claim thereto.

The defendant interposed a demurrer to the complaint upon the following grounds:

1. That the complaint did not show that the plaintiffs have legal capacity to sue.

2. That the complaint showed a defect of parties plaintiff.

3. That the complaint showed a defect of parties defendant.

4. That the complaint did not state facts sufficient to constitute a cause of suit.

If it be conceded that the proper parties were before the Court, and that the plaintiffs had legal capacity to sue, there would be no difficulty in determining the case at once. There is no question but that the complaint is sufficient to constitute, as between proper and competent parties, a cause of suit. The demurrer admits the complaint to be true, and the correcting of a mistake by reforming a deed so as to make it include a description of premises which the parties intended it to cover, has always been an acknowledged branch of equitable jurisdiction.

The main question to be determined is: Had the plaintiffs legal capacity to sue under the circumstances of this case, and the right to claim the relief decreed by the Circuit Court herein?

This question leads to an examination of the rights and capacities of voluntary associations in the State of Oregon, such as organized churches, and religious, benevolent,

literary and charitable societies, and the jurisdiction of Courts of equity respecting the same. I do not understand that it is claimed that a society of that character is clothed with the legal capacity of an individual to any extent. Such societies are very numerous, and wield an extensive and important influence in community. They are really the instrumentalities through which religion and learning are disseminated and charity exercised throughout the land, to a great extent, at least. The statutes of the State recognize their existence and provide for their incorporation.

Chapter 8, Miscellaneous Laws, prescribes the requirements necessary to their incorporation. They must have an organization before they can become incorporated; and subdivision 3 of § 4 of said chapter requires that the estimated value of property and money *possessed* by "said church," etc., shall be specified in the articles of incorporation.

Again, the articles must be made by the officers or trustees of such association. This is a clear recognition of such organizations and of their right to possess property. Upon the incorporation of the association such property is transferred by act of law to the corporation. (*Happy v. Morton*, 33 Ill. 398; *Merrill v. McIntyre*, 13 Gray, 157.)

It has been repeatedly held, that an unincorporated society is capable of receiving a bequest, and that a Court of chancery will enforce the same. (*Coggeshall and others, Trustees of New Rochelle v. Patton and others*, 7 Johns. Ch. 291; *Hombeck v. American Bible Society*, 2 Sand. Ch. R. 133; *Wright and others v. Trustees of the M. E. Church*, 1 Hoff. Ch. 222; *Potter v. Chapin and others*, 6 Paige R. 639; *King v. Woodhull*, 3 Edward Ch. 79; *Executors of Burr v. Smith*, 7 Vt. 241; *Bartlett v. Nye*, 4 Metc. R. 378.)

In the case of *Owens v. Missionary Society of the M. E. Church* (14 N. Y. 380), some doubts were expressed as to the soundness of these authorities. Judge Selden, who announced the opinion of the Court in that case, asserted that a devise or bequest to an unincorporated association was, in general, void, as well in equity as at law; he admitted, how-

ever, that such bequests were, in certain cases, sustained but affirmed it was only by virtue of the jurisdiction exercised by the Courts of equity in regard to charitable uses. His conclusions upon that point were: That where a bequest was made to an unincorporated society, whose general objects were known to be "religious" or "charitable," a trust might be implied, that the general fund would be devoted to those objects. (14 N. Y. 387.) It will be seen, by a careful examination, that this case does not decide that an unincorporated society cannot receive a bequest, but that its right, in that respect, will depend entirely upon the question as to whether the general objects of the society are known to be "religious" or "charitable;" and if so, a trust may be implied, that the fund will be devoted to such objects and the bequest upheld as a charity.

In the case of *Potter v. Chapin,* before cited, the Chancellor lays down the proposition, that a gift, bequest, or dedication of property to public or charitable uses (provided the same is consistent with local laws and public policy), where the objects of the gift or dedication are specific and capable of being carried into effect according to the intentions of the donor, will be sustained and protected by the Court of Chancery. The same proposition was affirmed in the case of *Perin v. Casey et al.,* 24 How. U. S. 501.

In *Bartlett v. Nye* (4 Met.) before cited, it was held that a devise of real estate to an unincorporated society for charitable uses, was valid, and that equity would enforce the trust as against the heirs; but the peculiar jurisdiction of the Court of Chancery over the subject of charitable uses, as it existed at common law and under the statute of 43 Elizabeth, and exists in many of the older States, where, as in Massachusetts, the principles of the statute of 43 Elizabeth still prevail, does not particularly affect this case. Equity jurisdiction, as administered by the Courts of this State, derives its authority from the Constitution and laws of Oregon, and includes only the ordinary jurisdiction of the Court of Chancery of England, modified and extended by the statutes of this State, and the changes in the condi-

tion of the affairs of our community. I refer to these authorities more particularly to show that voluntary associations are recognized in law as having a capacity for certain purposes, and it is conclusive to my mind that such associations in Oregon, when organized so as to entitle them to become incorporated under the laws of this State, are capable of being the beneficiaries of a specific trust created for their benefit, and that our Courts, in the exercise of chancery jurisdiction, will, in a proper case, enforce the same.

I do not hold that such societies can take and execute a trust. As societies they cannot be trustees so as to be vested with legal title. It was decided in the case of the *Baptist Association v. Hart's Executors* (4 Wheat. 1) that a voluntary association was incapable of taking and executing a trust, and, so far, that decision is approved. Nor can such an association take or hold title to real estate. An unincorporated society is not competent to take an estate in fee. (*Hombeck v. Westbrook*, 9 John. Ch. R. 73.) It cannot, however, be denied but that such associations have property rights. They certainly have the right to use and enjoy the means necessary to maintain their organization, and the consequent right to be protected in the possession thereof. They possess, at least, a *limited* legal *status*.

Take the case at bar. Can any one reasonably claim that this church had no right to use and enjoy a piece of land, eighty-six feet square, for the purposes of erecting thereon and maintaining a church building? Would such a use conflict with public policy, or be inconsistent with local law? Are not such rights accorded to every religious society in the land? It was a use of property essential to its organization. The members of the church must have a place to congregate, and they certainly ought not to be compelled to subject themselves to an action for trespass in so doing, nor should they have to depend upon the generosity of mankind for such privileges, and yet if it be true that voluntary church associations cannot be the beneficiaries of real property, for any purpose, and their rights to the use thereof be enforced in a court of justice, what assurance would the members and attendants have that they could

meet and worship, according to the dictates of their faith and conscience, with any degree of freedom or security? This would present a state of affairs not altogether unlike that which existed in the first centuries, when it was regarded as an offense for Christians to assemble in the name of the Saviour.

It appears from the complaint in this case that the proprietor of the land in controversy, James Bates, set it apart for the use and benefit of the Methodist Protestant Church of the town of Jefferson in Marion County, as a site for the erection of a house for public worship, intending to give the same to the church for that purpose. That in order to carry out such intention, said Bates and wife executed a deed to one E. E. Parrish, intending to convey the said land to Parrish for the use and benefit of said church for the purpose aforesaid, and that Parrish received said deed for the purpose of holding and securing said land to said church for such purpose, the members thereof consenting thereto. That after the church became organized and had elected trustees according to the discipline of said church, Parrish and his wife executed a deed to Henry Martin and four others, then such trustees, and to their successors in office, intending thereby to carry out the intention and understanding with said Bates and the members of said church. That Bates at the time was a member of said church, and after the execution of the deed by him to Parrish he and the other members thereof took possession of said land and erected and built thereon a house for the use of said church and themselves as a place of worship, under the impression, no doubt, that the perpetual use of the land was secured for the uses and purposes mentioned. That after the completion of said house the same was regularly dedicated, and they have continuously ever since held, used and enjoyed the same, and said land, as a place of public worship according to the usages of the Methodist Protestant Church. If there had been no misdescription in the deed from Bates to Parrish the land would have been conveyed and the members of the church been secured in its enjoyment.

The principle recognized in the case of *Vidal v. Girard's Executors* (2 How. U. S. 127), would no doubt apply. This in fact, would be a much stronger case than that. A difficult question arose there. First, as to the capability of the corporation of the City of Philadelphia to take under a devise of real and personal estate in trust for the purpose intended. And second, the beneficiaries of the trust were uncertain. Here there is no doubt as to Parrish being competent to receive the title to the land in the character of trustee, and no uncertainty in identifying the beneficiaries.

The gift was for a specific purpose, and I hardly think any one will question the right of Bates to appropriate his land to the purpose intended; but owing to this mistake the legal title never passed to Parrish, and was not conveyed to Martin and the other trustees for the like reason, and probably would not have been conveyed to them under any circumstances. The grantees in the deed from Parrish, to wit, "Trustees and successors," etc., doubtless rendered it entirely too uncertain to pass the title; but this question need not be determined in this case.

The defendant Adams, as shown by the complaint, has attempted to take advantage of the condition of affairs occasioned by the mistake in the deed to Parrish, and through collusion with Bates, has procured from him a deed to the land and appurtenances, intending to wrong this association and its members out of the same; and the question to be determined is, has the society or its members, under the circumstances of the case, any remedy.

It was claimed by the appellants' counsel upon the hearing, that the society in question, not then being organized, had no existence at the time the grant of the land was attempted to be made, and that consequently the grant was void. I cannot indorse this view. Bates made the deed to Parrish in trust for the benefit of this society. Parrish was a competent grantee, and the fact that the society was not then in a condition to receive the benefit of the trust as an organized association, did not prevent it from claiming such benefit after it became organized. While the law

requires a present competent grantee to receive title, yet a beneficiary or *cestui que use*, though not in existence at the time of the grant, may be competent to claim the benefit when ushered into being.

It is a principle of the common law that the fee to real property cannot be granted to commence *in futuro*. The title cannot remain in abeyance, but must immediately vest or not pass at all; but its use may be limited to such objects and purposes as the owner may deem proper, if legitimate; the grantor having the absolute *jus disponendi* of the property may annex such conditions to its enjoyment as he may desire, if consistent with public law. The use may be to some object thereafter to be established. (*Inglis v. Sailors' Snug Harbor*, 3 Pet. 99.) If there is a competent grantee and a beneficiary capable of being identified the conditions of the law are answered. (*Dutch Church in Garden Street v. Mott*, 7 Paige Ch. R. 77.)

The respondent's counsel claims that grants and dedications to public and religious uses form an exception to the general rule applicable to private grants, and may take effect although there be no grantee *in esse*. I concede that lands may be dedicated by the owner to public or pious uses, and that when the public have entered upon the use of the land so dedicated, so that to allow it to be reclaimed would be unjust, the dedication becomes irrevocable. (*Beatty v. Kurtz*, 2 Pet. R. 566; *City of Cincinnati v. White's Lessees*, 6 Pet. R. 431.)

If such dedication can be regarded in the nature of a grant, it constitutes the only exception that I am aware of where a grantee *in esse* can be dispensed with. I am rather inclined to agree with the appellants' counsel that the law applicable to grants to charitable uses is the same in this country as that applicable to other grants, unless a dedication may be included under the head of grants. But I am satisfied that the transaction between Bates and Parrish in regard to making the deed of June 5, 1857, and the fact that the members of the society in question, relying upon the same, took possession of the land in controversy, built the house thereon as a place of worship, and used the same

with the consent and approval of all parties, creates in equity a good and valid trust in favor of the society, which Bates had no right to violate; and that the deed from Bates to Parrish constituted, in equity, at least, an agreement to convey the land; and the subsequent entry by the members of the society into the possession and expenditure of money as shown by the complaint, upon the faith of such transaction, renders such agreement valid and binding upon Bates and his grantees, who might take the title with notice thereof.

The rule ordinarily is, that a mere stranger to an executory contract between third persons cannot avail himself of the benefits of its provisions, although named therein as a beneficiary; but where the contract is of such a nature and has been so far acted upon as to change the condition in life of the stranger, and to raise reasonable expectations in him, grounded upon the contract, it constitutes an exception to the general rule. This case clearly comes within the principle of the exception. It is not at all probable that the members of this society would have entered upon the land in question, and built and erected, at great cost and trouble, the church edifice referred to, if Bates had not proposed to give them the land in question and executed the deed to Parrish with that intent; that transaction must have raised expectations of that character in their minds, and induced them to do as they did in that respect; and now to permit Bates, notwithstanding this, to dispose of the land in disregard of the rights of the association, would be in violation of common honesty and fair-dealing. The defendant Adams having taken the title with full notice of the facts, must therefore be regarded as a trustee of the legal title for the benefit of the society; that is, he took it impressed with the trust.

It is now settled law that the Court of Chancery, before as well as at and after the statute of Elizabeth, would, where the uses were charitable and the grantor competent to convey, aid a defective conveyance to uses. (2 Kent's Com. 287, and note "A.") And it appears to me that the Courts of this State, in the exercise of chancery jurisdic-

tion, should certainly not hesitate to aid a defective conveyance where the grantor was competent to convey and the grantee competent to receive, and a beneficiary not only entitled to take the benefit of the use, but has materially contributed to the consideration of the grant.

My deductions from the foregoing premises are: That the association in question, known as the Methodist Protestant Church, of the town of Jefferson, is entitled to claim as a remedy under condition of affairs shown by the complaint, and consistent wth the law applicable to the facts, that the defendant, S. B. Adams, be declared a trustee of the legal title to the land in question, for the use and benefit of the association or church, for the purposes mentioned in the complaint, and that said defendant be perpetually enjoined and restrained from interfering with such use and enjoyment by the association and its members. If this conclusion is correct, the main question raised by the demurrer to the complaint, and the only difficult one in the case, the question whether the plaintiffs have legal capacity to sue, is easily solved. The association could not maintain a suit in its associate name. The several members might unite as plaintiffs and legally claim a remedy, but it certainly would be very inconvenient to do so, and, to avoid such difficulty, the Legislature wisely provided that, where the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole. (Civ. Code, § 381.) This provision is but declaratory of a rule of equity, which had existed long before the adoption of the Code, and which the members of this association were entitled to the benefit of in bringing this suit. The plaintiffs allege that they are the trustees and agents of the association, and claim relief for the benefit of the association and members thereof. I can only regard the suit as brought for the benefit of all the members of the Methodist Protestant Church of the town of Jefferson, and in that view they certainly have legal capacity to sue and enforce the remedy to which the association is entitled. Under this view of the case there is no defect of plaintiffs. It is to be presumed that

this church embraced as many members as churches in general that are similarly situated, and to bring them all before the Court would be almost impossible. Such a practice should not be tolerated. They are members of the association, and entitled to maintain the suit for the benefit of all the members thereof. (*Beatty v. Kurtz,* 2 Peters, *supra.*)

Neither is there a defect of parties defendant. Adams has the legal title, and a full and complete remedy may be had without bringing any of the other parties who have participated in the transaction referred to before the Court, They are not necessary parties to a complete determination of the question involved in the suit.

The Circuit Court, in pursuance of the prayer of the plaintiffs, decreed that the defendant execute a deed conveying the land to said plaintiffs, as trustees of said association, for the use and benefit of the association, or that in default thereof the decree operate as such conveyance, etc. I doubt whether relief to that extent could be legally claimed or granted in this case. I do not think that the plaintiffs had a right to claim any remedy beyond that before stated. But, as that part of the decree is more formal than otherwise and does not affect any substantial right, it may as well be allowed to stand uncorrected in that particular.

The judgment of the Circuit Court should therefore be affirmed.

A. H. BROWN, Respondent, v. WM. HARPER, WM. RUSBERRY and H. STEWART, Appellants.

MECHANIC'S LIEN ASSIGNABLE.— Although the right to perfect a lien by filing notice, under the Act concerning liens of mechanics, is a privilege to be exercised by the person performing the labor or furnishing the materials, when the lien is perfected it is assignable.

APPEAL from Baker County.

THIS suit was brought by Brown, assignee of Starr and others, to foreclose mechanic's lien, procured by them and

assigned to Brown, for labor and material furnished Harper & Rusberry, and for the sale of property for the benefit of plaintiff, and also to cut off a similar lien of Stewart's for labor and material furnished to aid Harper & Rusberry.

Defendants filed a general demurrer, which was overruled and judgment given for plaintiff. Other proceedings, but having no important bearing in the case, were had in the Court below.

R. A. Pierce and C. G. Curl, for Appellants.

A mechanic's lien is a personal right, and not assignable without special authority in the statute. (*Caldwell v. Lawrence,* 10 Wisc. 331; *Pierson v. Ficher,* 36 Me. 384; 2 Washb. Real Prop. 563; Houck on Liens, 205; *Roberts v.* Fowler, 3 E. D. Smith, 632; Mis. Laws, ch. 32, § 10.)

I. D. Haines, for Respondent.

Choses in action are assignable. (Cal. Prac. Act, 5; 18 Cal. 127; 12 Cal. 98; 18 Cal. 123; 2 Kern. 625.) Mechanics' liens are assignable. (3 E. D. Smith, 632; 20 U. S. Digest, 101, §§ 8, 9.) Liens of material-men are assignable. (1 Estee Pl. 73; 4 Abb. Dig. 4, § 10.) Must be assigned in writing. (7 Cal. 389.) Is in the nature of a mortgage. (Cal. Dig. 722.)

By the Court, UPTON, J.:

This is an appeal from a judgment or decree foreclosing mechanics' liens. The point of objection made by the appellant is that the complaint does not state facts sufficient to constitute a cause of action or suit, in that the plaintiff sues as assignee, and that liens for labor and material under the statute (Mis. Laws, ch. 32) are not assignable.

Notices of these liens were filed by parties performing the work and furnishing the materials, and they were assigned to the plaintiff after the liens were perfected. The authorities cited by appellant sustain the position that under statutes similar to ours the lien cannot be perfected by an assignee,—and that seems to be fairly inferable from §§ 1 and 2 of our statute,—but I think none of these au-

thorities support the position that the perfected lien cannot be assigned.

The appellant claims that such assignment is inconsistent with the requirements of § 10 of the statute, and that the owners of the building have a right that satisfaction be entered by the original lien-holder. The language is, "Whenever any person *having* a lien by virtue of the provisions of this title shall have received" payment, he shall "enter satisfaction of his demands," etc. I do not think there is anything in this section conflicting with the idea of the assignability of the perfected lien. The cause of action for the work and material, aside from the lien, was assignable and might have been reached by garnishee process. If this demand had been levied upon by a creditor before assignment but after the lien was perfected, I cannot think such an indebtedness for work and material, when transferred by judicial sale, or enforced by decree for the benefit of the creditor, would be treated as divested of the character of a lien. I think there is nothing in the statute that necessarily leads to the conclusion that a perfected lien is not assignable.

The authorities cited by the appellant treat the *right to assert and perfect* the lien as a personal privilege not transferable. So our statute provides "that any person who shall" * * * "perform labor," etc., shall have a lien upon filing the notice, etc.; and "any *person* wishing to avail himself of the provisions of this title," * * * "shall file," etc. I think when he has availed himself of these provisions and his rights have become settled and vested there is no longer an occasion for exercising his personal option, and his rights are no longer in the nature of a privilege that must be exercised or enjoyed by him personally in order to be valid.

The record, as presented by the transcript, is somewhat incomplete in not showing the time of filing some of the motions passed upon by the Circuit Court, and it is therefore difficult to determine whether the defendant was in default or whether he was entitled to a hearing on the demurrer, or to say whether this should be deemed a judg-

ment for want of answer, and consequently not appealable. But, as upon the merits presented by the demurrer, we should arrive at the same conclusion that was reached in the Circuit Court, these questions become immaterial for the purposes of this cause.

The decision of the Circuit Court should be affirmed.

W. C. FOREN, Respondent, v. DAVID DEALEY, Appellant.

SUFFICIENT ANSWER.—If an answer puts in issue the material facts it is sufficient.

STRIKING OUT AN ANSWER.—To justify striking out an answer as false and therefore sham, it must be obviously false or false in fact and pleaded in bad faith.

SHAM ANSWERS.—Sham answers are such as are good in form, but false in fact and pleaded in bad faith.

VAGUENESS IN PLEADING.—Mere vagueness in pleading must be corrected by amendment and not visited by judgment.

APPEAL from Baker County.

The action is upon a promissory note for one hundred and fifty dollars and interest, which purports to be for value received. The complaint sets out a copy of the note, alleges its execution and delivery, and alleges that no part of the said promissory note or the interest thereon has been paid. That there is now due and owing to said plaintiff from said defendant on said promissory note the sum of one hundred and fifty dollars in gold coin, together with interest in like gold coin on said one hundred and fifty dollars at the rate of twelve per cent. per annum from February 28, 1867.

The answer admits the execution and delivery of the note but alleges that it was without any consideration; that a day or two prior to the execution of the note, plaintiff and defendant had an accounting and final settlement of all matters between them; that at such settlement a balance was struck and there was found due defendant from plaintiff upwards of one hundred and eighty dollars; that there has been no dealings between the parties since said settle-

ment, and that defendant is not indebted to plaintiff on said note in any sum whatever. The answer further alleges that immediately after the settlement the plaintiff refused to pay the defendant the amount found due, but then and there demanded that defendant should make and deliver the said note; and threatened that if the defendant refused to deliver the same the plaintiff would cause the arrest and imprisonment of the defendant. And the defendant believing and fearing that the plaintiff would carry his threat into execution, did on account thereof and without consideration make and deliver said note to the plaintiff. That there was no legal or equitable cause or right for said threatened arrest and imprisonment. That it was from fear of said threats, which were malicious and wanton, and not for any consideration, that he executed said note. *And that he told the plaintiff* at the time that he would not pay the note.

On motion of the plaintiff the answer was struck out and judgment was rendered for the plaintiff.

R. A. Pierce and C. G. Curl for Appellant.

Want of consideration is a good defense in an action of this kind. (1 Pars. on Con. 249, 250, Ed. of 1864; 3 Kent. Com. 103, Ed. of 1860; *Jenkins v. Schaub,* 14 Wisc. 1; *Stillwell et al. v. Kellogg et al.,* 14 Wisc. 461; Story on Notes, §§ 181 to 190. Fear of imprisonment is duress and a good defense. (*Whitfield v. Longfellow,* 13 Me. 146; 1 Pars. on Con. 392, Ed. of 1864; 2 Kent. Com. 610, note "b," Ed. of 1860; 5 Hill's R. 154; Duress Bouv. Law Dict.)

I. D. Haines, for Respondent.

The answer is sham. Making the note was a new dealing. (12 Cal. 171; 14 Cal. 509; Van Sant Pl. 603; 6 Cow. 34.)

It was a note given after a settlement. Counter claim is not well plead. (Van Sant Pl. 400, 579, 603; 15 Barb. 360.)

The allegations of fear, threats of arrest etc., are sham defenses, shown false by the amended answer which says that when the defendant signed the note he told the plaintiff that he would not pay it which does not show fear.

It is not shown by stating facts that the plaintiff had no right to arrest defendant. Facts should be stated. (Van Sant Pl. 302, 467; 5 Cal. 160; 18 How. 306; 6 Mass. 500.) Fraud, duress. (27 Cal. 166; 2 Estee Pl. 674; 19 How. 69; 2 Block, 499.)

By the court, UPTON, J.:

The only question presented arises upon an order striking out the answer and rendering judgment for the plaintiff. Evidently there are parts of the answer which, if they are unqualified by the other parts, amount to a defense.

"If an answer puts in issue the ultimate facts resulting from the evidence, it is sufficient." (*Moore v. Murdoc*, 26 Cal. 524.)

But it is claimed by the respondent's counsel and seems to have been held by the Circuit Court, that all the direct statements of the answer which would have been available, are rendered useless by qualifications and contradictions. If a defendant sets up that no consideration was given, and in a second defense sets forth the circumstances under which the note was given, the first branch of the answer will be interpreted by the second. (*Kyle v. Harrington*, 4 Abb. Pr. 42.) And if it appears from the circumstances that there was a consideration, the first defense, although direct and positive, will be of no avail.

This is but an application of the general and familiar rules of pleading, that a pleading must not be contradictory, and that a party is bound by the admissions in his pleading.

We have only to examine the answer and ascertain whether it contains any admission of a consideration or makes any statement inconsistent with the plea that the note was given without consideration. The answer contains many redundant statements in regard to the defendant's affairs and the members of his family which could not possibly aid his defense or serve any beneficial purpose; but we do not find in this array of circumstances any statement that flatly contradicts the plea that there was no consideration for the note. Nor do the allegations, taken as a whole, show that the note must have been founded

upon sufficient consideration. The circumstance that the parties met a day or two before the note was made "and accounted, reckoning all things theretofore existing in deal between them, and struck a balance," is not entirely inconsistent with the first plea. The same may be said of all the circumstances detailed in the answer; notwithstanding all that is set out, it is not impossible that there was an ascertained balance due to the defendant, and he may have been induced by threats to give the note without any good or valuable consideration, for ought that appears in the circumstances detailed. No affidavit was filed upon which the Court would act, as was done in the case of *Brewster v. Bostwick* (6 Cow. R. 34).

The argument of the respondent assumes that the Court can decide upon the truth of the plea, and declare an answer sham upon mere probabilities. Thus he claims that the allegations in regard to the accounting render it improbable that the account was settled, or that no money was due to the plaintiff, and that the defendant's assertion, made at the time he signed the note, that he would not pay it, renders it improbable that he was intimidated or that he signed the note through fear of arrest; but I think this assumption untenable. When an answer is objected to as false, and therefore sham, the Court should not proceed upon probabilities, but to justify striking out an answer on this ground it must be obviously false, or it must be shown to be false and in bad faith. "Sham answers are such as are good in form, but false in fact, and pleaded in bad faith." (*Gostorfs v. McCahill & Co.*, 18 Cal. 385; *Piercy v. Sabin*, 10 Cal. 22.) None of the numerous authorities cited by the respondent, justify a Court in striking out an answer, and rendering a judgment on the merits, upon a mere suspicion of untruth; nor in rejecting an answer as contradictory and thus terminating the case, unless the statements alleged to be contradictory are enirely inconsistent with the truth of the defense that is well plead. It cannot safely be asserted from an inspection of this answer that it could not have been established on the trial that the note was without consideration. If the truth of the matter rested

on probabilities, this entitled the party to a trial. It was, therefore, error to render a final judgment for the plaintiff.

So much irrelevant and redundant matter is contained in the answer and intermingled with that which is material, that it encumbers the case, and there is much reason to think the Court might well have made the order striking out the answer at the same time granting leave to amend upon terms; and if the terms were not accepted, might have rendered this judgment; but these defects do not warrant a judgment without an opportunity to defend.

"Mere vagueness in pleading is to be corrected by amendment, and not visited by judgment." (*Kelly v. Barnett*, 16 How. Pr. R. 135; *Struver v. Ocean Insurance Company*, 9 Abbott Pr. R. 23.)

The judgment should be reversed and a new trial granted.

JOHN O'RILEY and MARY O'RILEY, Appellants, v. JOHN WILSON, Respondent.

PLEADINGS—SUFFICIENCY OF A DENIAL.—Where in an action for the recovery of damages, the defendant pleads accord and satisfaction, and the replication denies that "in consideration of the payment of seventy-five dollars, or any other sum and the surgeon's fee," mentioned in the answer, the plaintiffs "accepted the same in full satisfaction and discharge of the damages," etc.: *Held*, that while this is an admission of the payments, it is a denial of their acceptance in discharge of the damages claimed, and, therefore, a sufficient denial of the settlement set up in the answer.

THE facts are stated in the opinion of the Court.

S. Huelat, for Appellants.

Page & Thayer, and Johnson & McCown, for Respondent.

By the Court, BOISE, J.:

This was an action brought by the plaintiffs to recover damages accruing to the plaintiff, Mary O'Riley, from the falling of certain seats, erected by the defendant at his circus, whereby the plaintiff was injured.

The defendant, in his special answer, says:

"Defendant, for further answer, avers that after the committing and happening of the alleged and supposed grievances and acts, in the complaint mentioned and before this action, to wit, on the said 20th day of September, 1869, the defendant delivered to the plaintiff seventy-five dollars in coin, and paid the surgeon's bill for attendance upon the said Mary O'Riley, and in consideration of such payment to the surgeon the plaintiffs accepted and received the sum of seventy-five dollars aforesaid, in full satisfaction and discharge of the damages or liabilities in the complaint mentioned, and of all the damages by the plaintiffs sustained by reason of the matters and things therein alleged."

To this answer the plaintiffs reply:

"That it is not true that plaintiffs, in consideration of the payment of the sum of seventy-five dollars, or any other sum, and the surgeon's fee for attendance upon plaintiff, Mary O'Riley, accepted the same in full satisfaction and discharge of the damages or liabilities in the complaint mentioned and set out, and of all of the damages by the plaintiffs sustained by reason of the matters and things in said complaint alleged, and plaintiffs deny that they have ever received from any person or persons compensation or satisfaction for the injury and damages in the complaint in this action set out."

The general allegations of the complaint were also denied. A trial to a jury was had, and a verdict for the plaintiffs rendered, when the defendant moved for judgment, notwithstanding the verdict; which motion was allowed, on the ground that the replication did not deny the accord and satisfaction pleaded in the special answer of the defendant. And the question to be determined by this Court is, does the replication put in issue the allegations of said special answer?

The answer says that defendant paid the surgeon's fees and paid the plaintiff seventy-five dollars, which was accepted as a full settlement and satisfaction by the plaintiffs.

The reply does not deny the receipt of the money or the payment of the surgeon's fee, which is therefore admitted;

but plaintiffs say that it is not true that they accepted the same in full satisfaction and discharge of the damages or liabilities in the complaint mentioned. It is insisted that it is not sufficient to deny that an allegation to be to the effect, as mentioned in the pleading replied to, but that the denial must show that there has been no settlement whatever. This is not a denial of a conclusion of law. A certain fact is set out in the answer, to wit: That the payment of the surgeon's fee and the payment of seventy-five dollars were accepted by the plaintiffs as a full settlement of the damages; this is to say, that such was the contract and the consideration thereof. Plaintiffs deny that they ever made any such contract. I think this is the denial of a fact, and not the pleading of a conclusion of law. It is not a denial of the defendant's conclusion of law, but it is the denial of the fact that there was any agreement such as the defendant has alleged. To say that a certain sum was accepted is stating a fact, and to deny it is to deny a fact. We think the replication makes an issue of fact with the answer on the question as to whether there was an acceptance in discharge of damages or not.

Judgment reversed.

SEPTEMBER TERM, 1871.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

SEPTEMBER TERM, 1871.

R. H. MOORE, Respondent, v. THOMAS FLOYD et al., Appellants.

INSTRUCTIONS.—In an action against a sheriff for failing and refusing to levy upon property sold by the judgment-debtor prior to the execution, and remaining in his possession, the Court instructed the jury that the title to the property so sold was in the judgment-debtor, and that such property was subject to the execution: *Held*, that the instruction was error. It should have been left to the determination of the jury whether the sale was made in good faith or not.

BURDEN OF PROOF.—When a sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded in the writ, it will be presumed that the plaintiff in the execution has suffered the loss of his debt, until the contrary is shown by the officer, upon whom the burden of proof rests.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

J. F. Watson, C. W. Kahler, and Hill, Thayer & Williams for Appellants.

B. F. Dowell and W. R. Willis, for Respondent.

By the Court, THAYER, J.:

This was an action in favor of the plaintiff, R. H. Moore, against the defendant, Thomas Floyd, former Sheriff of Josephine County, and the sureties on his official bond, to recover damages for an alleged neglect of duty as such Sheriff. The action was tried before a jury, who returned a verdict for the plaintiff for the sum of $3,500, of which the plaintiff remitted the sum of $291, and judgment was given in his favor, and against the defendants, for the balance, $3209 and the costs, from which the defendants appeal to this Court.

The plaintiff claimed that on the 21st day of February, 1867, he caused an execution to be issued upon a judgment in the Circuit Court for the County of Josephine, in his favor, and against one George E. Briggs, and delivered the same to said Floyd, as such Sheriff, for service. That Briggs, the defendant in said execution, was at the time owner and in possession of certain property sufficient to satisfy the said execution, which fact was known to said defendant Floyd, and that he failed and refused to levy upon the same, or any other property, until after the return day of said execution. All of which allegations were denied by the defendants.

The plaintiff gave evidence upon the trial tending to show that said George E. Briggs was the owner and in possession of certain personal property, consisting of live stock of sufficient value to satisfy the execution, and that Floyd had not levied upon the same, or upon any property, until after the return day of the execution, and that he had not made any part of the money required thereby to be collected.

The defendant gave evidence tending to show that said George E. Briggs had, prior to the issuance of said execution, sold the said personal property to one Gorgee H. Briggs, and received his pay therefor. The defendant's counsel claim that the Court erred in the instructions to the jury in several particulars; and also in refusing to instruct as requested by defendant's counsel. We have ex-

amined the bill of exceptions carefully, and regard only two of the points as at all questionable.

The plaintiff could undoubtedly maintain an action in such a case against a sheriff and his sureties. The statute gives a right of action for such official neglect in favor of a party who has been injured thereby, for the recovery of his damages. (Civ. Code, § 338.)

Among the instructions given by the Court to the jury was the following:

"If the jury find that the personal property mentioned in the complaint was sold by George E. Briggs to George H. Briggs, but was not actually delivered, then the title was in George E. Briggs and subject to the execution."

This instruction was duly excepted to by the defendant's counsel, and is now claimed to be erroneous. It appears that the question in the Court below was as to whether the sale claimed to have been made by George E. Briggs to George H. Briggs was in good faith or not, and in that view of the transaction the instruction was given as above stated. The effect of the instruction was, that under the circumstances of the case, George E. Briggs, being in debt to Moore, a sale of his property to George H. Briggs, without being followed by an actual delivery, would be fraudulent and void as against Moore. There is no doubt but that a transaction of this character, under such circumstances, would be very strong evidence of fraud. When a debtor sells personal property and retains possession thereof, it is, as against his creditors, presumptive evidence of fraud. But can the Court determine, as a matter of law, that it is fraudulent? This question has never been fully settled by the Courts. We have a statute, however, which provides that every sale person property, * * * unless the same be accompanied by an immediate delivery, * * * creates a presumption of fraud as against the creditors of the seller, * * * disputable only by making it appear that it was made in good faith." (Civ. Code, § 40.)

The Circuit Court should have left it to the determination of the jury, whether the sale was made in good faith or not. From the instructions as given, the jury was re-

quired to find that the title was in George E. Briggs, provided they found that the property was not actually delivered. The jury would not be justified in so finding under such a state of facts, if it appeared that the sale had been made in good faith, and there was evidence given upon the trial, as shown by the bill of exceptions, tending to prove that the sale was made in good faith. The instruction given, without the qualification suggested, was erroneous. (See *Hanford v. Archer,* 4 Hill, 271.)

This is sufficient to dispose of the case; but as it has to go back for a new trial, it becomes necessary for this Court to pass upon another question. The defendant's counsel in the Court below requested the Court to instruct the jury, that if they found that defendant Floyd neglected to return the execution within the time required by law, and that no damages resulted to plaintiff on account of said failure, then the plaintiff is entitled to only nominal damages for such failure. This instruction was refused and an exception taken to such refusal. The instruction should have been given. The action was to recover damages, and certainly the plaintiff should recover no more than his actual damages, unless the neglect of the officer had been willful, in which case exemplary damages might be recovered against him. I am not aware that any of the authorities go beyond this, although there has been a great diversity of opinion as to what should be the rule of liability in such cases.

The conclusion this Court has arrived at upon the point last referred to is: That where a Sheriff neglects to return an execution within the time required by law, or to levy upon property as commanded by the writ, *prima facie* the plaintiff in the execution has lost his entire debt, and the burden of proof is upon the Sheriff to show to the contrary. The Sheriff may mitigate the damages by proving the extent of the loss the plaintiff in the execution has suffered, by showing that the execution debtor was insolvent, or any fact which would legally tend to show the actual amount of damages the plaintiff has sustained. Upon this point we are inclined to adopt the rule laid down in *Stevens v. Rowe*

(3 Denio & N. Y. R. 327), although it seems to have been questioned by later decisions of that State.

Judgment reversed and new trial ordered.

JAMES ANDERSON, Appellant, v. T. J. BAXTER, Respondent.

MORTGAGE—SUIT TO FORECLOSE IS NOT FOR THE DETERMINATION OF ANY RIGHT OR CLAIM TO OR INTEREST IN REAL PROPERTY.—A suit to foreclose a mortgage is not for the determination of any right, or claim to, or interest in real property, within the meaning of section 378 of the Civil Code. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it.

STATUTE OF LIMITATIONS.—The absence of a mortgagor from the State will not prevent the Statute of Limitations from running on the mortgagee's right to foreclose. Equity acts by analogy to the rules of law. A suit of foreclosure is in effect a proceeding *in rem*. There is no analogy in the application of the Statute of Limitations between such a proceeding and actions at law.

EFFECT OF POSSESSION.—A mortgagee or his assignee in possession occupies a position, in a suit to foreclose, no more favorable than if out of possession.

PAYMENT—WHAT IS, TO TAKE A SUIT OUT OF THE STATUTE OF LIMITATIONS.—A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counter-claim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the Statute of Limitations from running.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Mallory & Shaw and E. D. Shattuck, for Appellant.

The receipt of the rents and profits of lands by a mortgagee or his assignee in possession, is payment *pro tanto* of the money due on the mortgage. (Powell on Mortgages, 225-228; *Waring v. Smyth*, 2 Barb. Ch. R. 135; *Shaler v. Signer*, 44 Barb. 614; 4 Kent, 166.)

Unless a period of ten years has elapsed since the last rents and profits were received, the statute has not run against the mortgage. (Civ. Code, §§ 24, 25; Powell on Mortgages, 249, 250.)

A mortgagee or his assignee in possession of mortgaged premises may defend that possession until the debt secured by the mortgage is paid, either from the rents and profits, or by the mortgagor, or by some one for him or representing his interest. The provision of the Code denying to the mortgagee the right to his action of ejectment for the possession without a foreclosure and sale (Civ. Code, § 323) does not deprive him of his right to defend his possession under his mortgage when obtained by lawful means. (*Jackson v. Winkler,* 10 John. R. 480; *Jackson v. Bowen,* 7 Cow. R. 20, 21; *Jackson v. Meyers,* 11 Wend. 538, 539; *Van Duyne v. Thayre,* 14 Wend. 234; *Phyfe v. Riley,* 15 Wend. 248; *Watson v. Spence,* 20 Wend. 263; *Waring v. Smyth,* 2 John. Ch. 135; *Casey v. Buttolph,* 12 Barb. N. Y. 638; *St. John v. Bumpstead,* 17 Barb. N. Y. 102; *Monroe v. Merchant,* 26 Barb. N. Y. 406; *Mickles v. Townsend,* 18 N. Y. 584; *Chase v. Peck,* 21 N. Y. 586; *Smith v. Garder,* 42 Barb. N. Y. 364; 44 Barb. N. Y. 613; *Ruch v. Hall,* 1 Smith's L. Cas. 816; *Dutton v. Warschauer,* 625.)

A mortgagee in possession has an interest in the premises which he has not when not in possession. In possession, he is entitled to rents and profits, and may defend his possession against the mortgagor and those claiming under him. (Powell on Mortgages, 235; *Dougherty v. Randall,* 3 Mich. 581; 21 N. Y. 343.)

Williams & Willis, for Respondent.

A mortgage creates no right to or interest in the land mortgaged. It is only a lien thereon, similar in character to the liens created by judgments generally. (Session Laws 1870, 265; 9 Cal. 411; 39 Cal. 247; 3 Denio, 234; 21 N. Y. 347; 6 Conn. 161.) The time that the mortgagor resides out of the State is deemed a part of the period of limitations. (Id.) Possession by the mortgagee, without the mortgagor's consent, does not operate to enlarge the mortgagee's rights. (Civ. Code, § 323; 9 Cal. 411, 428; 17 Cal. 593; 36 Cal. 42, 52.)

By the Court, THAYER, J.:

This is a suit by the appellant, James Anderson, as plaintiff, to foreclose a mortgage upon certain real property situated in the county of Marion. The complaint was filed on the — day of April, 1870. The respondent, T. J. Baxter, defendant in the Court below, demurred to the complaint on the grounds that the suit had not been commenced within the time limited by the Code. The Circuit Court overruled the demurrer, and the defendant appealed from the decision to this Court. The appeal was heard at the term of this Court held in the year 1870, and the decision of the Circuit Court upon the demurrer was reversed and the cause remanded to the Court below for further proceedings.

The case coming on to be heard in the Circuit Court upon the mandate of this Court filed there, judgment was given in favor of the defendant and against the plaintiff for the costs and disbursements, and the plaintiff, by leave of that Court, filed an amended complaint in the suit, to which the defendant interposed a demurrer upon the same grounds as before. The Circuit Court, at a term thereof held in January, 1871, regarding the decision of this Court upon the former appeal as decisive of the question raised by the demurrer to the amended complaint, sustained the same and gave judgment for the defendant, from which the plaintiff brings this appeal.

The only question we are necessarily required to consider is, whether or not the amended complaint referred to presents a state of facts that takes the case out of the principles of law determined by this Court upon a former appeal.

But as no opinion was then written, it has been deemed advisable to give at this time the opinion of the Court upon the questions determined in this case at the former term as well as those now submitted for our consideration.

The plaintiff alleges in his complaint, in substance, that on the 14th day of October, 1857, one William H. Nordyke and wife sold and conveyed, by deed of that date, the real property in question to Nathan Howe and Horace Howe,

Jr. That said Howes on the same day executed to said Nordyke a mortgage upon said property to secure eighteen hundred dollars of the purchase-money thereof, conditioned to be paid in two installments of nine hundred dollars each, in one and two years from date, with interest. That the mortgage contained a clause that until default by mortgagors in the performance of said condition, it should be lawful for them to retain the possession of the said property and to use and enjoy the same. That mortgagors wholly failed to pay the money or interest secured to be paid by the said mortgage, and abandoned the said mortgaged premises and went out of the (then) Territory (now State) of Oregon, and have continuously ever since remained out of said possession and absent from the State.

That after the default in the payment of said money, the said Nordyke, the mortgagee, entered and took peaceable possession of said premises under his said mortgage, and being so in possession thereof, he, on the 12th day of May, 1859, in consideration of twenty-two hundred dollars, sold and assigned the said mortgage to the plaintiff, which assignment was, at or about the day aforesaid, duly acknowledged and recorded; and the said mortgagee then and there delivered said mortgage, and the possession of the said premises, to said plaintiff, who then and there peaceably entered and has continuously ever since remained in the quiet and undisturbed possession thereof to the present time, and has received the rents and profits thereof, paid the taxes and other necessary expenses for repairs, and made valuable improvements thereon, an account of which was set forth in said complaint, in a bill of particulars, in which the mortgagors were credited for the use of the premises for each year, and were charged with the taxes paid, and the expense of improvements.

The plaintiff also alleges, upon information and belief, that said Horace Howe, Jr., died out of the State about the year 1862, or 1863; that he left no will, and no widow or children, and that Horace Howe is the father, and the only surviving heir-at-law of the said Horace Howe, Jr.; that on or about the 11th day of March, 1870, said Nathan Howe,

and his wife, and the said Horace Howe, for the consideration of one hundred and fifty dollars, conveyed, by quit-claim deed, all their right, title and interest in said premises, to said defendant T. J. Baxter, who took, with full notice of plaintiff's mortgage, possession and rights in the premises. The plaintiff also sets out in the complaint a copy of the mortgage; but it is not alleged, nor does it appear, that any personal obligation for the payment of the debt was given by the mortgagors, or by the defendant; nor is there any covenant in the mortgage for the payment of the sum intended thereby to be secured.

Plaintiff prays relief, that said account be examined, and after ascertaining the balance due upon the mortgage, that the said premises be decreed to be sold and said balance and the costs and disbursements of the suit be paid out of the proceeds.

The question raised by the demurrer, is as to whether the suit has been commenced within the time limited by the Code of Civil Procedure.

Section 378 of the Civil Code provides that a suit shall be commenced within the time limited to commence an action, as provided in title second, chapter one, of the Code, and further provides, "That a suit for the determination of any right or claim to, or interest in real property shall be deemed within the limitation provided for actions for the recovery of the possession of real property."

Section four, title second of chapter one of the Code, provides that actions for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within twenty years. And subdivision two of section five, title second, chapter one, provides that actions upon sealed instruments shall be commenced within ten years. The case at bar falls within these provisions of the statute, and it will readily be observed that if it is a "suit for the determination of any particular right or claim to, or interest in real property," the time is limited to twenty years. But if it is a suit upon a sealed instrument, and not for the determination of any right or claim to, or interest in real property, then it is limited to ten years.

Formerly, a mortgage of real property was regarded as a conveyance of the legal title, subject, of course, to be defeated by the performance of a condition, and this doctrine still prevails to some extent. Courts of equity, however, have always regarded a mortgage as a mere security for a debt, and the foreclosure thereof as a proceeding to satisfy the debt secured thereby; and Courts of law as well as Courts of equity, in many of the States, have taken the same view; that is, that a mortgage was a mere lien or pledge, and that the general title to the mortgaged property was in the mortgagor. In the language of one of the authorities, "The mortgagee has neither a *jus in re* nor *ad rem*, but a specific lien, similar in character to a general lien created by a judgment upon the land of the judgment-debtor." (3 Denio, 232.) However this may be, as a matter of strict law, I am satisfied that a suit to foreclose a mortgage is not for the determination of any right or claim to, or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby; at least this is in accordance with the express provisions of our statute. (Civ. Code, § 410.) In such a suit the title to the mortgaged premises is in nowise drawn in question. The adjudication is merely as to the fact of the execution of the mortgage, the amount due thereon, and the sale of the property to satisfy the debt secured. It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it. If it were a suit to divest a party of title, or to establish some right regarding the title to real property, it would stand upon a different footing; but the mortgage being in equity only a chose in action, a suit to foreclose it is more analogous to an action upon a sealed instrument, and should be governed by the same rule of limitation.

Another question which arises in this case is, whether the time the mortgagor, when the cause of suit shall accrue, or after it accrues, is out of the State, shall be deemed a part of the period of limitation.

Section sixteen, page 143, Civil Code, provides as follows: "If, when the cause of action shall accrue against

any person who shall be out of the State, * * * * such action may be commenced within the times herein respectively limited, after the return of such person into the State; and if, after such cause of action shall have accrued, such person shall depart from, and reside out of this State, * * * * * the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." It is urged that the provisions of the above section should be made applicable to this case; that the time for the commencement of a suit being limited by § 374 of the Code, before mentioned, to the time for the commencement of an action, as provided by title second, chapter one, it must, in all cases, be taken with the qualifications contained in said title. I do not think that view a reasonable construction of the statute. The provision referred to, that a suit shall only be commenced within the time limited to commence an action, is a declaratory Act. A Court of equity always would refuse relief where, under like circumstances, the claim would be barred at law by the Statute of Limitations; although the statute, in terms, should be applicable to Courts of law only. Equity, in such cases, acts by analogy to the rules of law. (Story's Equity Juris. § 64.)

I cannot think the Legislature intended that the qualification referred to should apply, except where the circumstances are similar. If the relief sought had been a decree *in personam*, the analogy would be sufficiently complete, and the period of such absence not be included as any part of the time limited. Such absence in that case would suspend, or at least affect the party's remedy, which is the only reason for the exception. In this case, the plaintiff can claim no remedy, except to have the property in question adjudged to be sold to satisfy the debt secured thereby. It was in effect a proceeding *in rem*, and the absence of the mortgagors did not interfere with the prosecution of his remedy, or render it less effectual. If the absence of the mortgagors in this case prevented the Statute of Limitations from running, then the same result would have followed if the premises had been sold to defendant the next

day after the execution of the mortgage, and he had gone into possession and remained in possession thereof; and in fact, the statute would never run so long as the mortgagors should remain away from the State. Where a personal obligation is sought to be enforced, the provisions of § 16 referred to, would undoubtedly apply; but where the only remedy is against the property, which has a fixed *situs*, the construction contended for would be unreasonable.

It is also claimed that as the mortgagee and his assignee, the plaintiff, took and retained possession of the mortgaged premises, after their abandonment by the mortgagors, and made improvements, and received the rents and profits, and used and occupied the same, it took the case out of the Statute of Limitations. That the mortgagors, and their grantee, the defendant, having the right to compel the plaintiff to account for such use and occupation, and to apply the same towards the payment of the debt, the plaintiff therefore has the right to make such application, and it will in effect be a payment, and bring the case within the provisions of § 25 of said Article Second. Said § 25 provides that, "whenever any payment of principal or interest has been, or shall be made, upon existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

I do not think we are called upon at this time to determine the rights of a mortgagee in possession, so far as his right to defend his possession until the debt secured by the mortgage is paid. That question does not properly arise at this time. Had this been an action by the mortgagors, or their grantees, to recover possession of the mortgaged property, it would have been pertinent, and the list of authorities, cited by the appellant's counsel upon that point, been entitled to consideration; but it is a suit to foreclose a mortgage, and the right to the possession, its being lawful or unlawful, is of no consequence. The view I take is: That a mortgagee, or his assignee in possession, in a suit to foreclose the mortgage occupies no more favorable position

than if out of possession; that his right to maintain possession under a mortgage, when he has lawfully acquired it, if he has such right, does not depend upon his having a remedy to foreclose the mortgage. His remedy, by action or suit, may be barred and still the obligation of the debt be unimpaired; that he might have the right to hold the property as a pledge, when he could not enforce a collection of his debt in an ordinary way. The Statute of Limitations only goes to the remedy by *action* or *suit*. (14 N. Y. 16.)

If a payment made by the mortgagor upon the mortgage debt, after the same becomes due, brings the case within the provisions of said § 25, and the limitation only commences from the time of such payment, yet I cannot regard the payment contended for by plaintiff's counsel as the kind of payment contemplated by the statute referred to. A payment by a debtor of a part of his debt is equivalent to a new promise to pay the debt. Such payment, however, must be the direct, voluntary act of the debtor. A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off, or counter claim which the debtor might insist upon, but which he has never claimed to have applied as such, cannot be regarded as such payment, and an application by the creditor of such matter as payment, without the assent of the debtor, would not prevent the running of the Statute of Limitations. Had the facts been, that the mortgagee went into possession under an agreement with the mortgagors that he should occupy the premises and apply the rents and profits in extinguishment of the debt and interest, the case would have been different upon that point. If the application of the rents had been under such an arrangement, expressly made between the parties, I think it would have been such a payment as I have indicated; but under the circumstances there has been no mutuallty, no meeting of the minds of the parties, a mere *ex parte* application, and nothing upon the part of the mortgagors showing an intention to acknowledge a binding, existing obligation on their part.

The judgment of the Circuit Court should therefore be affirmed.

THOMAS CROSS, Appellant, v. ELIAS CHICHESTER, Respondent.

COSTS.—The decision of a Circuit Court determining the amount of costs taxable in a case, may be reviewed in the Supreme Court on appeal.

UNDERTAKING, WHEN TOO LATE FOR FILING.—If the undertaking on appeal is not filed within ten days after the service of notice of appeal, it is too late, and the cause will be dismissed unless leave is obtained to perfect the appeal.

LEAVE TO PERFECT APPEAL.—It is too late to apply for leave to perfect the appeal after the motion to dismiss is brought on for hearing.

AFFIDAVITS SHOULD BE FILED, WHEN.—Affidavits to be read in support of the cross motion should be filed before the motion is brought on for hearing.

COST-BILL.—In taxing costs the practice requires a cost-bill or statement of disbursements, which must state the items separately, specifying the amount of each item and for what the expense is incurred, and it must be verified.

IDEM—VERIFICATION.—Such verification is sufficient, if the party deposes that the items of the bill or statement are correct as the deponent verily believes, and that the liability has been necessarily incurred.

OBJECTION TO COST-BILL.—The written objection to the bill need not be on oath, but it must point out particularly the errors in the bill.

APPEAL from Lane County.

The appeal is from a judgment of the Circuit Court affirming a taxation of costs by the Clerk.

Before a hearing was had upon the merits of the cause a motion was submitted by respondent to dismiss the appeal upon these grounds:

First. The order, affecting only the taxation of costs, is not a "final decision."

Second. The undertaking was not filed within ten days after the service of the notice of appeal.

Pending the argument of the motion, counsel for appellant asked leave to perfect the appeal *nunc pro tunc*, and offered to file an affidavit in support of such request.

Upon the motion to dismiss, Upton, J., delivering the opinion of the Court, said:

"By the Constitution it is provided that 'the Supreme Court shall have jurisdiction only to revise the final decisions of the Circuit Courts.' We hold that a decision of

a Circuit Court finally determining the amount of costs taxable in a case is within this provision and is reviewable in this Court.

"On the second ground of the motion, the Court is of opinion, that the undertaking was filed too late, it not being filed 'within ten days after service of the notice of appeal;' and that the motion must be granted unless leave be given to perfect the appeal.

"The appellant's counsel, in the course of their argument on this motion, expressed a willingness to file a new undertaking and to apply for leave to perfect the appeal by that method if the Court thought a new undertaking necessary. We do not deem it a correct practice to entertain such a proposition made after the motion to dismiss is brought on for argument. The application for that purpose ought to have been made in the form of a cross motion, and if any affidavits were relied upon in support of the application, they should have been filed before the motion to dismiss was brought on for hearing, so that the whole matter would be presented for consideration. If the respondent insists on the second ground, the motion to dismiss will be granted."

Respondent having filed an undertaking *nunc pro tunc*, appellant waived the second ground of his motion to dismiss and the cause was submitted on its merits.

Mallory & Shaw, for Appellant.

Ellsworth & Walton, for Respondent.

By the Court, UPTON, J.:

It appears from the transcript that the defendant filed with the Clerk, under § 546 of the Practice Act, a statement of his disbursements, the items of which were for witnesses' fees, in which he specified the name of each witness and the amount of the disbursement, setting out each item in the following form:

"————————, —— days,—— miles, $————————,"

giving the name of the witness, the number of days, the

number of miles, and the amount claimed for each witness. The statement was verified.

The appellant filed the following objections:

"1st. It does not appear from said bill of disbursements or the affidavit thereto, that the persons therein named as witnesses actually and necessarily traveled the number of miles charged therein or that they all or any of them actually attended the Court the number of days charged, as witnesses only.

"2d. It does not appear from said bill of disbursements that the defendant has paid, or is liable to pay to the persons named as witnesses, the amount therein charged.

"3d. It does not appear from said bill of disbursements that the said witnesses, or any of them, were material for the defense of this action; that they or either of them were sworn and examined in the trial."

The respondent filed an amended verification to the bill of disbursements, whereupon the Clerk made an order allowing the bill, and the Circuit Court affirmed the order.

The only points it is necessary to consider in reviewing the decision of the Circuit Court, are whether the original statement of disbursements filed by the respondent, and its verification, were in compliance with § 546 of the Practice Act in the first instance, and whether the objections filed by the appellant "state the particulars of such objections" within the meaning of that section, as construed in the cases of *Crawford v. Abraham* (2 Oregon, 163), and *Wilson v. City of Salem* (3 Oregon, 482), so as to make it obligatory on the respondent to file an "amended verified statement."

We think the original statement sufficient in the first instance; that is, it is such that if not objected to, it would have justified the Clerk in taxing the costs therein mentioned.

Where a disbursement is made to a witness, or incurred by calling him into Court and thus becoming liable to pay him, a statement of that disbursement is sufficiently explicit if it gives the name of the witness, the number of days he has attended the Court, the number of miles he has

traveled, and the amount of money he has become entitled to receive. And its verification is "as specific and formal as the verification to a pleading," and is sufficient if the party deposes that the items of the bill or statement are correct, as the deponent verily believes, and that the liability has been necessarily incurred. But we are of opinion that the objections filed by the appellant do not comply with the requirements of the practice, as established in the cases above cited.

When we compare the objections filed by the appellant in this case with those suggested by Judge Wilson in *Wilson v. City of Salem,* we find a marked difference. The latter specifies the particulars of the objection as follows: "C. D. did not attend as a witness only, but was a juror." The language of the objection in this case is, "*It does not appear* from said bill of disbursements or the affidavit thereto, that the persons therein named as witnesses * * * actually attended Court the number of days charged, as witnesses only." The one presents an issuable fact in regard to the disbursement, and renders it necessary that the adverse party admit the truth by his silence, or deny the allegation by his oath. The other alleges no fact, but merely raises an issue of law as to the sufficiency of the original cost-bill.

If any one of these witnesses did not travel the number of miles charged, the objection should have named the witness, and should have stated that he did not travel as alleged. If the witness came on other business and did not travel or attend Court as a witness, the objection should state the fact. Such specification would point out at once what additional fact ought to be set out by affidavit, and would oblige the party claiming costs to file what has been called an "amended verification" or "an amended verified statement." In other words, an affidavit containing material facts which are not shown in the original statement and which meet and traverse or avoid the particular matter specified in the objection, so as to put the Court in possession of all the material "facts necessary to show the justices of the claim."

The appellant has objected to the sufficiency of the bill

filed, but not to any item or claim, according to the meaning and intent of the rule as laid down in the cases above cited. In those cases it was held that, "if this is not done, the objection may be passed without notice and all items not objected to are supposed to be admitted."

The objection filed by the appellant seem to have been drawn up under the impression that, for the purpose of taxing costs, the papers to be filed must set out the facts which show the party to be entitled to recover as fully as a complaint sets out the facts that constitute a cause of action. Such is not the construction of the statute intended to be expressed in the opinions above cited. It is true Judge Wilson says: "Each *item* should be briefly but particularly set forth, just as in a complaint each cause of action must be specifically set forth and must of itself show a right to recover." This I understand to assert that each item must be stated separately so as to be distinguishable from all others, as each cause of action must be stated separately in a complaint, but as these papers do not necessarily constitute a judgment-roll or make up a record of what was the subject of the litigation as do the pleadings, there is not, in taxing costs, a necessity for the same kind of statement in all particulars that there would be in a complaint filed in an action to recover the same money that is here claimed.

In passing upon the cases above cited, the Court endeavored to fix upon a convenient mode of practice. The intention of the Court was not to assimilate this proceeding to the trial of a cause, but, on the contrary, to make the business of taxing costs as simple as is compatible with correctness and certainty. To this end the Court provided by rule that no affidavit should be filed, except by the party claiming the costs or disbursements. The practice which the Court has endeavored to establish requires, in the first place, simply a cost bill or statement of disbursements, which must state the items separately, specifying the amount of each item, and for what it is incurred, and must be verified. If any part of it is objected to, the objection need not be on oath, but it must point out particularly in what respect the claim presented is wrong or unfounded.

As to any particular fact thus pointed out, the party who claims the item must state, on his oath, such additional facts, not stated in the original bill, as to present the truth in regard to the particular point specified in the objection, so that the Clerk, or the Court, by inspecting the original bill or statement, and the additional affidavit, sometimes called the "amended verified statement," can be informed of the truth of the matter pointed out in the objection. This is our understanding of the practice established by the cases above cited. We think the objections filed in this case are too general, and that they do not point out any particular respect in which the claim is unfounded, and that no additional verification was rendered necessary.

The judgment of the Circuit Court should be affirmed.

JOHN NEWSOM, Appellant, v. J. W. GREENWOOD, Respondent.

STATUTE—CONSTRUCTION OF.—A statute repealing or in anywise modifying the remedy of a party by action or suit, should not be construed to affect actions or suits brought before the repeal or modification.

REFORMING WRITTEN INSTRUMENT.—In order to warrant a Court of equity in decreeing the reformation of a written instrument, the testimony must be clear and satisfactory.

APPEAL from Marion County.

This was an action of ejectment, in which Newsom was plaintiff, and Greenwood defendant. Plaintiff filed his complaint, claiming a certain parcel of land in what is known as the Wesley Shannon Donation Claim, and also the sum of one hundred and seventy-five dollars as damages. The answer denies the ownership of plaintiff, and alleges that on March 9, 1865, the defendant purchased of one William Helm the south half of the prairie and south half of the timber land on said donation claim; that, by mistake, the deed from Helm to defendant was drawn for the south half generally; that on the 25th of March, 1865, the plaintiff, with full knowledge of the facts concerning the defendant's purchase, purchased from said Helm

the remaining portion of said claim, viz.: the north half of the prairie, and the north half of the timber; that, by mistake, the deed from Helm to the plaintiff was drawn for the north half generally (which includes the parcel in dispute). That on December 15, 1866, defendant took possession of the land by him purchased. That when the plaintiff took possession of the land he recognized the division in accordance with their respective purchases, as alleged by the defendant. This answer developing an equitable defense, the cause was transferred to the equity side of the Court. To the defendant's answer, plaintiff replied, denying mistake in deed, and other material allegations. The Court below, after trial, found the equities to be with the defendant, and decreed accordingly. While the cause was pending, the Statute of 1866, by which actions at law were required to proceed as suits in equity, when the facts stated in the pleadings of either party presented a case requiring the interposition of a Court of equity, was repealed.

G. W. Lawson and Sullivan & Thompson, for Appellant.

The repeal of a statute, from which the Court derives its jurisdiction, at any time before the proceedings are consummated, deprives the Court of its jurisdiction, and puts an end to the proceedings. (1 Kent. Com. 526 and note; 1 Hill, 324; 36 Barb. N. Y. 447; 5 Blackf. R. 195; 2 U. S. Eq. Dig. 593; Smith's Com. 887; 1 Wm. Black. R. 451; Sedgwick on S. & C. L. 121; 23 Cal. 522; 2 Estee Pl. 277.)

The proofs are not sufficient to warrant the Court in correcting a mistake in the deeds. If the testimony is vague, uncertain, conflicting, or in anywise contradictory, a mistake will not be corrected, but the deed will be taken to express the exact terms of the agreement between the parties. (Willard's Eq. 70; Story Eq. 152-164; 42 Barb. N. Y. 455; 2 Johns. Ch. 585, 630; 11 Paige, 658; 33 N. Y. 676; 19 Cal. 660; 23 Cal. 522; 2 Estee Pl. 277; 29 Barb. N. Y. 595; 26 Wend. 268; 2 Ogn. 26, 290.)

Williams & Willis, for Respondent.

A Court, having acquired jurisdiction, does not lose it by

the repeal of a statute, under which such jurisdiction is acquired, while proceedings are pending. (Smith's Com. 880; 23 Wend. 481.) Jurisdiction of Courts of equity over questions of mistake. (Story Eq. §§ 157, 159; Willard's Eq. 73; 2 Ogn. 288; 10 N. Y. 322.)

By the Court, MCARTHUR, J.:

Two questions are presented in this case: the one touching the jurisdiction of the Circuit Court; the other touching the sufficiency of the testimony. After issue joined, and while this cause was pending in the Court below, the amendment to § 93 of the Code,—which amendment was couched in the following language: "A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleadings without leaving it insufficient. When the facts stated in the pleadings present a case cognizable in a Court of law, the case shall proceed as an action at law. But if the facts stated, either by the plaintiff or defendant, show a case requiring the interposition of a Court of equity, the case shall proceed as a suit in equity" (Laws of Oregon, 1866, p. 12),—was further amended so as to read as follows: "Section 93. A material allegation in a pleading is one essential to a claim or defense, and which could not be stricken from the pleading without leaving it insufficient as to such claim or defense." (Civ. Code, § 93.)

This case was commenced on the law side of the Court, and the answer developing an equitable defense it was transferred to the equity side, and then tried, the transfer being ordered and the judgment rendered after the repeal of that part of § 93 which established such rule of practice. Wherefore it is contended by counsel that the Court had no jurisdiction to transfer or try the cause, for that the proceedings were inchoate at the time of such repeal, and there was no saving clause as to the causes pending.

As a general rule, it is true that the effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been passed, and that it must be considered as a law that never existed, except for the purpose of those

actions or suits which were commenced, prosecuted and concluded while it was an existing law. Such was the language of Tindal, Lord Ch. J., in *Key v. Goodwin* (4 Moore & Payne, 341, 351), and such is the recognized rule in this country. But there is a class of cases forming exceptions to this general rule. In *Hitchcock v. Way* (6 Adolphus & Ellis), a case similar in principle to the one now under consideration, Denman, Lord Ch. J., in delivering the opinion of the Court, said: "We are of opinion that the law as it existed when the action was commenced, must decide the rights of the parties to the suit, unless the Legislature express a clear intention to vary the relations of litigant parties to each other." Upon the same principle was decided the case of *Butler v. Palmer* (1 Hill, 325), in which it was very emphatically declared that positive enactments are not to be construed as interfering with previously existing contracts, rights of action, or suits, unless the intent thus to interfere be expressed in the enactment. Extending this principle, it was held in *Redford v. Shilling* (4 Serg. & Rawle, 401), that a statute in any way modifying the remedy of a party by action, shall never be so construed as to affect actions brought before the statute. Also, in *Bates v. Stearns* (23 Wendell, 482), it was decided that a statute should never be so construed as to affect even pending remedies, unless it either expressly declare such to be its object, or there remains no prospective remedy upon which it can operate. We recognize and shall follow the principle governing in the exceptional cases, as well because it is sanctioned by approved precedents, as because it is calculated to prevent the evils which would result from the too rigid application of the general rule. Applying it, therefore, to the question of practice presented, we conclude that the Court below very properly transferred this cause from the law to the equity side, and that it had jurisdiction to try the same after the repeal of the section of the Code above referred to.

We now proceed to the second question presented. Since the amendment of § 533 of the Code (Civ. Code, § 533), appeals from decrees are to be tried *de novo* by this Court, upon the transcript and the evidence accompanying it. All

the testimony is therefore before us; and the respondent's counsel claim that the conclusions of fact to be drawn therefrom, warranted the Court below in decreeing the correction of the deed and the division of the parcel of land described as the Wesley Shannon Donation Claim, in accordance with the terms of an alleged contract of purchase which is assumed to be fully proven. Appellant's counsel, however, urge that the proofs are not sufficient to warrant the Court in concluding that there was a mistake in the deed and proceeding to correct the same.

A brief inquiry into the laws relating to the quality and character of the testimony necessary to warrant a Court of equity in decreeing the correction of a mistake in a deed will not be amiss. In *Shively v. Welch* (2 Oregon, 290), Kelsay, J., in delivering the opinion of the Court, said: "To entitle a party to the decree of a Court of equity reforming a written instrument, it is incumbent upon him to establish the error or mistake alleged by proof so satisfactory in its nature as to preclude all question."

The language used by the learned judge is far too strong. To hold that proof in these, or in any cases, shall be so satisfactory as to preclude all question, would defeat the object of the law for it seldom lies within the range of human possibility to furnish that quality of proof. The rule which should govern in this class of cases is laid down in Willard's Equity Jurisprudence, page 75, where it is held "that to show a mistake in a written instrument, the evidence must be clear and satisfactory, so as to establish the mistake to the entire satisfaction of the Court." And this is identical with that expressed by both Fonblanque and Story, and has received the approval of the highest judicial tribunals of the United States and of England.

The testimony before us does not fill the measure of the rule just stated, much less that laid down in *Shively v. Welch*, and is not of that clear and satisfactory nature requisite to warrant us in reforming a written instrument.

The decree of the Circuit Court must, therefore, be reversed, and a decree entered in conformity with this opinion.

Decree reversed.

N. G. PITZER, Appellant, v. W. J. RUSSEL, Respondent.

RIGHT TO SUE UPON A JUDGMENT.—A judgment creditor cannot claim a strict right to sue upon his judgment as often as he may choose, without showing any necessity for such course. Neither the common law nor the practice in the various States, nor anything inherent in the subject, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

COMPLAINT IN AN ACTION UPON A JUDGMENT.—Where a judgment creditor had neglected for more than one year to file a transcript of his judgment with the County Clerk and had thereby lost his power to levy on real estate, and the complaint contained no explanation of the delay: *Held*, not to be error to decide that the complaint did not lay a foundation for an action upon the judgment.

APPEAL from Benton County.

This action was brought in the County Court of Benton County by the appellant, upon a judgment obtained by him before a Justice of the Peace in Grant County in this State. The complaint states that the defendant was indebted to the plaintiff, on the 22d of October, 1863, in the sum of $154.80, for which he gave his promissory note; and it sets out the proceedings in the former action, in which, on the 4th of April, 1866, the plaintiff obtained judgment upon the promissory note for want of answer, and it avers "that the same judgment is in full force, having never been paid or reversed," and that the defendant is now a resident of the county of Benton, owns no personal property, but does own real estate in Benton County.

The defendant demurred, assigning as cause: "1st. That it appears from the complaint that the Court has no jurisdiction of the subject of the action. 2d. The complaint does not state facts sufficient to constitute a cause of action."

The County Court sustained the demurrer. The plaintiff having appealed to the Circuit Court, the judgment of the County Court was affirmed, and the plaintiff now appeals to this Court.

F. A. Chenoweth, for Appellant.

A judgment was at common law a good cause of action.

(1 Chitty's Pl. 109, 110, 111; Civ. Code, §§ 5, 143, 145; 20 John. 342; 9 Cow. 26; 3 Blk. Com. 159, 420.)

The Code has not abolished common law causes of action. (9 Barb. 268; 5 John. 175; 13 Id. 322; 15 Id. 220; 6 How. Pr. 229; 19 Barb. 560; 27 Id. 310; 7 Abbott's Pr. 129.)

It has always been regarded in all the States a just foundation for an action. (17 Wend. 329; 1 Hill, 645; 5 Id. 408; 29 Barb. 295.)

Without this action the plaintiff has no remedy. (Civ. Code, § 50.)

John Burnett, for Respondent.

When a judgment is obtained upon a demand, the right to maintain an action therefor is at an end. The manner of enforcing collection is then by execution and not by an action. Civ. Code, §§ 209, 271.) The Code having provided the manner in which judgments, foreign and domestic, can be enforced, that course must be pursued. The Statute of Limitations and the statute for enforcing the judgments of sister States, exclude the idea of enforcing a domestic judgment by action. (Civ. Code, §§ 5, 728.) The manner of enforcing its domestic judgments is provided by each State. (13 Peters, 312.) The manner in which a judgment rendered in Justice's Court may be enforced is provided by statute. (Civ. Code, §§ 50, 51.)

Since the disuse of real actions, actions for debt, upon judgments, have been discountenanced by the Courts as vexatious and oppressive. (Blackstone Com. (Chitty's Ed.) 118, 159.) A practice at the common law not adopted by the Courts of the State will not be recognized. (*Commonwealth v. Roby*, 12 Pick. 513.)

A judgment in this State is effected for the purpose of supporting an execution within five years from its rendition, and as a lien upon real estate for ten years therefrom. (*Murch v. Moore*, 2 Ogn. 190.)

By the Court, UPTON, J.:

The matters discussed on the argument may be resolved into these questions:

First. Does an action lie, as a matter of course upon a judgment rendered in this State as soon as the judgment is rendered?

Second. Do the particular circumstances disclosed by the transcript in the case justify the plaintiff in suing upon the judgment?

The respondent claims that the statutory mode of applying for leave to issue execution, and the provisions in relation to filing transcripts and docketing judgments, are intended as a substitute for all other proceedings in the nature of *scire facias* and for all actions upon domestic judgments. The appellant claims that a judgment creditor has a common law right to sue upon his judgment as soon as it is rendered, and it is expressly stated in two of the New York cases, cited by the appellant, that it is a common law right to sue upon a judgment as soon as the judgment is recovered. (*Hale v. Angel*, 20 John. 342; *Smith v. Mumford*, 9 Cow. 26.) The appellant also claims as a general rule that creating a new remedy for the redress of a private injury does not by implication abolish or take away any existing right of action; and this must be admitted to be the general rule.

If the language used in pronouncing upon the two cases above cited is to be taken without any qualification and received as sound law, and if it is to be deemed expressive of what is sometimes denominated American common law, that is, the general rule of action now in force in this country, except where it is modified by statute, the appellant's conclusion seems a logical and necessary deduction. What is claimed by the appellant amounts to this: That although the Legislature may have intended to provide a statutory mode of enforcing judgment sufficient to meet every contingency that may arise, yet the Legislature has not interdicted the common law right of action if such right existed. It therefore becomes necessary to determine whether the appellant really has the common law right which he claims, and whether the language of those cases correctly declares the common law.

The reports of those cases are not very full, but they in-

dicate that counsel did not at all, in either case, discuss the question whether at common law the action lies as a matter of course as soon as the judgment is rendered; and it is impossible to determine from the reports of those cases how much consideration was given by the Court to the point, whether at common law the bare existence of the unsatisfied judgment was a sufficient ground for an action, or to say whether debt upon the judgment was there sustained as a matter of course upon grounds or reasons that still exist. An examination of later decisions in that State and of the rulings in other States, leads to the belief that the Court would not have held, upon full investigation, that a plaintiff could maintain debt upon a judgment in a case where he could have the full effect and benefit of his judgment without such action.

It is true that from very ancient times the action of debt on judgment has been recognized as proper, but like every other proceeding at common law, the action was based upon some sufficient reason arising out of the nature or necessities of the case. If it would be a proper construction of the language used in the cases of *Hale v. Angel* and *Smith v. Mumford* to treat those cases as holding that the common law sustained the action without any other reason or necessity, and solely to enable the creditor to coerce, or intimidate the debtor by threatening him with accumulation of costs, it is believed that that position is not sustained by any other case to which our attention has been called.

The cases of *Ames v. Hoy* (12 Cal. 11), and *Stuart v. Lander* (16 Cal. 374), each declare that the action would lie at common law, and that it is maintainable even though an execution might issue to enforce the judgment. Each of these opinions contains language capable of construction quite as favorable to the appellant as that of the case above cited. But in the first case the report shows that the record-book containing the judgment had been destroyed by fire, and in the second case that "the time in which an execution could be issued had expired, and that there was no means of enforcing the judgment except by action." If the record in the two cases first above-mentioned could be in-

spected, it is possible similar reasons might be disclosed; and if so, the cases would be classified with those where the action is grounded upon special reasons arising out of the necessity of the case, and would not support the applicant's first position.

In most of the subsequent cases arising in the State of New York in which the subject of suing upon judgment is discussed, either the discussion relates to foreign judgments, or the disputed right involves the construction of a statute, or the right to sue is based on a ground of some necessity or some substantial advantage to the creditor. After an examination of many cases from the same State, we do not find the idea reiterated that at common law an action would lie where no necessity exists, if in fact it ought to be considered as affirmed in these cases. On the contrary, in most of the subsequent cases cited from the State of New York, the proceeding is either based upon a statute, or some special reason appears why the plaintiff cannot otherwise have the full effect of his judgment. In some cases, the plaintiff being an executor, is compelled by statute to sue in order to have the benefit of the former judgment; in others, the new complaint is in the nature of a creditor's bill; in others, it was necessary to try some issue in regard to the validity of the original judgment. (*Cameron v. Fowler*, 5 Hill, 306; *Burwell v. Jackson*, 5 Seld. 535; *Dobson v. Pearce*, 2 Kern. 156.)

This class of actions had frequently been the subject of legislation in that State prior to 1851; at which time it was provided by statute that leave should be obtained from the Court before bringing an action upon a judgment between the same parties. In regard to that provision, Justice Roosevelt remarked in *Burrough v. Hull*, "It was enacted 'to prevent the evil of accumulating costs by piling judgment upon judgment.'" And he adds: "The ordinary and, in ninety-nine cases out of a hundred, the proper mode of collecting a debt which is already in judgment is by issuing an execution." When, however, circumstances have occurred since the judgment was rendered, such, for

example, as a discharge in bankruptcy, or a release by act of the creditor, or a constructive payment, about the truth or effect of which circumstances a dispute exists, a formal action to try the newly arisen issues would not only be proper, but some proceeding of the kind may be necessary.

For such reasons, actions upon judgments continue to be brought; and there is no doubt they have been permitted, from the earliest times of which we have knowledge, for other equally valid reasons. Our statutory proceedings in the nature of *scire facias* (Civ. Code, § 292) are proceedings in the nature of an action, which afford means of disposing of many, if not all, such newly arisen issues; and these proceedings have the advantage over an ordinary action of retaining the entire record in the same Court and of preventing unnecessary cost and inconvenience to the defendants. Whether they are intended as a substitute for all other actions upon a domestic judgment, as is claimed by the respondent, it is not necessary now to attempt to decide. On the subject of the common law right to the action of debt on judgment, an opinion of Chief Baron Comyn is mentioned in *Clark v. Goodwin* (14 Mass. 228), in which the Chief Baron places the right to bring debt upon judgment, on the ground that at common law the plaintiff had no other mode of recovering interest on his judgment. He states that final process did not authorize the collection of interest accruing after the rendition of the judgment; and it seems to have been his opinion that the right at common law to sue upon a judgment depended upon the necessity of the case, and on the circumstance that full redress could not be obtained without resorting to the action. It is argued that, at common law, the plaintiff was not required to set forth in his complaint any such special grounds, and hence it is inferred that none need exist. But since the Court takes notice of the law governing its own process, the matters mentioned by the Chief Baron are such as need not be set forth in the pleading.

In South Carolina, the action being permitted upon a judgment where the original cause of action did not be interest, it was said: "At common law no j-

collected upon an execution under a judgment, but interest is recoverable in an action of debt on judgment." (*Pinckney v. Singleton,* 2 Hill, S. Car. 343; *Harrington v. Glen,* 1 Hill, S. Car. 79.) It would seem from these cases, as well as from the opinion of Baron Comyn, above referred to, that the common law permitted the suing over a judgment whenever that was necessary to afford the plaintiff a means of having the full effect of his judgment, and not otherwise.

If the common law permitted debt upon judgment solely to enable the plaintiff to obtain interest upon his judgment, that reason for the practice would be inapplicable in a State where every judgment bears interest collectible by execution, and where interest can be obtained equally well without an action. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

It was held in Connecticut, that "an action of debt on a judgment will not lie unless it appears that the plaintiff cannot otherwise have the effect of his judgment." (*Wells v. Dexter,* 1 Roote, 253.) And in Alabama it is a good defense to such action to show that execution is still available on the former judgment. (*White v. Hadnot,* 1 Port. 419.)

A similar opinion was expressed in *Lee v. Giles,* (1 Bailey, 449.)

The Court is of opinion that the plaintiff cannot claim a strict right to sue his judgment as often as he may choose without showing any necessity for such course. And if, in coming to this conclusion, it is necessary to disregard the positions stated in the cases of *Hale v. Angel,* and *Smith v. Mumford,* I should feel less hesitation in doing so for the reason already expressed in regard to those cases, and because of the peculiar position the question has occupied in that State as compared with other States. We conclude, from all the authorities presented, that neither the common law nor the practice in the various States of the Republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

In considering the peculiar circumstances of this case as applicable to the second question, it must be observed that by the statute (Civ. Code, § 50) the plaintiff had one year in which he might file a transcript with the Clerk, and thus make the judgment a lien upon real estate, which time expired without such filing before this action was commenced. And by § 60 of the same Act, the plaintiff still has the right to file a transcript with a Justice of the Peace of any other county, which filing will authorize the Justice to issue execution and to enforce the judgment by levy upon personal property. It seems to be understood, however, that any execution that can now issue, whether from the Court where the judgment was rendered or from one in which a transcript shall be filed, will only authorize a sale of personal property. It, therefore, may be a positive advantage and even a necessity to the plaintiff to have this action. Possibly the plaintiff may never be able otherwise to have the full benefit of his judgment because the defendant may remain destitute of personal property. Had the plaintiff shown a sufficient reason for not filing his transcript with the County Clerk, I confess I am unable to see how he could be denied this action. And I come to the decision of this branch of the case with hesitation, and with the impression that if the case had been submitted to me at *nisi prius*, as it was to the County Judge of Benton County, as a new and undecided question in this State, and one that perhaps was, under the circumstances, *sub modo*, addressed to the discretion of the Court, I am no way confident that I should have held it incumbent on the plaintiff to set forth facts in excuse of his want of diligence, or to justify his failure to file a transcript within the year. But there are many reasons in favor of the view that seems to have been taken by the County Judge. The case disclosed a want of diligence on the part of the plaintiff, from which had resulted whatever of disability he now seeks to avoid, and the facts stated do not show him entirely without remedy, nor present any excuse for the delay.

The County Judge violated no rule or precedent established in this State in ruling that the facts set forth in the

complaint did not lay a foundation for an action upon the judgment, and I am not prepared to say that the County Court committed an error, or to hold that the Circuit Court erred in sustaining the ruling.

It is the opinion of this Court that the judgment of the Circuit Court should be affirmed.

B. F. BROWN, Appellant, v. FLEISCHNER, State Treasurer, Respondent.

AUTHORITY OF THE SECRETARY OF STATE IN AUDITING CLAIMS AND DRAWING WARRANTS.—The authority of the Secretary of State to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislature for their payment.

STATE TREASURER—WHAT WARRANTS MAY BE PAID BY.—The State Treasurer is presumed to know what appropriations have been made, and he has no right to pay warrants unless drawn upon some specified fund, except when a claim is authorized by law to be paid out of a general contingent appropriation, he may pay the same upon the warrant of the Secretary.

Per Upton, J., dissenting:

LEGISLATIVE POWER, DELEGATION OF.—The Legislature cannot delegate the power to legislate, unless it be in the specified exceptional case of creating municipal corporations.

STATUTE, AMENDMENT OF—APPROPRIATION ACT.—Provisions in a General Appropriation Act cannot operate to transfer the power of auditing claims from one officer to another. Nor can the statute that provides the mode of auditing public accounts be revised and amended by a joint resolution, or by provisos in a General Appropriation Act.

FUND.—Every law that imposes or authorizes a tax must create a fund, unless a fund already exists, into which the tax is to be paid.

IDEM.—When a statute provides that the State shall pay for particular services, if there is no special requirement that the claim shall be paid out of a particular or special, fund, it will be payable out of the general fund.

AUDITING PUBLIC ACCOUNTS.—The provisions of § 6, p. 622, of the Compiled Laws, requiring the Secretary of State "to examine and determine the claims of all persons against the State, in cases where provisions for the payment thereof shall have been made by law," limits the action of the Secretary to *cases* where the law provides or enacts that the claimant is entitled to be paid by the State, and not to *times* when payment can be instantly made.

DUTY OF THE SECRETARY OF STATE.—It is the duty of the Secretary of State to audit public accounts in every case where the law has clearly provided that the claimant shall be paid by the State; and if the claim is allowed, to draw his warrant for the amount found due.

APPEAL from Marion County.

In §§ 5, 7, 8, 10 and 12 of the General Appropriation Bill passed by the Legislature in 1870, provisions were made for the redemption of warrants drawn on the penitentiary, incidental, executive and general funds, with a proviso in each case that said warrants should not be paid until after the same had been audited by an investigating commission, *provided* such commission was appointed. At the same session the Legislature adopted a joint resolution creating such a commission.

Appellant petitioned for a mandamus to compel the payment of certain warrants drawn by the Secretary of State on the penitentiary and incidental fund for the payment of claims which had been disallowed by the investigating commission. These warrants had been drawn prior to the Act of 1870, to cover expenditures which the Legislature of 1868, failing to pass an appropriation bill, had not provided for.

The other facts are stated in the opinion of the Court.

Knight & Lord, for Appellant.

The provisos contained in §§ 5, 7, 8, 10 and 12 of the Act of 1870, are unconstitutional and void. In contemplation of law no such investigating commission as is referred to in those sections has been created. The Constitution has made the Secretary of State auditor by virtue of his office (Constitution, Art. 6, § 2), and in pursuance thereof the Legislature has defined his duties. (Mis. Laws, ch. 1, §§ 15-20.) The Legislature has no power to delegate any duty or authority which the Constitution has imposed on the Secretary of State, to any other officer, board, commission or tribunal. (10 Wisc. R. 525.)

The joint resolution creating the investigating commission creates an office. (2 Bouv. Law Dict. 239; 8 Cal. 41.) The Legislature has no power to enact a law the taking effect of which is made to depend on any condition or other authority not provided in the Constitution. (Constitution, Art. 1, § 21; 4 Selden, 483; 2 Iowa, 205.) Laws making

appropriations for the salaries of public officers and other current expenses of the State, shall not contain provisions on any other subject. (Constitution, Art. 9, § 7.) Every act must embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But only so much of any act shall be void as relates to subjects not embraced in the title. (Constitution, Art. 5, § 20; 14 Louis. R. 9; 32 Ill. R. 181; 11 Ind. R. 199; 4 Metcalf (Ky.) R. 72.) If the void part of a statute can be stricken out and the valid portion will be operative, the former should be rejected and the latter allowed to stand. (1 Gray, 21; 5 Gray, 100; 4 Metcalf, 288; 24 Pick. 361; 3 Nevada, 180.) It is the imperative duty of the Secretry of State to draw his warrant when claims of the character embraced in the warrants in question are presented duly credited and certified. (Mis. Laws, ch. 44, § 14; Id. ch. 1, §§ 15, 21.) The Treasurer has no power to audit and settle claims against the State and cannot refuse to pay a warrant drawn on him, in legal form, if there are funds in the Treasury appropriated by law for the purposes specified in the warrant. (Mis. Laws, ch. 1, § 28; 2 Metcalf (Ky.) R. 106; 14 Louis. R. 225.)

G. W. Lawson and C. G. Curl, for Respondent.

The State Treasurer cannot pay without an appropriation first made by the Legislature, and the Legislature may appropriate or not in its discretion. (Constitution, Art. 9, §§ 2, 4, 7; 1 Ogn. 213.)

The Secretary of State has no right to audit claims against the State, excepting cases where provision for their payment has been made by law. (Mis. Laws, ch. 1, § 15.) The warrants in question were drawn prior to the Act of 1870, and before any attempt had been made to appropriate money for their payment. They were therefore void.

By the Court, THAYER, J.:

This was a proceeding by petition for a writ of mandamus against the State Treasurer, L. Fleischner, to compel the payment of five certain State warrants, drawn in 1869 and

1870 by Samuel E. May, late Secretary of State, upon said Treasurer, who refused payment thereof.

The application for the writ was argued at Chambers before the Judge of the Third Judicial District, Hon. R. P. Boise, and the writ dismissed, from which order the petitioner appeals to this Court.

Many points were discussed in the argument of this case, by the counsel for both parties, which this Court does not deem it necessary to decide.

It seems from the proceedings herein, that the Legislature which convened in 1868, failed to make appropriations to defray the expenses of the State for the ensuing two years, as required by law.

The only question which this Court has considered it necessary to determine is, whether the State Treasurer was bound to pay warrants drawn upon him by the Secretary of State, when no appropriations have been made by the Legislature for their payment.

Section 2, of Article IX, of the Constitution of this State reads as follows: "The Legislative Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year, and also a sufficient sum to pay the interest on the State debt, if there be any." Section 4, same Article, provides, that "no money shall be drawn from the Treasury, but in pursuance of appropriations made by law." Section 7, ditto, provides, "that laws making appropriations for the salaries of public officers and other current expenses of the State, shall contain provisions upon no other subject." The statute, page 621, § 15, subdivision 7 (Mis. Laws, ch. 1, § 15), provides, that among other duties of the Treasurer, "he shall examine and determine the claims of all persons against the State in cases *where provisions for the payment thereof shall have been made by law,* and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant upon the Treasury for the same," etc.

The Secretary of State, like every other officer of the State government, possesses no substantive powers, except

such as are enumerated in the Constitution and statute. The provisions of law referred to define and limit his duties, and he can only exercise those duties upon the terms and conditions specified in those provisions. His authority to audit accounts and draw warrants upon the Treasurer, depends upon the condition that an appropriation has been made by the Legislative Assembly for their payment.

The State Treasurer, like the Secretary, has only limited duties and functions, which he has no right to transcend. He is presumed to know what appropriations have been made by the Legislature, and has no right to pay warrants, unless drawn upon some specified fund, except when a claim or amount is authorized by law to be paid out of a general contingent appropriation, which he may pay upon warrant of the Secretary. (Mis. Laws, ch. 1, § 28.)

These guards and checks upon transactions of public officers were wisely made, and each officer should be required to keep within the scope of his authority, not only in order to secure the interest of the public, but also to protect the rights of the individual citizen. As there were no appropriations made for the payment of the warrants in question, the Secretary of State had no right to draw the same, and the State Treasurer violated no official duty in refusing to pay them.

The decision of the Court below is, therefore, affirmed.

UPTON, J., dissenting:

This case involves the question whether the Secretary of State has authority to audit public accounts at times when all the money which may have been appropriated to the payment of the particular class of accounts that may be presented, has been paid out upon claims of the same class. Some incidental questions of minor importance arise in the case, and it will avoid complication to refer to them before entering upon the principal and very important question relative to the duties of the Secretary of State. The incidental questions relate to the powers and duties of a commission or legislative committee, appointed in pursuance of a joint resolution passed October 25, 1870.

The Constitution uses the following language in regard to the Secretary of State (§ 2, Art. 6): "He shall be, by virtue of his office, auditor of public accounts, and shall perform such other duties as shall be assigned him by law." By the act of 1859 (Mis. Laws, ch. 1, § 15), it is made his duty "to examine and determine all claims of all persons against the State in cases where provision for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon and from what fund the same is to be paid, and draw a warrant upon the treasury for the same."

There are some provisions of statute that appear at first glance to be an attempt to transfer the power to audit public accounts from the Secretary of State; as, for instance, that which directs the Superintendent of the Penitentiary to certify to certain accounts; but in reality they amount only to this: that the certificate shall be sufficient evidence to authorize the Secretary to approve the account and draw his warrant. I think these provisions have never been treated as having greater force, and up to the passage of the joint resolution above mentioned, I am not aware that any question has been raised against the power of the Secretary of State to act as auditor of public accounts.

Prior to the session of the Legislature of 1870, the Secretary of State had audited claims and drawn warrants which were unpaid at the time of the passage of the joint resolution in question, among which were the warrants in controversy; and it has been assumed in the course of the argument that the commission appointed in pursuance of the joint resolution was clothed with power to review the action of the Secretary of State, and to annul or approve the warrants previously drawn by that officer; and the power has been claimed for the commission, to annul such part of each warrant as their discretion should dictate. Whether the Legislature could confer such power on a commission or committee thus appointed, is one point discussed; another point is, whether the language of the joint resolution imports an intent to confer such power.

The joint resolution directs "that a committee com-

posed of two persons, one to be chosen by each House, be constituted a commission. Said commission shall have power to select an additional commissioner, who shall be governed by the same rules and receive the same compensation as the other commissioners." The compensation is fixed at five dollars per day. This commission is directed to inquire into various specified matters. Their duties, so far as they relate to any subject connected with the warrants in question, are declared in the following language: "It shall be the duty of said commission, after it is organized, to proceed at once to investigate the official conduct of the State officers for the last four years in the following order: First, Superintendent of the Penitentiary; second, Treasurer; third, Secretary of State; fourth, Governor; and fifth, Commissioners of School Lands; to examine the books of each department, compare all entries therein with the vouchers on file; to examine all original bills by items, comparing them with the vouchers, and attest the same to the Treasurer, if correct, and the Treasurer is required to pay the warrants so certified upon presentation."

That part of the resolution that treats of the general powers of the committee provides, that "said commission shall have power to appoint a competent clerk to issue subpoenas, administer oaths, compel the attendance of witnesses and to send for persons and papers. They shall keep a correct record of the testimony taken before them and report the same, properly attested, at the next session of the Legislative Assembly."

The leading object here contemplated is evidently a committee or commission to investigate facts and report for the information of the Legislature; and I am unable to find, in the language employed, authority in the Commission, either to assume the duties of the Secretary of State in auditing accounts, or to render final decisions as a tribunal to review his action.

It may be a reasonable inference from the language of the resolution, that it was then expected some Act would be passed prohibiting the Treasurer from paying the warrants then outstanding, and perhaps amending the statutes that

relate to the duties of the Secretary of State and of the State Treasurer. But nothing in the resolution purports to amend those statutes or to prohibit the Treasurer from paying warrants; nor does it require holders of warrants to surrender or present them. If *bills* were found *correct* the committee was directed to *attest* them; but as to bills that they should consider incorrect or doubtful, or correct in part and incorrect in part, they have no authority to attest or certify or take any action except to report their proceedings with the evidence to the Legislature. I infer from this language that the object of causing bills which the Commission deemed correct to be "attested," was to indicate those in regard to which there was in their opinion no necessity of reporting to the Legislature and no necessity for legislative action.

If the matter could be divested of all question as to the power of amending laws or making laws by joint resolution, and of all question as to the constitutionality of what is contended for, the language of the resolution, of itself, is not sufficient to direct the Commission to undertake to make a final decision in regard to bills that they do not deem correct, or to do more in regard to them than to investigate and report. This view corresponds with the whole tenor of the resolution, the general object of which is an investigation and information to be laid before the Legislature. If we add to this the consideration that the Legislature must be presumed to know that the statutes prescribing the duties of the Secretary and Treasurer were still in force, and that they could not be amended by a joint resolution, the conclusion is irresistible that the Legislature never contemplated conferring power to make final decisions by the joint resolution alone.

These are not the only difficulties in the way of claiming such power for the Commission. An attempt to show that this was something more than a legislative committee of investigation, and to show that, in addition to its duty to investigate and report for the information of the Legislature, it had power to make final decisions, whether in the capacity of public auditors or as a judicial board for review-

ing the decisions of the Secretary of State, or as a representative of the Legislature to determine these matters by virtue of delegated legislative power, will meet with very serious obstacles. The following are some of the difficulties that stand in the way of the assumption:

The Legislature cannot delegate the power to legislate unless it be in the specified exceptional case of creating municipal corporations. It is a maxim of the law that a delegate cannot delegate his powers.

By § 30, Art. IV of the Constitution, no Senator or Representative shall be appointed to any civil office of profit that shall have been created during his term.

Such a Board, in making final decisions, must act within one of the four governmental departments: the legislative, executive, administrative or judicial; "and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." (Section 1, Art. 3.)

The Constitution vests the power of auditing public accounts in the Secretary of State.

Section 1, Art. VII, of the Constitution, vests the judicial power of the State in the particular tribunals there specified, and such a commission cannot be clothed with judicial power.

The mode of auditing accounts was already prescribed by statute, and it could not be changed, except by amending or repealing the law. Laws cannot be amended by joint resolution, but the act or section amended must be set forth at length.

Whether the power of such Commission to decide the matter in question be claimed as exercised within the legislative, the administrative or the judicial department of the government, the difficulty is equally great. If it is conceded that the Legislature may, as a legislative act, pass upon all claims against the State, it is certain that a legislative act requires a quorum of each House, and the power to act in a legislative capacity cannot be thus delegated. If the Commissioners are appointed not to legislate, but merely to audit claims, their acts would be within the administra-

tive department; their function would be one which the Constitution has vested in the Secretary of State, and they while members of the Legislature, would be holding an office of profit created by the Legislature of which two of them are members. If their action is a mere review of the decisions of the Secretary of State with power to affirm or reverse, they must either act by virtue of delegated legislative authority, or their action is an attempted exercise of a part of the judicial power of the State.

It is plausibly said the Legislature has power to appoint committees of inquiry to act during the recess, or while the Legislature is not in session, and hence had a right to appoint this Commission, and that the Commissioners were still members of the Legislature, and consequently not appointed to any office of profit created by the same Legislature of which two of them were members; that the Commission was authorised to perform certain duties which it was not convenient for the Legislature to perform in session, and that "this kind of legislation is not new."

The sophistry of this statement lies in the circumstance that it ignores the main point claimed by its author, and the main point which it seeks to establish; it ignores the question whether the Commission has power to make decisions that shall be *final* without being reported to and acted upon by the Legislature. With this point added, it cannot be said that this kind of legislation is not new. It is claimed in the same connection and as part of the same argument that this Commission exercises "powers that are in their nature judicial," and that their decision concerning the warrants is "a final judgment so far as any provision now exists for their redemption." The bare statement of this position is sufficient to show that the power claimed for the Commission is something more than can pertain to a mere legislative Committee, and that, if such be their powers, they are officers filling an office created by the Legislature of which two of them are members.

The position that the Commissioners had power to make final decisions and yet held no office other than that of members of the Legislature, and the statement made in the same

argument, that the constitutional limit of pay to members of the Legislature only applies during the time of the session, and that at other times members may receive five dollars per day, seem to rest on very similar bases; but I have not been able to appreciate the strength of either position, and I must proceed upon the conviction that if the Commissioners were thus empowered they held an office other than that of members of the Legislature.

To the point touching the ability of members to fill the office, if it be an office of profit, it is replied on the part of the respondent that even a constitutional disqualification of members will not render the acts of the Commission void, and that the point is therefore immaterial.

Whether or not the acts of the Commission would be void in the case supposed, the fact that members of the Legislature were appointed by the authors of the resolution is a material and a very strong circumstance against the inference that the framers of the resolution intended to charge the Commission with duties which members of the Legislature were prohibited from performing; and such considerations are especially applicable to a case like this, where the power to audit claims or make final decisions is not conferred by express words, but sought to be raised by implication. In construing the resolutions, we have no right to assume that its authors were ignorant of the law, or that they intended to violate the Constitution.

It cannot be supposed that the Legislature intended, by the indefinite language employed in this resolution, to direct the Commission to take all the bills from their proper custodian and pass them over to the custody of the State Treasurer, thus destroying the system of checks and balances and the means of verifying the accounts between the Secretary and Treasurer. Yet the only certificate they were empowered to make is an attestation of the bills deemed correct; and the power to make that attestation is the only power the resolution purports to confer upon them, even by implication, except the power to investigate and report to the Legislature. The Committee was not empowered to draw warrants or in any manner to give the Treasurer official

notice or information in regard to bills that were deemed incorrect or doubtful.

It is also indicated in provisos contained in the Appropriation Act passed three days later than the resolution, that the Legislature did not consider the duties of the Treasurer modified or changed by the joint resolution; but the resolution derives no force or vitality from the provisos contained in the Appropriation Act, because the Constitution, Article IX, section 7, provides that "laws making appropriations for the salaries of the public officers, and other current expenses of the State, shall contain provisions on no other subject." It cannot reasonably be contended, in the face of that direct and unequivocal provision, that the General Appropriation Act can operate to transfer the power of auditing claims from one officer to another; or that it can contain valid provisions in regard to what persons shall act as auditor of public accounts," when that matter is already settled by the Constitution.

Section 10 of the Appropriation Act, just mentioned, is as follows: "For the redemption of warrants drawn on the General Fund, $8,500; *provided,* that nothing in this section shall be so construed as to apply to the payment of said warrants until the same have been audited by the investigating commission; *provided* said commission is appointed." And the other sections, making appropriations, are accompanied by similar provisos. It is conceded, in this case, that the Appropriation Act has taken effect, the point controverted in relation to it being whether the provisos are operative, or whether they are surplusage. And I think it may be taken, as conceded in the argument, that unless the commission had power to decide upon the validity of these warrants, the appropriation covers them. At least that is the law, if the Act has become operative. It needs no argument to show that the statute that prescribes the mode of auditing public accounts cannot be revised and amended by a joint resolution, or by provisos in a General Appropriation Act. The statutes defining the duties of the Secretary of State, and of the Treasurer, have not been amended in any manner known to the Constitution. The

effect and authority of the warrants remained the same after the passage of the joint resolution as before, and the duties of the Treasurer remained the same.

In my opinion the commission had no power to make a final decision upon the claims in question, and the case must turn wholly upon the point whether the Secretary of State had power to audit the accounts at the time the warrants were drawn. The decision of this point depends upon the construction of the provision of statute first above quoted. It is contended on behalf of the respondent that the words of that section which limit the action of the Secretary of State to "cases where provisions for the payment thereof shall have been made by law," should be construed to limit the Secretary's action to *times* when there are unexpended appropriations; or, in other words, that the language employed indicates an intention to limit the times when, or the circumstances under which, he may proceed, rather than the *cases* in which he shall *audit* public accounts.

In discussing this question, much stress is laid on the provision of the same section which requires the Secretary to indorse on the claim, "from what fund the same is to be paid." It is assumed that when the money specified in an appropriation act is exhausted a *fund is annihilated;* and from this assumption it is argued that from the time of exhausting the appropriated money "it was impossible for him [the Secretary] to indorse on a claim the fund out of which it was to be paid," it being claimed that, "when the appropriation was exhausted, no such fund existed, and the only way in which a fund can be created is by an appropriation by the Legislature." The argument is founded upon an evident inadvertency in applying or defining the words "fund and "appropriation," by which the words are treated as convertible terms or their signification is confounded. The whole of this branch of the argument is based on the erroneous assumption that a fund can be created only by an appropriation act.

The constitution and our statutes relating to finance, use the word "fund" in its ordinary acceptation, and a brief examination will show that the word is employed to denote

something other than an appropriation, and that every law that imposes or authorizes a tax must create a fund, unless a fund already exists, into which the tax is to be paid. Funds are frequently created by law for particular purposes, such as the payment of interest on loans, or for the payment of a particular class of expenses; and a fund may be thus created in advance of the time when any of the money is appropriated by an appropriation act. Sec. 2, of Art. VIII of the Constitution, created a fund called the Common School Fund. By § 58 Mis. Laws, ch. 57, the Legislature created a fund consisting of five mills annually on the dollar, of the taxable property in the State, which is usually denominated "The General Fund." But by the Act creating this fund, the Legislature did not make an appropriation; it simply created a fund to meet the current expenses of the State, and provided a mode of collecting the money into the State treasury. These details of mode could not have been provided by an appropriation act, for those Acts can contain provisions on no other subject but that of the appropriation.

The Legislature from time to time creates special or particular funds, but after they are created the Treasurer cannot lawfully pay out any money from a special fund, nor can he pay out money from the general fund, until an Act is passed appropriating the money.

The difference in the meaning of the two words "fund" and "appropriation" is broad and distinct, both in their ordinary acceptation and in the manner in which they are employed in the Constitution and statutes of the State. And unquestionably a fund may exist before any of the money pertaining to it is appropriated and after an appropriation is exhausted.

By Art. IX, § 3, of the Constitution, "Every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." Every such law creates a fund or raises money for a fund already created.

Section 111 (Mis. Laws, ch. 57) provides that "whenever any moneys shall have been collected or received by any officer for any distinct and specified object, no portion of

them shall be paid or applied to any other object or purpose without due authority, but it shall be kept *a separate fund* for such specific object."

From these, and similar enactments, it is clear that a fund must exist in every case where a tax is levied, that every collector and custodian of public money is presumed to know that such is the law, and is liable to criminal prosecution if he diverts any money from the fund to which it belongs, or fails to keep it in that fund.

In many cases, statutes that provide for paying for services are silent as to the fund out of which the claim is to be paid. When a statute provides that the State shall pay an officer or other person for particular services, or on account of property sold to the State, if there is no special requirement that the claim shall be paid out of a particular or special fund, it will be, I think, as a matter of course, payable out of the general fund created to defray the current expenses of the State. Section 28 of the same chapter that defines the duties of the Treasurer of State (Mis. Laws, ch. 1), provides that when any claim is "required to be paid out of a particular fund, it shall be paid out of such fund only." This is a very plain indication that a claim which is not required to be paid out of a particular fund is to be paid out of the general fund only.

The distinction between a fund and an appropriation has always been observed by prior Legislatures, and was not disregarded by the Legislature that passed the joint resolution in question. The statutes passed by the last Legislature recognize the existence of a general fund and of special funds in the absence of any appropriation. In treating of warrants drawn when there was no unexpended appropriation in existence, they approporate money for warrants drawn on the general fund, on the penitentiary fund and on several other funds. They also appropriate money *"out of* the general fund" for certain purposes. No appropriation act was ever passed appropriating money *into* the general fund; and if the terms "fund" and "appropriation" are synonymous, or if the only way in which a fund can be created is by an appropriation, there has never been any

money belonging to the general fund. It would be absurd to attempt to appropriate money *out of* the general fund if that fund is not created otherwise than by an appropriation act.

Unquestionably the existence of a fund does not depend upon whether or not the money pertaining to the fund has or has not been appropriated, and every lawful claim is either payable out of some particular fund or out of the general fund. When the law provides that a claim shall be paid and the claim is presented to the Secretary to be audited, it becomes the duty of the Secretary, if the claim is allowed, to determine out of what fund it is to be paid. If the law requires it to be paid out of a particular fund, he should indorse it accordingly, and if the law requires it to be paid, but does not require it to be paid out of a particular fund, it is to be paid out of the general fund, and it should be so indorsed.

The provision about indorsing warrants need not be further considered in construing the words, "in case where provisions for the payment thereof shall have been made by law," I think the most natural and obvious import of the words just quoted, is what the Legislature intended by this enactment; and that these words import an intention to confine the action of the Secretary to *cases* where payment has been sanctioned by law. I think the word "provisions" is here used, as it is generally used when speaking of legislation in the sense of "enactments;" and that the intent was to confine the Secretary to *cases* where the law provides or enacts that the claimant is entitled to be paid by the State and not to *times* when payment can be instantly made.

It is said this doctrine would invest the Secretary with legislative "power to control the disbursements of the public funds and pledge the public credit." The auditing of a public account neither controls the disbursement or pledges the credit or faith of the State. An account cannot be paid simply because it is audited, and the Secretary cannot audit an account unless the credit of the State is already pledged by some provision of law *previously* made, pledging the

faith of the State that the claimant shall be paid. The Secretary's function is to decide whether the faith of the State has been so pledged by previous legislation, and if it has been pledged, to ascertain and certify to what extent. The claim certified by him is not to be paid solely because of his certificate or warrant, nor until the Legislature shall, in addition to such previous pledge, pass an act of appropriation in fulfillment of the pledge. If the Secretary commits a fraud or exceeds his jurisdiction, his action is as open to investigation before the judicial tribunals of the State as are those of a minor officer. He pledges nothing; he simply decides matters within his jurisdiction. It is the Constitution and the law-making power that pledges the faith of the State.

By § 6, Art. IX, of the Constitution, "Whenever the expenses of any fiscal year shall exceed the income, the Legislative Assembly shall provide for levying a tax for the ensuing fiscal year sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of the ensuing fiscal year."

From this carefully chosen language, we see that for the ensuing year an *estimate* may be relied upon; but the deficiency is to be *ascertained* and not merely estimated. The provision must be *sufficient* to pay the *deficiency* of the past in addition to the amount *estimated* for the future. Using the word "estimated" in the one case and omitting it in the other precludes any supposition that the levy is to meet only a mere estimated deficiency or an amount supposed to be sufficient to meet the deficiency. The Legislative Assembly is required to provide for levying a tax that is sufficient for the actual and not the estimated deficiency; and to do this it is evidently intended that they will know the amount of the deficiency. How is the amount to be known if he who alone is auditor of public accounts and who is made such by the Constitution, is prohibited from auditing?

This section of the Constitution answers a point raised by the defendant's counsel, that until the money is to be drawn from the Treasury there is no necessity of auditing claims. Drawing a warrant is incident to the auditing and

is made so by statute. The manner in which the auditor enters or records his decisions is by indorsing the decision on the claim, and if the decision is favorable he does what is denominated "drawing" a warrant; but drawing a warrant is not a necessary part of the auditing except as it is made so by statute, and the decision would be just as effective if recorded in some other way. Drawing a warrant is not drawing money out of the Treasury, nor does it entitle the holder to receive money out of the Treasury, unless all the other requisites of the law concur with this act. The money must be collected and payment must be preceded by an act of appropriation. Drawing a warrant is part of the formal and convenient mode provided by statute for recording the auditor's decision, but the decision would be as effectual if the Legislature had provided some other mode of entering the decision. The substance of the transaction which, it is claimed, is prohibited, is the auditing of the account. If the Secretary is utterly prohibited from passing upon claims, it is difficult to know how the expenses could ever exceed the income or how a deficiency could ever arise. But even if we consider claims that are not even entitled to be audited to be "expenses," from which a deficiency may arise, it is certain that a rule that would prohibit the auditor of public accounts from acting upon such claims, would deprive the Legislature of the only mode known to the Constitution of ascertaining a deficiency.

I think too much importance is attached to the use of the word "provisions" in this connection. An attempt is made to construe the sentence as if that word pointed particularly to obtaining or appropriating money. The words "provision" and "provided" are employed frequently in speaking statutory enactments of every kind, and on every subject, and the phrase "provisions made by law," when used to denote a statutory enactment, is no more subject to such limited meaning than the word "enactment," or any of the phrases used to denote the passage of a statute authorizing, permitting, directing, or requiring some particular thing to be done. It is not an unusual mode of expression to say, "provisions are made by law" for the

times of holding Courts, for compelling the attendance of witnesses, for taxing costs, for changing the place of trial, for paying jurors for the payment and satisfaction of judgment, when the collection, appropriation, obtaining or providing money is not alluded to by the statute or by the speaker, and when the only allusion to the subject of money is a provision as to the amount payable or the party entitled.

Another reason why the word "provisions" as used in this section ought not to be construed to point to the appropriation of money is, that the State is as well provided with money before the passage of the Appropriation Act as after. Such Act does not place a dollar in the treasury; it is merely the Treasurer's letter of authority for paying out money which is provided or obtained by virtue of some other law.

Section 28 of the Act under consideration assumes that the Secretary shall draw warrants in cases where money is not actually provided, in the strict sense of that word, and it directs that in such cases the Treasurer shall indorse the warrant, "not paid for want of funds."

What claims, then, are "in cases where provisions for the payment thereof shall have been made by law?" Provisions are made by law for paying a salary to District Attorneys, and no provision is made by law for paying a salary to a Sheriff. If money is placed in the general fund, or a salary fund, and a certain amount thereof is by an appropriation act appropriated to the payment of salaries of officers for the current year, the necessary money is provided; but when the money is provided and appropriated, if both a District Attorney and a Sheriff should present claims for salaries, it would still be the Secretary's duty, notwithstanding the appropriation, to ascertain whether provisions had been made by law for paying the respective claims. He would find one to be a case "where provisions for the payment thereof" had been made by law, a law having provided what party was entitled and the amount to be paid. In the other case, no such provisions would be found.

A fund may be created, money may be collected and kept

in the fund, and an appropriation may be made from the money; but still the question will remain in each case that comes before the Secretary of State, whether the claim is made *in a case* where provisions have been made by law for the payment thereof. Collecting and appropriating money will not alone serve to bring any claim within the "cases where provisions for the payment thereof" have been made. Aside from, and in addition to, raising or providing money, some other provisions made by law must be found, or the Secretary has no right to allow the accounts; and I think it is obvious from the language employed, that the latter are the provisions referred to, and required by the statute in question. It is a matter of grave doubt whether the Constitution would permit legislation such as it is claimed resulted from this section.

The Constitution provides that certain officers, the Governor, or instance, shall receive a specified salary annually; that "the Legislative Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each fiscal year;" and that the Secretary of State "shall be, by virtue of his office, auditor of public accounts." Here are provisions made by the fundamental law for the payment, annually, to that particular officer, a specified sum. To attempt to deprive the Secretary of State of the power to audit the claim, would seem much like an attempt to set aside the requirements of the Constitution. It cannot be said that such a claim is not *in a case* where provision is made by law for its payment.

If it is contended that the Legislature, in enacting the section under consideration, relative to the Secretary's duties, used the language above quoted, not to interpose a barrier against allowing claims in cases where there was no law directing that the party should be paid, or specifying the services for which payment should be made, but sought to remedy the evil of a possible failure to make appropriations for the current expenses, by depriving the Secretary of State of the power to audit public accounts, it would seem to be doing evil that good may ensue, and to be violating the fundamental law in order to preserve

the State. This, it seems to me, would be assuming that one department of the government would or might violate the Constitution, and that the Legislature attempted to remedy the evil by compelling another department to violate it. When a definite and ascertained amount is due to a certain person, and the Constitution provides that the money shall be raised and the amount shall be paid within a specified time, I cannot conceive that it is a case where provisions for its payment are not made by law; nor can I conceive what power the Legislature has, under the Constitution, to prohibit the Secretary of State from auditing the account.

A statute must receive a construction consistent with its constitutionality, if its language will admit of such a construction. It seems to me clear that the construction contended for would conflict with the requirements of the Constitution, and I am fully convinced that it does not comport with the most obvious meaning, nor with the most reasonable construction of the language employed by the Legislature in defining the duties of the Secretary of State.

I am therefore compelled to dissent from so much of what I understand to be the opinion of a majority of the Court, as holds that the Secretary can audit public accounts only when there is an unexpended appropriation applicable to the payment of the particular claim presented. And I am of opinion that it is the duty of the Secretary of State to audit public accounts in every case where the law has clearly provided that the claimant shall be paid by the State; and if the claim is allowed, to draw his warrant for the amount due.

I think the warrants mentioned in the petition for mandamus were legally drawn, that the Legislature has passed no Act prohibiting the Treasurer from paying them, and that they are payable out of any money that may have been appropriated for the payment of the classes of expenses to which they respectively belong.

WILLIAM CHAMBERS, Appellant, v. MARY ANN CHAMBERS, ELIZABETH MAURY, and her Husband, R. F. MAURY, Respondents.

DESCENT OF LANDS UNDER THE DONATION ACT.—The restrictions upon the descent of lands granted under § 4 of the Act of Congress, relating to public lands in Oregon, approved September 27, 1850—commonly called the Donation Act—do not apply to lands granted under § 5 of the same Act.

IDEM.—Lands granted under § 5 of said Act descend in accordance with the provisions of the Statute of Descents, and of the common law.

APPEAL from Jackson County.

This suit was commenced in the Circuit Court for Jackson County, at its November term, 1870, to have the rights of the parties to Donation Land Claim 66 declared, and for assignment of dower and partition. The complaint alleges, that in the year 1852, Aaron Chambers, the father of the plaintiff, and Waity Ann Chambers, his wife took up Donation Land Claim No. 66 in Jackson County, Oregon, and made proof of residence and cultivation as required by the Donation Act of 1850, and the amendments thereto; that said donation claim was divided by the Register and Receiver at Roseburg, and the north half assigned to Waity Ann Chambers, and the south half to Aaron Chambers; that on July 20, 1859, Waity Ann Chambers died, leaving her surviving husband, and her son (by a former husband), John W. Manning, her only heirs at law; that on August 19, 1865, a patent for said donation claim issued to said Aaron and Waity Ann Chambers; that on September 13, 1869, said Aaron Chambers died intestate, seized and possessed of the south half of said donation claim, and the undivided half of the north half of said claim and also seized in fee of the fractional southwest quarter of section 10, and fractional west half of section 15, township 37 south, range 2 west, and leaving the plaintiff, William Chambers and defendant, Elizabeth Maury, his only children and heirs at law and defendant, Mary Ann Chambers, his surviving widow; that after the death of Waity Ann Chambers, the defendant Mary Ann Chambers

purchased the interest of John W. Manning in said donation claim, and by virtue of said purchase now claims the whole of the north half of said claim; that plaintiff is advised and believes that said Mary Ann Chambers is only entitled to one half of the north half of the said donation claim and to dower in the remainder of said land, and therefore prays that the rights of the several parties be declared and set apart, and that the dower of Mary Ann Chambers be set apart and assigned to her.

The answer of Mary Ann Chambers admits that Aaron Chambers and Waity Ann, his wife, took up said donation claim in 1852, under the fifth section of the Donation Act of 1850, and resided on said claim four consecutive years, and that the north half was assigned to Waity Ann Chambers as her half of said claim; that said Waity Ann Chambers died July 20, 1859, but denies that Aaron Chambers was her heir at law; that Aaron Chambers died September 13, 1869, in possession of said claim, but avers that his possession of the north half thereof was by right of curtesy, and not as owner. It avers that the said Waity Ann was the owner in her own right of the north half of the said claim at the date of her death, on July 20, 1859, by virtue of four years' residence and cultivation, under the fifth section of the Donation Act, dated September 27, 1850), and was entitled to a patent from the United States for the same, and that afterwards the patent issued, bearing date August 19, 1865, and granted to said Waity Ann Chambers and her heirs the north half of said claim; that John W. Manning was, at the time of her death, her only lineal descendant and sole heir at law, and as such inherited the said north half of said donation claim; that on August 12, 1869, by deed duly executed, he conveyed all his interest in said claim to defendant, Mary Ann Chambers, for the sum of $2,000; that she is justly entitled to said north half of said claim and to dower in the remainder thereof, for which she prays:

To this answer plaintiff interposed a demurrer, for the following reasons:

"1. The answer does not state facts sufficient to constitute any defense to this suit.

"2. It admits the land was acquired by residence, cultivation, notice and proof, according to the Act of Congress of September 27, 1850, and that the patent did not issue until after the death of the second wife of Aaron Chambers.

"3. The Donation Act gives the land in case of the death of either claimant before patent issues, to the survivor and children or heirs of the deceased, in equal proportions."

The Court overruled the demurrer and dismissed the suit, and from this judgment plaintiff, William Chambers, and defendants, Elizabeth Maury and R. F. Maury, appeal.

B. F. Dowell and E. B. Watson, for Appellant.

C. W. Kahler and J. F. Watson, for Respondents.

By the Court, MCARTHUR, J.:

The only question pressed upon the attention of this Court was that in relation to the descent of the north half of the donation land claim described in the pleadings. The other question in relation to the partition and assignment of dower raised by the demurrer to the answer was not argued. It was admitted that John W. Manning was the only lineal descendant of Waity Ann Chambers, and that she was the owner of the land described in the grant, and that she obtained it under and by virtue of § 5 of the Donation Act, as the "Act of Congress, relating to public lands in Oregon," approved September 27, 1850, is commonly designated. Appellant's counsel urge that the restrictions placed upon the descent of lands acquired under and by virtue of § 4, which provides, among other things, that "when either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions," apply with equal force to lands acquired under and by virtue of § 5 of said Act.

It will be noticed that the grants made in §§ 4 and 5 of the Act are separate and distinct grants of different quanti-

ties of land to different classes and descriptions of persons. Also that the provision in § 4 changes the rule of descents from that of the common law and that of our statute, and that the conditions attached to a grant under § 5 are in many respects different from those to a grant under § 4. Though embraced in the same Act the two sections are entirely independent of each other so far as the restrictions upon descent are concerned. The provision in § 4 in relation to descents being in derogation of the common law should be strictly construed. It should not be extended in its operation over any property not expressly included in its terms. The words "and in all cases when such married persons have complied with the provisions of this Act so as to entitle them to the grant as above provided" which almost immediately precede the words "when either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions," clearly limit the restrictions upon the descent to the lands granted to settlers who have complied with the requirements as above provided, and they do not extend to the lands granted to settlers who comply with the requirements specified in subsequent sections. The language of that part of § 4 restricting the descent is clear, and in our opinion applies exclusively to lands granted under that section. Waity Ann Chambers held the north half of the Donation Claim under § 5, and as there are no restrictions placed upon the descent of lands acquired by virtue of said section, it follows that the provisions of the statute of descents and of the common law apply. In accordance therewith it descended upon her death to John W. Manning, her only lineal descendant, charged with the curtesy of Aaron Chambers, her husband, since deceased. Manning for a valuable consideration sold and conveyed it to Mary Ann Chambers, in whom the title now rests.

It follows from the above that in overruling the demurrer and dismissing the suit the Court below did not err.

Decree affirmed.

STATE OF OREGON, Respondent, v. N. R. PACKARD, Appellant.

INDICTMENT.—Where the statute makes it a criminal offense "willfully and knowingly to charge, take or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed" by an officer, the indictment should show for what service or duty the charge was made or the money taken.

APPEAL from Wasco County.

The defendant was indicted under § 636 of the Criminal Code, which provides as follows: "If any officer of this State, or of any county, town, or other municipal or public corporation therein, * * * shall willfully and knowingly charge, take or receive any fee or compensation, other than that authorized or permitted by law, for any official service or duty performed by such officer, * * * such officer, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than one year, or by fine not less than fifty nor more than five hundred dollars or by dismissal from office with or without either or any of such punishments."

The offense is set forth in the indictment in the following language:

"Said Newton R. Packard, in the county of Wasco aforesaid, in the 4th day of February, A. D. 1870, being then and there an officer of said Wasco County, State of Oregon, to wit, the County Clerk of said county, duly elected and qualified to act as such, there and then acting as such clerk; and the said Newton R. Packard having then and there received the sum of four thousand two hundred and seventy and eighty-one one-hundredths dollars, as his full and lawful fees and compensation for official services, rendered by the said Newton R. Packard as such clerk, for said Wasco County, prior thereto; the said Newton R. Packard did, then and there, willfully, knowingly and feloniously, charge the said county of Wasco, for said official services performed by him as such officer, a compensation other than that authorized by law, to wit: The said Newton R. Pack-

ard did, then and there, charge said Wasco County, and have the same allowed him by the County Court of said county, the sum of eight hundred and fifty-four and seventeen one-hundredths dollars, as an additional compensation for said service, rendered by said Newton R. Packard as such clerk, for said county, prior thereto, and for which the full compensation of four thousand two hundred and seventy and eighty-one one-hundredths dollars had been made by said county."

The defendant pleaded not guilty.

On the trial the State offered a record of the County Court, in the following words: "That N. R. Packard be allowed the difference between county warrants sold at eighty cents, on $4270.81 received by him as County Clerk, the sum of $854.17." The defendant objected, but the record was read in evidence, and the defendant excepted to the ruling.

The defendant was convicted and fined $500. Before sentence he filed a motion in arrest of judgment, based upon the ground that the facts stated in the indictment do not constitute a crime. The motion was overruled, and defendant, having excepted to the ruling, appeals.

Orlando Humason, and Hill, Thayer & Williams, for Appellant.

In certain cases the County Court may allow to any officer or person performing service, additional compensation, when that prescribed is deemed inadequate for the service. (Mis. Laws, ch. 20, §§ 16, 22.) It does not appear that the services of defendant were not of this character.

Unless from the facts stated it affirmatively appear that the act done was unlawful it will be presumed to have been lawful. (Civ. Code, § 766.)

Defendant is entitled to be apprised of the particular official act for which the overcharge was made. (1 Wharton Crim. Law, § 285 and note *g.*) The indictment should state the legal fee allowed and the overcharge or extortion on the part of the officer. The offense could not be committed with reference to an official act or service for which

the law had fixed no compensation, nor for an official act, known to the County Court, for which they might deem the compensation allowed by law inadequate and in their discretion allow additional compensation. (Whart. Prec. Ind. and Pleas, 909 note *m*.) The officer could not commit the crime without the act for which the charge was made was imposed upon him as an official duty. No act could be proven except the act alleged. No act is alleged in the indictment. He could not plead his present conviction in bar of another prosecution. (1 Pick. 171; 15 Mass. 525; 10 Mass. 211.)

The record of the County Court should not have been admitted in evidence. It shows that the amount received by defendant was allowed him to make up the difference between the face value of county scrip and the amount that had been realized on the sale of such scrip, and not as pay for any official service whatever. If the jury were allowed to consider this as in any manner proving the charge in the indictment, it may have misled them. (3 Cow. R. 612; 1 Comstock, 519; 3 Hill, 194.)

S. Ellsworth, for Respondent.

The indictment follows the statute *in ipsissimis verbis*, and nothing could have been added that would not have been mere evidence. (1 Ogn. 266; 2 Wheat. Crim. L. §§ 2514, 2516.)

The verdict is sufficient to support the judgment of conviction. (Crim. Code, § 179; 3 Wheat. Crim. L. § 3048.)

An alleged irregularity in the proceedings of the Circuit Court cannot be considered here, unless it is presented by affidavit supporting a motion for a new trial. (Civ. Code, §§ 235, 236.)

By the Court, UPTON, J.:

The case turns upon the sufficiency of the indictment. It is insisted on the part of the State that the offense is described in the language of the statute, and Wharton's Am. Cr. L. § 364, is cited to show that that mode of charging the acts that constitute the crime is sufficient. That author

says: "It is a well-settled general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute;" and the position is undoubtedly correct as a general rule. The question whether the offense is described in the words of the statute, includes the question whether the acts constituting the crime are stated with "the circumstances that are necessary to constitute a complete crime." (Crim. Code, §§ 69, 72.)

An indictment cannot be said to describe the offense in the words of the statute, or in any words, unless it charges the acts which constitute the offense; and when an act is not criminal, unless done under particular circumstances referred to in the statute, the indictment does not follow the statute or describe the offense in the words of the statute unless it is direct and certain as to those particular circumstances mentioned in the statute.

In this case, it is an essential matter that the money willfully and knowingly charged, taken or received, be charged, taken or received for some "official service or duty performed by such officer," and that the fee or compensation be "other than that authorized or permitted by law" for that service. One of the particular circumstances mentioned in the statute as necessary to make such charging, taking or receiving money criminal is, that it must be taken for an official service or duty. Another is, that the money is other or more than is authorized or permitted by law for the official service or duty. To state that the defendant took money for official services, embraces the statement of a conclusion; and to state that the amount of money mentioned is more than is permitted by law for services without stating what the services were, is a statement of another conclusion. An issuable fact which is essential to be known in order to determine the correctness of either of these conclusions is, what were the services for which the money was charged, taken or received.

If the defendant wrongfully, willfully, knowingly, and even fraudulently and corruptly charged and received money

from the county, it is not a violation of this particular section of the statute unless he charged or received it for an official service or duty. It is therefore necessary to show in the indictment what service or duty it was charged or received for, that the conclusion may be lawfully drawn whether or not it was for some official service or duty and whether or not it was excessive.

If the indictment states what the service or duty is for which the money was charged, the Court can take judicial notice of the law making that an official service or duty; and if the amount of compensation is fixed by law, the Court can take judicial notice what fee or compensation is authorized or permitted by law for that particular service. But if the service or duty is not designated in the indictment, there is not such a statement of "the acts constituting the crime" as will enable the Court to determine whether or not the money was charged or received for an official service or duty, or whether or not the fee or compensation charged and received was "other than that authorized or permitted by law." These are conclusions to be drawn from these facts stated in the indictment, or in other words, from a statement of the acts constituting the offense.

The distinction becomes obvious in instances like the following: If a statute defines a crime by the words "assault another with intent to commit a felony," it would not be deemed safe to use in the indictment only those words, but the pleader would *give the name* of the person assaulted, and state *what crime* the defendant intended to commit. If the statute used the words "assault with intent to kill," the pleader would not omit the name of the person assaulted, nor fail to show against whom the intent was formed, although he could in one sense follow the language of the statute without giving the name of any person.

If a statute defines a crime by the words "assault with a dangerous weapon," it would be unsafe to make the charge in those words only, but the usual course is to add the name of the weapon, as with an axe, gun or sword; or if the assault be made with an instrument which the law does not adjudge to be a dangerous weapon, as a cane, to

add, after charging that the assault was made with a cane, the averment that the cane was a dangerous weapon.

If the statute punishes the stealing of "any valuable thing, the personal property of another," the pleader will designate the thing stolen, allege the value and name the owner, that the Court may be put in possession of facts upon which to predicate the conclusion that a valuable thing, the property of another, has been stolen.

Upon the same principle it was necessary in this case that the indictment should state what service was charged for the defendant. It is necessary for the pleader to designate the service that it may be determined whether it was an official service, and in order that it may be determined what fee or compensation was authorized or permitted by law for such service. The plea of not guilty puts in issue every material allegation of fact, and it is necessary that every material fact should be so pleaded that issue can thus be taken upon it. If the indictment states that the defendant performed certain services, not named, which were official services; that he charged a compensation therefor, other than that authorized or permitted by law, these allegations are not issuable facts, upon which the Court can predicate a judgment.

Upon a less strict theory of pleading, the indictment is bad. The pleader evidently intended to charge, in substance, that for all his official services, rendered during a certain term or period, the defendant was entitled to receive $4270.81, and no more. That he did receive from the county that sum therefor, and that he afterward charged and received from the county an additional sum of $854.17 for the same services. If this general mode of charging a crime could be sanctioned by the law, the indictment would still exhibit this defect, that it is not directly stated in the indictment that the sum of $4270.81 is the only fee or compensation authorized and permitted by law for the services referred to. The indictment states that the defendant received that sum "*as* his lawful fees and compensation," and at the close of the stating-part it says that for those services

"the full compensation of $4270.81 had been made him by the said county."

But this is not that directness and certainty of statement as to what compensation was permitted by law, required by §§ 69 and 72 of the Criminal Code. Nor is this mode of stating the acts constituting the crime sanctioned by any approved criminal law, to our knowledge. The indictment not only fails to state what the services were, but it does not directly state that $4270.81 is all the compensation or the only compensation therefor authorized or permitted by law.

The defendant's counsel has referred to certain duties of the County Clerk for which the compensation is left to the discretion of the County Court, but that subject is not shown to be pertinent to the case made by the evidence.

The transcript does not bring the merits of the case before this Court, and what evidence is noted in the exceptions indicates an attempt to show that the defendant obtained from the county additional compensation or payment because county warrants which he had received were not par. However reprehensible such conduct may be when proven against a county officer, it is a matter with which this Court has nothing to do in passing upon the questions presented by the transcript. The point already discussed is decisive of the case as presented here, and the judgment should be reversed.

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*GEORGE W. HILLMAN, Respondent, v. W. T. SHANNAHAN and WILLIAM WADHAMS, Appellants.

INDEMNITY BOND—WHEN NOT ASSIGNABLE.—Where the purchaser of a business takes a bond from the seller conditioned in a certain sum as liquidated damages that the seller will not engage in business of the character sold for a stated period, such bond can only be enforced for the protection and indemnity of the buyer alone, while carrying on the business in person, and will not be extended to his assignee. In such case, there is no right of action to assign until after a breach of the conditions of the covenant.

APPEAL from Multnomah County.

*See 18 Am.. Rep. 281.

The facts are stated in the opinion of the Court.

Bronaugh & Catlin, for Appellants.

The bond was executed for the personal protection and indemnity of Tileston alone and there is no privity between appellant and respondent. (*Cal. Navigation Co. v. Wright,* 6 Cal. 258.) The absence of the words "heirs" or "assigns" in the bond, is evidence of a want of intention in the parties to make the bond assignable, and the law will construe the contract according to the intention of the parties. (*Dunlap v. Gregory,* 6 Seld. 241; *Moffit v. Coffin,* 3 Ogn. 426.) It has been held that the parties to a covenant of this kind cannot make such covenant assignable. (*Hurd v. Curtis,* 19 Pick. 459; *Webb v. Russel,* 3 T. R. 402.) If the lessee of *personal goods* covenants to deliver the goods or such price for them, this covenant shall not bind the assignee, for it is but a personal contract and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. (*Spencer's Case,* 1 Smith's L. Cas. 118.) Covenants will not run with personal property. (Addison on Contracts, 321; *Splidt v. Bowles,* 10 East Rep. 279.)

Until the happening of a breach of the condition of the bond Tileston had no interest that was assignable at law. (22 Barb. N. Y. 110; 7 How. P. R. 492; 4 Duer, 74; *Mitchell v. Winslow,* 2 Story R. 630; *Field v. The Mayor of New York,* 2 Seld. 186; *Bibend v. Insurance Company,* 30 Cal. 78; *Coolidge v. Ruggles,* 15 Mass. 338; 46 Barb. N. Y. 84; 8 Bacon Ab. 280; *Jackson v. Waldron,* 15 Wend. 180.) When the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made requires, the contract is void. (*Hitchcock v. Coker,* 6 Adolph. & Ellis, 106; *Chappelle v. Brockway,* 21 Wend. 157; *Jarvis v. Peck,* 10 Paige Ch. 123; *Lawrence v. Kidder,* 10 Barb. N. Y. 641.)

When Tileston sold out and went away without notifying respondent of the assignment, the latter had a right to suppose that the purposes of the contract were ended. (*Doll v. Anderson,* 27 Cal. 243; Williams on Per. Prop. 321; *Comstock v. Farnum,* 2 Mass. 97; *Van Veehten v. Graves,* 4 John. 403.)

A policy of insurance is not assignable before loss so as to enable the assignee to recover after loss. After loss it becomes a debt and may be assigned. (2 Parson, on Con. 450; *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Wilson v. Hill*, 3 Metcalf, 68; I Iowa, 408.)

J. H. Reed, for Respondent.

This was not an equitable assignment and under the protection of a Court of Chancery, and to have brought suit in the name of Tileston for the use of respondent would have been in contravention of our statute, which requires actions to be prosecuted in the name of the real party in interest. (Voorhees' N. Y. Code, 96; 2 Seld. 179.) This was not a contract in restraint of trade and the assignment was valid. (8 Mass. 223; 3 Bing. 322; 6 Adolph. & Ellis, 438; Id. 959; *Mitchell v. Reynolds*, 1 Smith L. Cas. 181 and notes; 1 Estee Pl. 58; 21 Wend. 157; 22 Wend. 201; 9 Cal. 325.)

A policy of insurance may be assigned before any liability is fixed on the company by the burning of the property or the death of the party insured, and the company will be liable to the assignee after the event happens fixing their liability. (*Hurlstone v. Bonds*, 9 L. L., 1 Leigh's N. P. 639; *Wright v. Rider*, 36 Cal. 356; 2 Abb. Dig. 75; 6 Cal. 258.)

By the Court, PRIM, C. J.:

The bond upon which this action is predicated was entered into between appellants and one Tileston, the assignor of respondent. Shannahan, one of the appellants, was in partnership with respondent in a music and picture store in the city of Portland, and sold out his interest in the concern to one Tileston. On the same day the appellants jointly executed to said Tileston a bond in the sum of $500 liquidated damages, to be paid to Tileston in case Shannahan should at any time within five years thereafter engage in the music and picture business in said city of Portland. It also appears that prior to the commencement of this action Tileston sold out all his interest in this store to his partner, the present respondent, and left the State. After Tileston sold out and left the State, and prior to the com-

mencement of this action, Shannahan purchased several pianos and exhibited them for sale, and sold three of them at a profit of thirty dollars each. At the time Tileston sold out his interest in the business to respondent, he also turned over to him the bond; and afterward, and prior to the alleged breach thereof by Shannahan, he transferred it to him by assignment in writing. The Court below, in construing the bond, found as a matter of fact that it was the intention of the parties that it should be for the protection and advantage of the business sold, whether carried on by said Tileston in person, or by his assignees. The Court also found as a conclusion of law, that said bond was given as a protection in business, and as such was assignable with the transfer of the business from Tileston to Hillman.

As I understand the ruling of the Court, it amounts to this: The covenant with Tileston was not a mere personal contract with him for the protection of his own interest in the business in which he was engaged at the time, and while he should continue in the business personally, but it was such a covenant as passed with the business, and thus became attached to and ran with it, so as to give his assignee the same rights under the bond he had while carrying on the business personally. This seems to be the only theory consistent with the idea that Shannahan had committed such a breach of the bond as would enable respondent, as assignee, to maintain this action in his own name, unless it was for a breach committed while Tileston was engaged in the business himself. This is not pretended, as the only breach complained of occurred after he had sold his interest in the business and left the State.

There is a doctrine in the law-books that certain covenants made by parties standing in certain relations to each other, in relation to real estate, run with the land, in whose hands soever it may come. But I am not aware that any case has been cited in which it has been held that this doctrine is applicable to contracts or covenants made in relation to personal property.

It was resolved in *Spencer's Case* (1 Smith's Lead. Cas. 117), "If a man leases sheep, or other stock of cattle, or

any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a *personal contract* and wants such *privity* as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the lease of personal goods there is not any *privity* nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators who represent him."

In *Hurd v. Curtis* (19 Pick. 459), the owners of different mills, who drew the water which they used from the same stream and dam, entered into an agreement by which they covenanted to use water-wheels of a certain power and construction. Subsequently, one of the mills was conveyed to the defendant and an action brought against him for a violation of this agreement. The Court held the covenant *personal,* and that it could not be *extended* beyond the original parties, as there was no privity in estate or contract between plaintiff and defendant, although the covenant in that case was by its terms extended to heirs and assigns, etc. (*Webb v. Russel,* 3 T. R. 402.)

The case of *The California Steam Navigation Co. v. Wright* is cited and relied upon. In that case, Wright, the defendant, being the owner of certain steamboats, entered into a contract with one Chenery, also the owner of boats, whereby, in consideration of fifteen thousand dollars, to be paid by Chenery, Wright covenanted that he would not permit any boat in which he was interested to navigate certain waters of the State, at any time within three years from the date of the contract; and if he failed to comply with his contract, he would pay to Chenery, or his assigns, etc., the sum of $15,000. This contract was assigned by Chenery to the plaintiff; whether before or after breach does not appear. It does appear, however, that Wright was notified of the assignment and received of the plaintiff the full sum of money which Chenery had agreed to pay. The Court

said: "It has always been the policy of our law to construe contracts according to the intention of the parties, and it was evidently the intention of the parties that the contract should be assignable, as it is made payable to Chenery, his heirs," etc. We think it is very properly urged in the case at bar, that "if this rule is to work both ways, then the lack of such words as 'heirs,' 'assigns,' etc., is evidence of the want of such intention."

But in the California case the Court further said: "And as it appears * * * * that the defendant was notified of the assignment, and received from the plaintiff the full sum of money which Chenery contracted to pay, he is estopped from denying that the contract was assignable."

In the case under consideration, there are no such words as heirs or assigns, to indicate that it was the intention of the parties that the contract should be assignable, nor are there any circumstances from which it could be inferred that a new and original promise was made to Hillman at the time the bond and business went into his hands, or that would operate to estop appellants from denying that the bond was assignable. Then we hold that this bond was executed for the *personal* protection and indemnity of Tileston *alone,* while carrying on business in *person,* and did not extend to his assignee, as there was no privity between him and appellants.

It is insisted by respondent that the bond is a chose in action, and as such was assignable by Tileston to him, which assignment gave him the same right to maintain the action in his own name, as the real party in interest, that Tileston had. It appears from the allegations of the complaint that the assignment took place on the 8th day of July, 1870, and that the alleged breach did not occur until afterwards, to wit, on the 20th day of July, 1870. The bond being a conditional one, Tileston himself could have no right of action upon it against the obligor until there was a breach of that condition by Shannahan. Then how could Tileston assign that to another which he did not have himself? A chose in action is defined by Burrell's Law Dictionary to be a *thing* in *action*—a thing of which one has

not the possession or actual enjoyment, but only a right to *demand* it by *action*. 2 Kent, 356, says: "Money due on a bond, note or mortgage or other contract is a *chose in action* —a right to *recover damages* for a breach of covenant or a tort is a chose in action. There must be something *due* on a bond, mortgage or other contract, before the party holding it can bring his action to recover the amount due." Tileston had the bond in his possession, but until the happening of a breach of the condition of it he had no right of action or chose of action to assign; his interest in the bond prior to that time being a mere possibility or contingency, not assignable at law. Sec. 27 of our Code does not alter the rule as to the assignability of choses in action, so at to make those assignable which were not so before; but it simply provides that the real party in interest may sue in his own name, without being required, as formerly, to sue in the name of his assignor, for his use. (22 Barb. 110.)

Respondent, in his brief, asks: "Cannot a policy of insurance be assigned before any liability is fixed on the company by the burning of the property, or the death of the party insured, and will not they be liable to the assignee after the event happens fixing their liability?" This question has long since been answered and settled in the negative by the ablest jurists of both England and America. In *Lynch v. Dalzell* (4 Bro. Parl. Rep. 431), which was an insurance against fire, Lord Chancellor King said:

"These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as an incident thereto, by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damages as *they* may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without express consent of the office."

The same doctrine was asserted by Lord Hardwicke in the

case of *Saddler's Company v. Babcock* (2 Ark. 534). In the case of *Carpenter v. The Providence Washington Insurance Company* (16 Peters, 503), Story, J., said: "An assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and *his alone,* that is designed to be covered, and when he parts with his title to the property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; and as to the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or an incident thereto."

The same doctrine is laid down by Chief Justice Shaw in the case of *Wilson v. Hill* (3 Met. 68, 69.) He said: "An insurance of buildings against loss by fire * * * is in effect a contract of indemnity with the owner or other person having an interest in the preservation of the buildings * * * to indemnify *him* against any loss he may sustain, in case they are destroyed or damaged by fire. The contract was to indemnify the assured; if *he* has sustained no damage, the contract is not broken."

He further said: "These considerations, however, do not apply to a case where the assured, *after loss,* assigns his right to recover that loss."

It would then amount to a right of action, which could be assigned by him the same as any other chose in action. And so in the case under consideration, at any time after the happening of a breach of the condition of the covenant, Tileston would have had a right of action to recover the damages agreed upon in the bond. And having a right of action, there can be no doubt that such right was assignable to another, who could maintain an action in his own name, as the real party in interest. But in this case it appears he undertook to assign his right of action prior to the happening of any breach of the covenant; consequently the assignment amounted to nothing, as at that time he had no right of action to assign.

The Court being of the opinion that the judgment of the Court below cannot be sustained upon the facts appearing in the record in this case, it is ordered that the judgment of the Court below be reversed.

Mr. Justice McARTHUR dissented.

EDWARD CARNEY, Respondent, v. CHARLES BARRETT, Appellant.

LIABILITY OF A PARENT ON CONTRACTS OF HIS MINOR CHILD.—In general a father is not liable on a contract made by his minor child, even for necessaries furnished, unless an actual authority is proved, or the circumstances be sufficient to imply one.

COURTS MAY MAKE RULES.—Under our system all Courts have certain powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of the business as shall best serve this purpose, having proper regard for the rights of parties litigant, as guaranteed and recognized by the Constitution and the laws.

APPEAL from Multnomah County.

This is an action upon a contract to recover one hundred and five dollars for board and lodging furnished by plaintiff to defendant's infant son for a period of fourteen weeks. The answer admits the defendant's liability for two weeks' board and lodging, and denies as to the remainder of the time, twelve weeks, and pleads a set-off of nineteen dollars and fifty cents, and prays judgment for four dollars and fifty cents, the difference between the value of two weeks' board and nineteen dollars and fifty cents. The set-off is not denied.

Upon the trial the plaintiff was sworn as a witness, and testified that about the 5th day of July, A. D. 1870, plaintiff was and still is the proprietor and keeper of a hotel in the city of Portland, in said county; that on or about said day the defendant, accompanied by his minor son, came to said hotel, and defendant contracted with plaintiff for board and lodging for his said son for the period of one week, defendant agreeing that he would pay for the same; that plaintiff

agreed with defendant to board and lodge said boy a week, and showed defendant a room in said hotel which said boy might occupy, which room was accepted by defendant for the boy, who boarded and lodged with plaintiff for a week, at the expiration of which time defendant called at the hotel and renewed his contract to pay for board and lodging for the boy for another week; and plaintiff accordingly furnished said boy with board and lodging for the second week; that at the expiration of the second week, the defendant called again at the hotel and informed plaintiff that he would not pay or be responsible for the board and lodging of said boy at said hotel any longer; that when said boy came in, plaintiff informed him of what his father had said, and the plaintiff requested the boy to seek accommodations elsewhere, which the boy refused to do; that plaintiff immediately called on defendant and informed him that his son refused to leave the hotel, and requested defendant to come to the hotel and take him away, which defendant declined to do, saying he would not be responsible or pay for his board and lodging any longer, and instructing the plaintiff to put the boy out if he refused to leave the hotel; that plaintiff again informed said boy of what his father had said, and renewed his request to the boy to depart from the hotel, which the boy again refused to do; that plaintiff thereupon called on defendant the second time and apprised him of his son's refusal still to quit the hotel, and again requested defendant to come to the hotel and take his son away, which defendant again declined to do, saying he would not pay for the board and lodging of the boy at said hotel any longer than the two weeks; and the defendant instructed plaintiff, if the boy persisted in refusing to quit the hotel, to kick him out; that the boy remained at plaintiff's hotel for fourteen weeks in all, or twelve weeks after defendant refused to be longer responsible for his board and lodging; at the expiration of which time the boy went to Salem to attend the State Fair, and plaintiff availed himself of the opportunity to put another man in the room which had been occupied by the boy, and thus got rid of him; that during the time the boy occupied the room, he

generally carried the key to it in his pocket, but that plaintiff had other keys, by means of which the servants obtained access to the room to clean it up and make the bed; that board and lodging at said hotel during said fourteen weeks, was reasonably worth six or seven dollars per week, in gold coin. This was all the evidence offered by either party.

In charging the jury the Court instructed the jury, "that the question of defendant's liability in this action was a mixed question of law and fact; that it had been argued on behalf of the plaintiff, that possession of the room by the defendant's son was possession by the defendant, which matter the Court left to the jury to inquire of and determine, as well as the further point, whether or not it was defendant's duty to have gone to the hotel, and have taken his son away from said hotel; that cases could easily be imagined where it might become the duty of a person placing another at a hotel to board and lodge, to take such person away again; as, for instance, if the person so placed in the hotel were a lunatic, or a helpless invalid. And that the Court left it to the jury to determine whether such a principle of duty were applicable in this case. And that the Court also left it to the jury to determine whether the plaintiff removed defendant's son from said hotel as soon as he reasonably could after defendant notified plaintiff that he would not be any longer responsible for the boy's board and lodging, and would not pay for the same."

And, at the request of plaintiff's counsel, the Court further instructed said jury as follows, to wit: "If the father placed the minor in possession of the premises, the possession was that of the father and not the son, the son being the agent of the father so far." At the request of defendant's counsel, the Court gave a number of special instructions to the jury, but declined and refused to give two others that were asked, because they had not been submitted to the Court for its inspection at the proper time, in conformance to a rule of practice heretofore adopted by the Court, requiring all written special instructions desired by either party to be submitted for inspection prior to the commencement of the final address of counsel holding the

affirmative of the issues before the jury. To this ruling counsel duly excepted, and the exception was allowed. The jury found a verdict for the plaintiff, and judgment was rendered thereon.

Bronaugh & Catlin, for Appellant.

O. P. Mason and Charles Gardner, for Respondent.

By the Court, McARTHUR, J.:

Commercial communication with infants has been productive of much litigation, and hence we find abundant authority to guide us to a correct conclusion in the case now in hand.

The evidence shows that after the expiration of the contract between the plaintiff and the defendant, the plaintiff allowed the defendant's minor son, Arthur, to board and lodge at his hotel for a period of twelve weeks, notwithstanding the defendant informed him that he would not be responsible for said son's board and lodging, and the plaintiff, assuming the legal liability of the defendant therefor, seeks to recover reasonable compensation for the entertainment furnished.

In general, a father is not liable on a contract made by his minor child, even for necessaries furnished, unless an actual authority is proved or the circumstances be sufficient to imply one. (*Varney v. Young,* 11 Vermont, 258; *Hunt v. Thompson,* 3 Scammon, 179; *Angel v. McLellan,* 16 Mass. 28; *Van Valkinburgh v. Watson,* 13 Johns. 480; *Owen v. White,* 5 Porter, 435; *Gordon v. Potter,* 17 Vermont, 350; *Raymond v. Loyl,* 10 Barbour, 483.)

Actual authority is not claimed but it is urged that the circumstances of the case raise the implication of the defendant's liability for the necessaries furnished.

The most favorable construction for the plaintiff that can be put upon the testimony flatly negatives any such implication.

From all the facts in the case, we are of opinion that after the expiration of the contract between the plaintiff and de-

fendant, and after the notification of the defendant, he would not be responsible for the further entertainment of his son. It was the duty of the plaintiff to have closed his doors to the son, unless indeed he relied upon the son's capacity and intention to compensate him. Under some circumstances a disregard of this duty has been deemed good ground for an action of damages against the innkeeper for harboring the infant. (*Everett v. Sherfey,* 1 Iowa, Clark, 356, 364; 2 Hilliard on Torts, 520.)

In the case in hand the father was under no obligation to remove the son, as he would have been had the son been a lunatic, a helpless invalid, or an infant of tender years, and placed at the hotel by the father's authority, or under circumstances sufficient to imply his authority. Instead of being a lunatic, a helpless invalid or an infant of tender years, it *seems* that the son Arthur was at the time a youth bordering upon the verge of manhood and in perfect health, so as to be able to support himself by his own industry. This fact affords additional reason why the defendant should not be held liable for his maintenance. As the general instructions of the Court below were based upon conclusions at variance with our views as just indicated, they were, therefore, erroneous.

The refusal to give the jury several special instructions requested by the appellant's counsel, upon the ground that they were presented too late under a rule of Court, is charged as error. It appears that a rule has been formally adopted by the Circuit Court of the State of Oregon for the county of Multnomah, requiring counsel in a cause, when they desire special instructions to be given to the jury, to present the same in writing to the Judge before the last address of counsel to the jury. The power and authority of the Court to make such rule is denied by counsel, hence the refusal to give the desired instructions is charged as error. Under our system all Courts have certain inherent powers to be exercised for the purpose of methodically disposing of all cases brought before them. They can establish such rules in relation to the details of business as shall best serve this purpose, having proper regard for the rights

of parties litigant as guaranteed and recognized by the Constitution and the laws. This principle is recognized in 3 Binney, 417, and 2 Sergeant & Rawle, 253, the decisions in which cases are approvingly referred to in 2 Reed's Blackstone, 439-40. We cannot discover that it conflicts with any provision of our Code. Indeed, we think it a salutary rule, and one well calculated to suppress that loose system in submitting special instructions which has heretofore prevailed to a greater or less degree in all the Courts of the State, to the annoyance and embarrassment of both the bar and the bench.

The Court below, at the request of the respondent's counsel, instructed the jury that "if the father placed the minor in possession of the premises, the possession was that of the father and not of the son—the son being the agent of the father so far." The application of the principles of the law of agency to cases of this kind is recognized in some instances and to a limited extent in many English and in some American cases. (1 Parsons on Contracts, 300.) In this case, however, the instruction was calculated to mislead the jury, for the evidence shows that the appellant, after the expiration of the second week, called upon the respondent and distinctly told him that he would not pay or be responsible for the board and lodging of his son at the hotel any longer. The contract between the respondent and appellant expired at the end of the second week. Up to and including that time the appellant was willing to pay for his son's entertainment; beyond that time he was not, and so informed the respondent. It was then the duty of the innkeeper, as already indicated, to have closed his doors to the defendant's son and refused him all further entertainment, unless he expected payment at the hands of the son himself.

Judgment reversed.

DELIA B. LEWIS, Respondent, v. DAVID R. LEWIS, Appellant.

EVIDENCE.—Unless the evidence shows the alleged mistake clearly and satisfactorily, it is not sufficient to establish cause for the correction of a deed.

PARAMOUNT BOUNDARIES.—Where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

IDEM—JURISDICTION TO ASCERTAIN.—The locality at which a lost stake was set may be ascertained as well in a Court of law as by a suit in equity.

APPEAL from Polk County.

The plaintiff filed a complaint in ejectment, and the answer sets up what is relied upon as an equitable defense.

It is admitted that in 1855 the defendant, being the owner of a land claim embracing the premises in controversy, sold a part of it at six dollars per acre and executed a deed, under which the plaintiff claims, to Ira A. Hooker, the plaintiff's grantor, conveying to Hooker the southwest part of the land claim by the following descriptive words: Beginning at the southwest corner of the land claim and "running thence north 1°, 24′ east fifty-nine chains to a stake; thence east forty chains; thence south 1°, 25′ west forty-three and twenty one-hundredths chains; thence south 68°, 25′ west forty-three chains to the place of beginning; containing one hundred and four acres." A piece of land four and one-half chains in width north and south and forty chains long, off the north end of the land which corresponds to those measurements, is the parcel in controversy.

The defendant claims that the stake mentioned in the deed, as at the termination of the line first described, was in fact only fifty-four and one-half chains from the place of beginning; that the parcel sold contained only eighty-six acres; and that there is an error in the deed in that respect; and that by mistake the deed was so written as to include the premises in controversy. He avers that he has tendered back to the plaintiff the purchase-money received by him for the surplus eighteen acres; and he asks that the deed be

reformed and that the plaintiff's action be barred. A decree was rendered in favor of the plaintiff.

C. G. Curl, J. A. Applegate and John Kelsay, for Appellant.

Ben. Hayden and P. C. Sullivan, for Respondent.

By the Court, UPTON, J.:

The answer in this case does not specifically point out in what particular there is a mistake in the deed sought to be reformed, but describes by metes and bounds a tract fifty-four and one-half chains in length, north and south, as the tracts actually sold, and avers that by mistake the deed was so drawn as to include the premises in controversy. The record shows that the only controverted question of fact on the trial related to the locality of the stakes set up by the parties on the day of the execution of the deed, as monuments of the northwest and northeast corners of the parcel actually sold.

It is admitted that the parties, after having agreed upon the price per acre, and before determining the size or shape of the parcel, went on to the ground with a survyeor, and that they there agreed upon the particular parcel to be sold, measured its west side, and set up a stake to mark the northwest corner of the parcel selected; and that the north line of the parcel actually sold runs due east from the place of that stake. On the trial, the controverted question of fact was, whether that stake was in fact placed fifty-nine chains from the southwest corner of the land claim, as indicated by the figures noted in the deed, or whether the distance is erroneously noted in the deed, and the stake was in fact planted at a point fifty-four and one-half chains from the place of beginning: in other words, whether that stake was in fact placed at the northwest or at the southwest corner of the parcel described in the complaint and now in controversy.

The cause having been treated by both parties as one cognizable in equity, we have carefully examined the evi-

dence, and we do not find it clearly and satisfactorily proved that the place selected by the parties as the northwest corner of the parcel sold was not fifty-nine chains from the southwest corner of the land claim. The evidence, therefore, is not sufficient to present a cause for correcting a deed, according to the decisions made by this Court in *Shively v. Welch* (2 Ogn. 288), and in *Newsom v. Greenwood,* decided at the present term.*

That it may not be inferred that this Court, as a Court of equity, has assumed jurisdiction of the subject-matter controverted in the proofs adduced by the respective parties in this cause, it is deemed proper to advert to another reason for affirming the action of the Circuit Court in denying equitable relief.

If the defendant could have established by evidence before a jury that on the day of selecting the land and at the time of executing the deed, the parties by mutual consent fixed the northwest corner of the parcel selected at the point fifty-four and one-half chains from the place of beginning, and there drove a stake to stand as a monument of that corner, there would be no occasion for correcting or reforming the instrument. The deed would then, without correction, call for the land the defendant says it should be made to call for, and the repugnance of the measurement to the known boundary or monument would be disregarded by the Court, whether such repugnancy be made to appear in an action or in a suit.

"Where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement either of lines, angles or surfaces, the boundaries or monuments are paramount." (Civ. Code, § 845; *Preston's Heirs v. Bowman,* 6 Wheat. 580.)

"A conveyance is to be construed in reference to its distinct and visible locative calls, as marked or appearing upon the land, in preference to quantity, course or distance." (*Van Wyck v. Wright et al.,* 18 Wend. 157.) This rule applies upon ascertaining the place of the monument, although

* *Ante,* p. 119.

its locality had become uncertain. (*Jackson v. Britton,* 4 Wend. 507.)

If the visible monuments have disappeared but their places can be ascertained, the construction of the deed should of course be the same now as on the day it was executed.

"When practical location and a long acquiescence have been held conclusive, it has been, 'not upon the notion that they are evidence of a parol agreement establishing the line,' but because they are of themselves proof that the location is correct, of so controlling a nature as to preclude evidence to the contrary." (*Baldwin v. Brown,* 16 N. Y. 359.)

In this case there is no reason why the locality at which a lost stake was set could not be determined and the true construction of a deed ascertained as well in a Court of law as by a suit in equity. To lay the foundation for correcting a deed something more should be shown than an ambiguity that can be explained by evidence, or a repugnance between distances noted and monuments agreed upon.

The defendant invokes equity jurisdiction to correct a mistake, but directs all his proofs to establish a fact, which, if true, shows that the deed needs no correction. We can see no reason for resorting to equity; and treating the case as an action, there is no ground for reversing the judgment. It should therefore be affirmed.

STATE OF OREGON, Respondent, v. JAMES OFFICER, Appellant.

JURISDICTION OF COUNTY COURT.—The County Court is practically and essentially a Court of special and limited jurisdiction.

IDEM—WHAT RECORD SHOULD SHOW.—The record of the County Court should show affirmatively that it had jurisdiction of the person and subject matter affected by its proceedings.

IDEM—WHAT RECORD INSUFFICIENT.—A record of the County Court, made in the matter of the location of a county road, which reads, "The bond and proof of posting notices having been made to the *satisfaction* of the Court," etc., is insufficient to show that the Court had acquired jurisdiction of the persons of parties whose rights might be affected by the location of such road.

APPEAL from Clackamas County.

At the October Term, 1870, of the Circuit Court for Clackamas County, the appellant, Officer, was tried and convicted on an indictment charging him with having obstructed a public highway in said county.

On the trial of the cause the State, to maintain the charge preferred, offered in evidence the record of the County Court appointing viewers to lay out the county road, for obstructing which appellant was indicted. This record, so far as it refers to the proof of the posting of notices of the application for the location of the road, reads: "The necessary bond and proof of posting notices having been made to the *satisfaction* of the Court, it is hereby ordered that the prayer of said petition be granted," etc. To the introduction of this record as evidence appellant objected; but the Court allowed the same to be read to the jury; to which ruling appellant excepted. Several grounds of error were assigned, but none were much relied upon by counsel for the appellant in the argument of the cause, except the objection to the sufficiency of the record above quoted; which involves the only question necessary to be considered.

The bill of exceptions shows that no other proof or reference to the posting of notices was made by the State than that contained in the record referred to.

S. Huelat, for Appellant.

The State must prove that the way in question is a public highway. (Roscoe's Crim. Ev. 562.)

Jurisdictional facts must appear affirmatively in the proceedings of inferior tribunals. (*Thomson v. Multnomah County,* 2 Ogn. 34; 1 Smith L. Cas. 818, 832, 843; 2 Abb. Dig. 257; *Frees v. Ford,* 2 Seldon, 176; 6 Barb. N. Y. 607; *Hunsaker v. Coffin,* 2 Ogn. 107; 3 Abb. Dig. 290; *Johns v. Marion County, ante,* p. 46.)

Addison C. Gibbs and C. B. Upton, for Respondent.

The existence of a road as a legal highway is to be learned from and proven by the order for its establishment. (1 Ogn. 216.)

When the evidence as to notice was once before the Court, it then had full jurisdiction to decide as to its weight, or as to any other matter pertaining to the road, and thereafter all the proceedings must be presumed to be regular and legal. (1 Saund. 74; 4 Cow. 296; 2 Cow. and Hill Notes, 779; 1 Smith L. Cas. 816.)

By the Court, BONHAM, J.:

The question to be determined in this case is, whether the record of the County Court above referred to shows the necessary jurisdictional facts to entitle it to read in evidence for the purpose for which it was introduced, to wit: to show that the road charged to have been obstructed was a legally established public highway.

Section 3 of Chapter 50, Miscellaneous Laws, reads:

"When any petition shall be presented for the action of the County Court for laying out, alteration or vacation of any county road it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding County Court, and also in three public places in the vicinity of said road or proposed road, thirty days previous to the presentation of said petition to the County Court, notifying all persons concerned that application will be made," etc.

In determining the question whether the record of the County Court referred to shows upon its face such a want of jurisdiction as to subject it to be thus collaterally attacked, it would be proper to consider the character of such Court as recognized and classified by the Constitution and laws of this State. While our Constitution on this subject is not as clear and definite as might be desired, yet, in construing its whole language in reference to the same together, we think that the County Court is regarded by that instrument as practically and essentially a Court of special and limited jurisdiction. It is true that § 1 of Art. VII classifies the County Courts with Courts of general jurisdiction; to be defined and limited, however, by laws, in accordance with this Constitution. But by reference to §§ 12 and 13 of the article of the Constitution referred to, it will be ob-

served that in providing *specially* for the organization and jurisdiction of County Courts, they are practically treated as Courts of special and limited jurisdiction. At all events, it has already been judicially determined by this Court, in several cases, that County Courts are to be regarded as Courts of special and limited jurisdiction. (*Thompson v. Multnomah County*, 2 Oregon, 37; *Johns v. Marion County*, *ante*, p. 46.)

In the former case the Court says: "It is admitted that the County Court or Board of County Commissioners, so far as it exercises judicial power, is a Court of special and limited jurisdiction." And further: "Before the Court could take a step, or acquire any authority, two things must plainly have been done: First. A petition of twelve householders. Second. Notice as provided above. Without these facts the Court was no more than a stranger to every person or interest involved in the proceeding; and until the jurisdiction was acquired no intendment of regularity or power operates in its favor. It nowhere appears in the record, by way of allegation or recital, that any such notice was given, either at the court-house door or in the vicinity of the road. The omission was fatal to the proceedings of the Board of County Commissioners, as clearly showing that no jurisdiction was at any time gained over the subject-matter to be adjudicated upon."

In the case of *Hahn v. Kelly* (34 Cal. 409), which is a leading case, and one evincing great ability and research, in reviewing the question of the jurisdiction of Courts generally, the Court says: "The presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of Superior Courts, or Courts of general jurisdiction, * * * * but that they are not in favor of the jurisdiction and regularity of the proceedings of inferior Courts, or Courts of limited jurisdiction; and parties who claim any right or benefit under their judgments must show their jurisdiction affirmatively."

The record in the case of *Thompson v. Multnomah County* differs from that in the case under consideration in this respect only: In the former it appears that no reference

was made whatever to the proof of the posting of notices, while in the latter the language of the record is, "Proof of posting notices having been made to the *satisfaction* of the Court," etc. Does this language disclose the necessary jurisdictional facts to warrant the Court in proceeding, is the question. The County Court in its proceedings by the location of public highways to condemn the lands of private persons to public use, is only required to cause constructive notice to be given by the petitioners of their application for that purpose. This notice is to be given by posting the same at the *time*, at the *places*, and in the *manner* prescribed by law; and the language of the record should show affirmatively that this law had been strictly complied with.

We do not think that it is sufficient to say that the proof of the posting of notices was made to the *satisfaction* of the Court. That proof which might satisfy the Court might not satisfy the law. That proof which might satisfy the Court might not justly and lawfully satisfy the persons whose private property is sought to be condemned to public use. If it is sufficient to say that the Court is *satisfied* with the proof of the posting of notices, without any *showing* as to the time, place or manner of posting, then the only question upon this subject would be one in the discretion of the Court, which, when once exercised, would be a finality, however erroneous the judgment of the Court might have been.

We do not think that the record of the County Court in this case was sufficient to show that it had acquired jurisdiction of the persons of those affected by its proceedings.

The judgment of the court below is reversed.

STATE OF OREGON, Respondent, v. ROBERT WILEY, Appellant.

POWER OF THE LEGISLATURE.—The Legislature had the power to confer upon the Police Judge of the city of Portland the jurisdiction and authority of a Justice of the Peace within the limits of said city, but it had no power to limit that jurisdiction to criminal cases.

JURISDICTION OF POLICE JUDGE, WHEN ACTING AS A JUSTICE.—The jurisdiction and authority of the Police Judge, when acting as a Justice

of the Peace, are identical with that of all other Justices of the Peace, and extend alike to civil and criminal cases.

VOID PROVISIONS IN STATUTE—EFFECT OF.—When some of the provisions of a statute are constitutional and others unconstitutional, the latter only are void.

APPEAL from Multnomah County.

The Grand Jury of Multnomah County indicted Robert Wiley for the crime of perjury, alleged to have been committed on his examination as a witness on the trial of a cause in the Police Court, in the city of Portland, before Hon. D. C. Lewis, Police Judge, in which the State of Oregon was plaintiff and Joseph Perry and Caroline Wilson were defendants, they being then and there charged with and tried for the crime of assault and battery. On said indictment Wiley was tried in the Circuit Court of the State of oregon for the County of Multnomah. Upon the trial, the Prosecuting Attorney offered in evidence the docket of the Police Judge and oral testimony to show that Wiley had taken an oath before said officer in an action in which the State of Oregon was a party. To the introduction thereof Wiley's counsel objected, urging that the Police Judge had no legal authority to assume the jurisdiction and power of a Justice of the Peace, and as such, administer oaths to witnesses in State cases or to try such cases. The Court overruled the objection, and admitted the evidence, to which ruling appellant's counsel then and there excepted. The jury returned a verdict of guilty, and Wiley, standing on his exception, appeals to this Court.

John Creighton, for Appellant.

Theodore Burmester, and Gibbs & Upton, for Respondent.

By the Court, MCARTHUR, J.:

The principal question to be decided in this case is, whether or not the Police Judge of the city of Portland —a municipal corporation — has any legal authority to act in the capacity of a Justice of the Peace, and as such, to try criminal actions and administer the necessary oath to

the witnesses therein. The jurisdiction of the Police Judge is defined in §§ 155, 156 and 157, p. 130-1 of the Laws of Oregon, 1870, which provide as follows:

"SEC. 155. The Police Judge has jurisdiction of all crimes defined by any ordinance of the city of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance.

"SEC. 156. The Police Judge has the jurisdiction and authority of a Justice of the Peace for the county of Multnomah, within the limits of the city of Portland, in criminal matters, and shall be subject to the general laws of the State, prescribing the duties of a Justice of the Peace, and the mode of performing them. He shall keep a record of all proceedings before him.

"SEC. 157. All criminal proceedings before the Police Judge or in the Police Court are governed and regulated by the general laws of the State applicable to Justices of the Peace and Justices Courts in like or similar cases," etc.

It will be noticed that § 156 confers upon the Police Judge the jurisdiction and authority of a Justice of the Peace, for the county of Multnomah, within the city of Portland. The power of the Legislature to enact a law investing the Police Judge of any municipal corporation, *ex-officio*, with the jurisdiction and authority of a Justice of the Peace, either generally or limitedly, was discussed at considerable length by counsel. It is not, however, deemed necessary to judicially explore this question at this time, for the reason that a similar one was presented and decided in *Ryan v. Harris* (2 Ogn. 177), in which case it was held that the Legislature could rightly confer upon the Recorder of the city of Portland (who executed similar functions to the Police Judge) the power and authority of a Justice of the Peace within the corporate limits; and this decision was approved in *Craig v. Mosier* (2 Ogn. 324.)

Passing from this, it was insisted by counsel that the limitation and restriction of the jurisdiction and authority of the Police Judge, when acting as a Justice of the Peace, *to criminal matters alone*, renders the entire section of the law

void, for the reason that it contravenes Article IV, § 23, Subdivision 1, of the State Constitution, which declares that "the Legislative Assembly shall not pass special or local laws in any of the following cases, that is to say:

"1. Regulating the jurisdiction and duties of Justices of the Peace and Constables."

In view of this constitutional provision and of the decision in *Ryan v. Harris,* we are impelled to the conclusion that the limitation and restriction of the jurisdiction and authority of the Police Judge when acting as Justice of the Peace *to criminal matters* is unconstitutional. There is no authority known to our laws for restricting the jurisdiction of a Justice of the Peace to one class of cases, whether civil or criminal. He must exercise jurisdiction and authority in both classes.

Admitting this conclusion, it was claimed that the restriction does not invalidate the entire section, but only overthrows that part thereof expressing the limitation. An examination of the authorities will enable us to reach a speedy and satisfactory decision on this point.

"The principle that a statute is void," says Mr. Sedgwick, in his elaborate and admirable treatise on the rules governing the interpretation and application of statutory and constitutional law, p. 489, "only so far as its provisions are repugnant to the Constitution, that one provision may thus be void and this not affect other provisions of the statute, has been frequently decided." In *Gibbons v. Ogden* (9 Wheaton, 1), and *The City of New York v. Miln* (11 Peters, 102), the Supreme Court of the United States recognized this as a settled principle of the law of construction. In *Fisher v. McGirr* (1 Gray, 22), it was declared "that where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection, will be held valid and have the force of law. There is nothing inconsistent in declaring

one part of the same statute valid and another part void." In *Commonwealth v. Kimball* (24 Pick. 361), and in *Norris v. Boston* (4 Metcalf, 288), a similar conclusion was arrived at. In *The People ex rel. Attorney-General v. Hill* (7 Cal. 103), Murray, C. J., in delivering the opinion of the Court, adhered to the same principle. The decisions upon this point are so abundant that it has not been thought necessary to refer to any save those which may well be considered as leading cases.

It follows that the clause "*in criminal matters*" should be stricken from § 156, and the remaining portion of the section stand as law. Also, that the jurisdiction and authority of the Police Judge, when acting as Justice of the Peace, are identical with that of all other Justices of the Peace and extend alike to civil and criminal cases. That officer had jurisdiction of the case in which the appellant was called to testify, and the witness was legally as well as morally bound to testify the truth. If he willfully testified falsely he was guilty of perjury. Therefore, the testimony offered by the Prosecuting Attorney on the trial in the Circuit Court, tending to show that Wiley had been a witness in a case tried before the Police Judge, acting as Justice of the Peace, and that he testified falsely therein, was properly admitted.

Judgment affirmed.

STATE OF OREGON, Respondent, v. E. L. PERHAM, Appellant.

INDICTMENT.—An indictment under § 636 of the Criminal Code charging the defendant with having received two hundred and fifty dollars feloniously for the payment of the amount of salary due him, should state the length of time the salary was unpaid or otherwise designate the service or duty charged for.

APPEAL from Wasco County.

The defendant was indicted under § 636 of the Criminal Code, and being convicted, was adjudged to pay a fine of

four hundred dollars. He appeals from the judgment of the Circuit Court.

The only ground of error assigned is that the facts stated in the indictment do not constitute a crime.

The charging part of the indictment is as follows: "Said Perham, in the county aforesaid, on the fifth day of January, A. D. 1870, being then and there an officer of Wasco County, Oregon, to wit, the County Judge of said county, duly elected and qualified as such, and then and there acting as such Judge did then and there willfully, knowingly and feloniously receive a compensation other than that authorized by law for an official duty performed by said officer to wit: the said Perham did then and there receive an order from the County Clerk of said county, on the Treasurer of said county, for the sum of fifty dollars; and also at the same time and place, an additional order from said Clerk for the sum of two hundred dollars, both of said orders *to be paid* out of the funds belonging to said county, and both of said orders being then and there issued in favor of said Perham for the payment of the amount of the salary due said Perham as such Judge up to the first day of January, A. D. 1870, when there was due to said Perham as such Judge the sum of two hundred dollars at said time and place."

Orlando Humason, and Hill, Thayer & Williams, for Appellant.

S. Ellsworth, for Respondent.

By the Court, UPTON, J.:

This case is very similar to that of *The State v. Packard,* decided at the present term. The defendant is indicted under § 636 of the Criminal Code, and the indictment does not describe the services or duty for which the compensation was received in such manner as to enable the Court to conclude from the facts stated whether or not the compensation received was "other than that authorized or permitted by law." The compensation is alleged to have been for

salary, but the indictment does not state for what period of time the salary was unpaid.

It is also questioned whether under the facts assumed in the argument, the warrant for fifty dollars is not void and consequently no payment within the meaning of the statute.

The latter question is not necessarily involved, inasmuch as the indictment must be held insufficient, for reasons expressed in the case of *The State v. Packard.*

The judgment should be reversed.

D. W. FRAREY, Appellant, v. JACOB WHEELER and JEMIMA J. WHEELER, Respondents.

REAL PROPERTY OF MARRIED WOMEN—SPECIFIC PERFORMANCE AGAINST.—A specific performance will not be decreed by a Court of equity to compel a married woman to convey her real property upon a contract or covenant executed by her and her husband for that purpose during coverture.

IDEM.—But where a married woman, during coverture, joins with her husband in a covenant to convey her real property, and the covenantee advances money to the wife on the contract, or, with her assent, enters into the possession of the premises, and makes permanent improvements thereon, the money so advanced, and the value of such improvements (less the value of the use of such premises), will be decreed to be a charge upon such land until paid. Courts in protecting the rights of married women should not go so far as to encourage the perpetration of fraud by them.

APPEAL from Multnomah County.

On the 1st day of April, 1867, the respondents, Wheeler and wife, covenanted to and with appellant, to convey to him in fee simple, with the usual covenants of warranty, certain real estate held by said Jemima J., in her own right, under the Donation Law of September 27th, 1850. The consideration of this covenant was the payment at the time by appellant of twenty dollars in gold coin and his agreement to pay, one year after date, the further sum of three hundred and eighty dollars in like money. By the terms of the covenant appellant was to have, and did take immediate possession of the described premises. He alleges that during the time he held such possession he made valu-

able and permanent improvements thereon, which greatly enhanced their value, although the use of the same yielded him no benefit. About the 1st day of August, 1870, he tendered to respondents the full balance of the purchase-price of said land, with lawful accruing interest thereon to that time, in gold coin, which they refused to receive, and refused to execute a deed to the premises.

Wherefore, appellant asks that the execution of the deed referred to be decreed, or that an accounting of the value of the improvements referred to and of the twenty dollars advanced be had and the same made a charge upon said land.

Respondents interposed a general demurrer to the complaint, which was sustained and the cause dismissed. From this order of dismissal appellant appeals.

W. W. Thayer and Charles Gardner, for Appellant.

The incapacity of a married woman at common law to contract did not proceed from a want of understanding or discretion, but was in consequence of the peculiar relation resulting from the marriage. She was placed under the power and protection of her husband, and deprived of the administration of property. (2 Kent's Com. 150.) Her personal property, *ipso facto,* with the marriage, went to the husband. He also became immediately seized, *jure uxoris,* of the freehold estate and entitled to the rents and profits, and, if issue were born alive, he took the estate absolutely for life as tenant by the curtesy. Her interest in everything she possessed at the time of the marriage at once became his, leaving in her only a residuary right, the enjoyment of which depended upon the contingency of survivorship. (2 Kent's Com. 130.)

"The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." (2 Kent's Com. 320.) "The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants." (Id. 326; 4 Kent's Com. 441.) In accordance with this principle, Courts of equity have

instituted the doctrine of settlement, whereby property is secured to the separate use of married women, and it is now a settled rule in equity that a *feme covert,* in regard to her separate property, is considered a *feme sole,* and may by her contracts bind such separate estate. (2 Kent's Com. 164; *Jacques v. M. E. Church,* 17 John. 548; 20 N. Y. 247; 2 Edward's Ch. 635.)

Whenever the entanglement of rights caused by the marriage have been avoided and the wife's property secured to her separate use, a complete right to dispose of or contract in regard to it is accorded her. (*Van Allen v. Humphrey & Gilbert,* 15 Barb. S. C. 556; 2 Bacon Abr. 71, title "M.;" 2 Bright. H. and W. 60.)

The Donation Act gives to the wife of a settler under certain circumstances a half section of land, "to be held by her in her own right." This right she cannot have if the land is subject to the marital rights of the husband as they existed at common law. (*Imlay v. Huntington,* 20 Com. 149.) If it is her separate property, she must be deemed to have the *jus disponendi.* (*Hulme v. Tenant,* 1 Leading Cas. in Eq. 533; *Greenough v. Wiggington and Wife,* 2 Green, Iowa R. 435; *Sherman v. Elder,* 24 N. Y. 384; *Yale v. Dederer,* 18 N. Y. 271; 22 N. Y. 452.)

The Act concerning conveyances does not incapacitate a married woman from conveying her separate property. It merely provides a *mode* by which the wife shall convey her real estate, and it also provides a mode by which real property shall be conveyed generally. (Mis. Laws, ch. 6, §§ 1, 2.) Unless the formalities required by the Act are observed, the title will not pass in either instance. (*Lessee of Patterson v. Pease,* 5 Ohio, 190.)

Courts of equity disregard the wholesome provisions of the Statute of Frauds when one party seeks to avail himself of them to practice a fraud upon another. (*Cayon v. Dox,* 34 N. Y. 307.)

A married woman should not be allowed to plead her coverture where the transaction relates to her separate property is fair, and would operate unjustly if not carried

into execution. (*Graham v. Meek*, 1 Ogn. 325; *Fulton v. Moore*, 25 Penn. 468.)

Time was not the essence of the contract. (*Seton v. Slade*, 3 Lead. Cas. in Eq.; *Waters v. Travis*, 9 John. 466; *Calmes v. Buch*, 4 Bibb. 453; *Farley v. Vaughn*, 11 Cal. 227.) Respondents could not complain of delay when they had not tendered a deed. (*Beecher v. Conradt*, 13 N. Y. 108.)

J. H. Reed, for Respondents.

A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried, but the wife shall not be bound by any covenant contained in the deed. (Mis. Laws, ch. 6, § 2.) The bond of a *feme covert* is void. (Bac. Ab., title, "Baron and Feme," 1.) A *feme covert* cannot bind herself by an executory contract to convey her own lands, even though the husband join with her in the obligation. (3 Green. 50.) Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert*, with the assent her of husband, for the sale of her real estate, is absolutely void at law, and the Courts of equity never enforce such a contract against her. (2 Kent Com. 168.)

A party cannot compel the specific performance of a contract to convey lands, unless he shows that he has specifically performed on his part. (Story Eq. Jur., § 771; 4 Scammon, 266; 3 Gillinan, 483; 2 Ogn. 93.)

By the Court, BONHAM, J.:

Two question are presented by the record in this case.

First. Can a married woman in any event be held liable under her covenant, entered into during coverture, to convey real estate held by her in her own right?

Second. Upon the failure or refusal of such married woman to convey her lands under such covenant, may the aid of a Court of equity be invoked to compel money advanced on the purchase-price, and value of permanent improvements made on the premises, to be refunded?

In support of the first proposition, it is claimed by counsel for appellant, that the right of a married woman to hold real estate in her own right carries with it as a necessary incident the power of alienation.

If there is any plausible theory in support of such right in this State, its origin must be traced to this principle; for it is not derived from the common law, nor is it expressly authorized by any statutory provision. The doctrine that the right to alienate property results from the right to hold it, is maintained in general terms by good authority. (4 Kent's Com. 441.)

But it will be observed by a perusal of the authority above cited in support of appellant's position, that the author is discussing in general terms the grounds on which the right to alienate property is based, without any special reference to the rights of married women as a class. And when this author comes to speak directly of the rights of married women over their real property (2 Kent, 168), he says: "Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert,* with the assent of her husband for a sale of her real estate is absolutely void at law, and the Courts of equity never enforce such a contract against her. In the execution of a fine or other conveyance, the wife is privately examined, whether she act freely, and without such examination the act is invalid. But a covenant to convey is made without any examination; and to hold the wife bound by it would be contrary to first principles on this subject, for the wife is deemed incompetent to make a contract unless it be in her character of trustee, and when she does not possess any beneficial interest in her own right."

This principle, as enunciated by Mr. Kent, although in one sense a disability, was not intended as a limitation of the rights of married women; but it was adopted for their protection and benefit.

Notwithstanding the doctrine which is so zealously promulgated by some (and which in some respects it is to be feared may be somewhat utopian in character), claiming an

enlargement of the rights of women, yet it is the generally received opinion that the sphere of married women's duties, as they have been heretofore generally recognized and acquiesced in, precludes the means of acquiring by them that knowledge of law and commercial transactions necessary to enable them, as a rule, to safely and understandingly enter into covenants concerning their real estate. The provision of our statute exempting married women from liability under their covenants in a deed must have had its origin, partly, at least, in this idea. (Mis. Laws, ch. 6, § 2.)

But, be this as it may, it will not be controverted that, at common law, married women are not only held incompetent to enter into covenants to convey their real estate, but they are classified with those who are under disability to make any contract whatever; because the legal entity of the wife was held to be merged in that of the husband. And whether this disability of the common law, as applicable to married women, is calculated to operate beneficially to them, or otherwise, is not the real question to be addressed to the Court in this case. The question to be determined is: What is the actual legal status of married women, as applicable to this case, under the law on that subject as it now exists?

The terms of the grant by which this property was acquired by Mrs. Wheeler, simply provide that it is to be *held* by her in her own right. (§ 4, Donation Law.) No provision is made in the Act referred to for the voluntary alienation of the wife's land acquired under it, other than "by testament duly and properly executed, according to the laws of Oregon." (§ 4, Donation Law.) Section 2, ch. 6, Miscellaneous Laws, reads: "A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried; but the wife shall not be bound by any covenant contained in such deed."

This statute provides the manner in which the wife may convey her real estate, and we think by implication excludes every other manner except by devise. The manner as well

as the capacity to alienate lands is conventional, and is not a natural or inherent right. Because a married woman is allowed by law to hold lands in her own right, she would not be tolerated in conveying the same to others without any regard to the local laws on that subject.

It would not be seriously contended as a matter of practice, that under our law a person might, if he chose to do so, convey his land by the ancient mode of livery of seizin. Nor would it be claimed that a married woman might, if she chose, go into Court and revive the ancient practice of alienation by fine.

We do not think it was the intention of the framers of our Constitution and laws on this subject, to entirely segregate the proprietary interests of husband and wife and make them to all intents and purposes *two* instead of *one* in law. But on the other hand, might it not be fairly inferred from the language of the law and its contemporaneous history, that the prime object and controlling purpose was, to secure to the wife the right to *hold* such property as the means of the support of herself and family in the event that her legal protector and provider might fail, through misfortune, improvidence or death, to do so?

It is also claimed by appellant that "it is a settled rule in equity that a *feme covert* in regard to her separate property is considered as a *feme sole*," and that she may dispose of the same as such. In support of this position, 2 Kent's Com. 164, and *Jacques v. M. E. Church* (17 Johns. 548) and other authorities are cited. But by a little further examination of the authority first cited (2 Kent's Com. 165-6) it will be observed that Mr. Kent qualifies his language at page 164 by saying: "A *feme covert* with respect to her separate property is to be considered a *feme sole sub modo* only, or to the extent of the power clearly given her by the marriage settlement. Her power of disposition is to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property; and if she has a power of appointment by will, she cannot appoint by deed; and if by deed, she cannot dispose of the property by a parol gift or contract." And in the same

connection the case of *Jacques v. M. E. Church* is carefully reviewed and its correctness questioned. (6 Wend. 10.)

The respondent, Mrs. Wheeler, in this case derived her title to the land in controversy from the Donation Law referred to; and when the same is conveyed away by her it must be done in strict pursuance of the provisions of the statute on that subject. (*Carter v. Chapman,* 2 Ogn. 93.) We are clearly of the opinion that under our law as it now stands, Mrs. Wheeler is not bound by the terms of her covenant entered into with appellant, and that his prayer for a decree of specific performance under it cannot be granted.

The second proposition in this case involves the consideration of the question whether appellant is entitled to the alternative relief prayed for in complaint. The law exempting a married woman from liability on her covenants to convey her real estate, was adopted for her better security and protection; and we do not think that it would be equitable, or in harmony with public policy and good morals, for Courts of equity, in protecting the rights of persons, to encourage the perpetration of an actual fraud by them.

We think that the allegations of the complaint in this case, which, standing upon demurrer, are to be taken as confessed, warrant an implied assumpsit, at least, against Mrs. Wheeler for the value of the permanent improvements made upon her premises by appellant. And we think that the twenty dollars in money which was advanced to Mrs. Wheeler on account of her land, and the value of the permanent improvements made on the same (less the value of the use of the premises, if any), should be decreed to be a charge on said land until paid. (37 N. Y. 35 and cases there cited.)

It is therefore ordered and adjudged that the decree of the Court below be modified in accordance with these views; and that this cause be remanded to such Court for further proceedings, according to law.

Decree modified.

STATE OF OREGON, Respondent, v. J. B. SPORES, Appellant.

RECEIVING VERDICT.—It is error to recive the verdict of a jury in the absence of the defendant where the crime charged is a felony.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

John Kelsay, J. F. Watson and W. R. Willis, for Appellant.

John Burnett and R. S. Strahan, for Respondent.

By the Court, PRIM, C. J.:

Appellant was indicted for the crime of willfully and knowingly altering and defacing the artificial earmarks of sheep, the property of another, and converting them to his own use, under § 556 of the Criminal Code. The jury returned a verdict of guilty as charged in the indictment. When the verdict of the jury was returned into Court the defendant was not present and was not called. It was received by the Court and ordered to be entered of record in the absence of defendant and the jury discharged. He was on bail at the time and had been present during the trial up to that time. Two days afterwards, when he was called up for sentence, and asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, he replied that he objected on the ground that the verdict of the jury was received by the Court when he was not personally present. Notwithstanding the objection, the Court proceeded to sentence him to imprisonment in the penitentiary for one year, to which his counsel then and there excepted.

The only question presented by this appeal is whether it was error in the Court below to receive the verdict of the jury without the defendant being personally present. Section 144 of the Criminal Code provides that "if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if

it be for felony, he must be present in *person.*" There are other sections, one of which provides that he must be present at the arraignment and at the time of sentence.

As the crime for which appellant was convicted was a felony under the Criminal Code, it is admitted by counsel for the State that he must be present at the trial; but it is insisted by them that the receiving of the verdict is no part of the trial. Then the question must turn upon the point whether the receiving of the verdict is a part of the trial, or does the trial end when the Court submits the case to the jury for verdict?

Section 175 of the Civil Code defines a trial to be "the judicial examination of the issues of fact between the parties." Burrell's Law Dictionary defines a trial to be "the examination and decision of an issue of fact by the jury under the supervision of the Court." Stephens on Pleadings, 76, calls it the "*decision* of an issue of fact." 3 Bl. Com., page 330, says: "Trial has been long used to express the investigation and decision of fact only. The Code further provides that the defendant may be present when the verdict is returned, and may poll the jury by asking each one of them as his name is called whether that is his verdict.

Then we conclude that the "trial" not only includes the examination of the issues of fact between the State and defendant, but that it includes the decision of those issues of fact also, which decision is made known by the announcement of the verdict of the jury and as appellant was prevented from exercising the right which the law gives him of polling the jury, we hold that it was error in the Court below to receive the verdict in his absence.

Therefore the judgment of the Court below is reversed, and a new trial awarded the appellant.

STATE OF OREGON, Respondent, v. THOMAS DOUGHERTY, RICHARD FLEMING and SAMUEL NEVILLS, Appellants.

INDICTMENT.—It is not the intention of the Code to abolish or dispense with any of the essential requirements of an indictment as sanctioned by the wisdom and experience of the past and determined by the well-established rules of sound reason. None of the substantial elements of a good indictment as tested by the long-established principles of criminal jurisprudence are ignored by our statute.

IDEM—DESCRIPTION OF ACTS CONSTITUTING THE CRIME.—The indictment should contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the Court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law.

APPEAL from Multnomah County.

The appellants were indicted for setting up and managing a lottery for money. The indictment was in these words: "Thomas Dougherty, Richard Fleming and Samuel Nevills are accused by the Grand Jury of the county of Multnomah, by this indictment, of the crime of aiding and being concerned in setting up and managing a lottery for money, committed as follows: The said Thomas Dougherty, Richard Fleming and Samuel Nevills, on the 9th day of January, 1871, in the county of Multnomah and State of Oregon, did unlawfully and feloniously aid and were concerned in setting up a lottery for money contrary to the statute," etc.

Dougherty and Nevills, by their attorney, demurred to the indictment on the ground that the particular acts constituting the alleged crime were not set forth. The demurrer was not sustained. Nevills pleaded not guilty and demanded a separate trial. He was convicted and sentenced to pay a fine of two hundred dollars, from which judgment he appeals.

It was shown by the testimony that the game in question was decided by throwing dice—certain numbers when thrown drawing prizes.

Theodore Burmester, for Appellants.

The indictment contains no statement of the acts consti-

tuting the alleged offense. The Code has merely simplified the forms of pleading. It has not abolished common sense and destroyed rules that have aptly been termed "the matured wisdom of ages." The demurrer should have been sustained. (Crim. Code, §§ 69, 70, 71, 72; *United States v. Howard,* 1 Sawyer R. 507; *People v. Taylor,* 3 Denio, 91; *People v. Allen,* 5 Denio, 76; Wharton's Prec. 836.) The word "lottery" is not defined by law. It must be construed in the indictment in its usual acceptation. (Code, 350, § 78.) In its best and most frequent application it describes those games of chance which are conducted under the supervision or guaranty of the government and the proceeds of which are devoted to public objects. (New Am. Encyclopedia, 664; Archibald Crim. P. & P. 1000.)

Lotteries have acquired a political importance not attained by any other species of gaming, and there is no comparison, so far as the effect upon the community is concerned, between them and ordinary games of chance. (*Phalen v. Virginia,* 8 How. S. C. 167.) The enactment of a general law against all kinds of gaming, and in which games played with dice are particularly enumerated and prohibited (Crim. Code, ch. 9) would be unnecessary if the word "lottery" includes all schemes which chance alone determines.

Gibbs & Upton, for Respondent.

The legal and popular meaning of the word "lottery" coincides. It has no technical or peculiar significance. (Abbott, U. S. Rep. 278.) It is defined to be a distribution of prizes and blanks by chance—a kind of game of hazard. (Worcester's Dic.; Webster's Dic.; Bouvier's Law Dic.; Rees' Cyclopedia; Am. Encyclopedia; Smith's Wealth of Nations, B. 1, C. 10; *U. S. v. Olney,* 1 Abbott U. S. R. 279; 13 Barb. N. Y. 577; 7 N. Y. 228; *Bell v. State,* 5 Sneed, 505; 2 Bishop Cr. Law § 946; 3 Seld. 237; 3 Denio, 88; 2 Mill. 128.) Within the meaning of our statute a raffle and lottery are one and the same thing.

By the Court, BONHAM, J.:

Although the question was not argued upon appeal, yet

the transcript in this case fails to disclose what disposition was made of the demurrer filed herein; which would be error in the Court below; if the record of proceedings in that Court are complete in the transcript, unless the objections raised by the demurrer were of such character that they would be waived by pleading over. (*Willamette Falls Co. v. David Smith et al.*, 1 Oregon R. 181.)

In the assignment of errors in this case, two principal questions are presented, and, in the argument of counsel for appellant, urged upon the consideration of this Court:

1. Is the indictment defective and insufficient for uncertainty, in that it does not set out the *acts* and *circumstances* constituting the offense charged?

2. Is the game or scheme which appellant was charged with "aiding and being concerned in setting up" (as disclosed by testimony in bill of exceptions) a lottery within the spirit and meaning of the Constitution and laws of this State?

For the purposes of this case, we deem it unnecessary to consider any of the questions raised, other than those embraced in the first proposition.

It is a provision of our fundamental law that, "in all criminal prosecutions the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel, to *demand the nature and cause* of the accusation against him," etc. (§ 11, Bill of Rights.) Auxiliary to the above constitutional provision, it is further provided by legislative enactment that in criminal actions the indictment *must* contain, "a statement of the *acts* constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Crim. Code, § 69.)

While it clearly appears to have been the purpose of our Legislature to simplify the old common law system of criminal jurisprudence, by divesting it of many of its technical requirements, such as do not appear to affect the substantial rights of the accused, yet we do not think that it

was ever intended to abolish or dispense with any of the essential requirements of an indictment as sanctioned by the wisdom and experience of the past, and as judged and determined by the well-established rules of good reason. In our practice in *civil* cases, a pleading is insufficient and subject to demurrer if the pleader alleges conclusions of law instead of the facts from which such conclusions may be deduced.

Measured by the rules and requirements above presented, is the indictment in this case sufficient to warrant the State in arraigning the defendants and placing them upon trial for a crime? By the provisions of our Constitution the accused is entitled "to demand the *nature* and *cause* of the accusation against him," before he can lawfully be called upon to answer thereto.

By a careful analysis of the language above quoted, we find that Webster defines "nature" to mean, "the sum of qualities and attributes which make a thing what it is, as distinct from others." The same author defines "cause" to mean, "that which produces or effects a result; that from which anything proceeds and without which it would not exist." And inasmuch as an effect cannot exist without a cause, neither do we think, as a rule, that a good indictment can exist without a statement of the essential acts and circumstances which are the cause of the alleged crime or result.

The attributes and elements of the accusation or crime, whenever it is possible to do so, should be set out in the indictment, and the accused is entitled to be informed of the same by a copy of the indictment, and not be compelled to wait until the State introduces testimony to develop the acts and circumstances which are necessary to the identity of the particular crime charged. The reasons for the above requirements are apparent, and need no extended argument in their support. Chief Justice Bronson, in speaking of the indictment in a case like this (*People v. Taylor*, 3 Denio, 91), says: "It is a general rule that there should be such certainty of description as will identify the offense, so that the party may not be indicted for one thing

and tried for another; certainty is also required, to the end that the defendant may know what crime he is called upon to answer, that the jury may be able to deliver an intelligible verdict and the Court to render the proper judgment; and finally, that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offense." Judge Bronson, however, very properly further remarks: "But this rule must not be carried so far as to furnish a shield from punishment where it is plain that a crime has been committed; and, therefore, the indicting jurors are allowed to state that a particular fact not vital to the accusation is to them unknown."

Under the provisions of the section of our statute before referred to, prohibiting lotteries, there is special reason for particularity and certainty in the indictments so far as "the nature and cause of the accusation" are concerned, for the reason that the lawmaker has conferred great latitude upon the Courts in imposing the penalty for the violation of such law; the punishment ranging all the way from a fine of one hundred dollars to imprisonment in the penitentiary. It was evidently the object of the Legislature to embrace within the purview of this section all the multifarious lottery schemes in vogue, from the most magnificient, and therefore most dangerous to the welfare of society, down to the most trifling in character and results. It is with this view evidently that the penalty is graded as we find it; and where such is the case it becomes the more important to disclose in the indictment (for the reasons already stated) the nature of the particular transaction complained of.

In fact the case at bar exemplifies the necessity of the observance of the rules above stated. The indictment charges the defendants with "aiding and being concerned in setting up a lottery for *money*," whereas the evidence in the case as disclosed in the bill of exceptions shows, that if a lottery at all, it was more a lottery for property, inasmuch as, of the forty-one prizes for distribution, there was but one of money.

Although it has sometimes been claimed by members of the profession, that by our Code of Criminal Procedure no

particular skill or precision was required in framing an indictment, and that almost any form of words would be sufficient, yet we fail to see that any of the substantial elements of a good and sufficient indictment, as tested by the long and well-established principles of criminal jurisprudence, are ignored by our statute. In addition to the constitutional and statutory requirements already referred to, it is furthermore provided (Crim. Code, § 72) that "the indictment must be *direct* and *certain* as to the crime charged, and the particular *circumstances* of the crime charged, when they are necessary to constitute a complete crime." We think that, under our Code, whenever it is practicable, the indictment should contain such *specification of acts* and *descriptive circumstances* as will, upon its face, fix and determine the identity of the offense, and enable the Court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law.

By the language of this indictment it is not possible to determine what particular unlawful act, or lottery transaction, or scheme, the defendants are charged with "aiding and being concerned in setting up." The defendants in this case might, at the time and place charged, have been engaged in half a dozen of the almost innumerable lottery schemes, from the magnificent "gift concert," in which hundreds of thousands of dollars are promised to be distributed, down to the little fifty-cent game for the sale or distribution of trinkets; and yet, from the language of this indictment, they are not furnished with the slightest intimation of what particular transaction or scheme they are charged with having aided or been concerned in setting up. By what *act* did they aid and in what *manner* were they engaged in setting up the forbidden scheme? What was the *nature* of the lottery scheme referred to? The language of the indictment answers none of these questions. How could the defendants, with any certainty, prepare for their defense? They might be prepared to defend against one transaction, while the State came into court prepared to prosecute them on another and entirely different one. Good

pleading in either criminal or civil proceedings does not subject the litigant to such uncertainty, annoyance and unnecessary expense.

Judging this indictment by the reasons, and measuring its sufficiency by the rules above stated, we think the Court below erred in not sustaining defendant's demurrer.

Judgment reversed.

J. B. SHEPHERD, Respondent, v. IRA HAWLEY, Appellant.

ESTRAY ANIMAL.—Our statute does not define an estray, but merely provides where, when, and how they may be posted. An estray is an animal that has escaped from its owner, and wanders or strays about—usually defined at common law as a wandering animal whose owner is unknown. An animal cannot be an estray when on the range where it was raised, and permitted by its owner to run, and especially when the owner is known to the party who takes it up. The fact of his being breachy or vicious has reference only as to when he may be taken up.

IDEM—WHEN MAY BE TAKEN UP.—An animal to be taken up and posted as an estray in the months of August and September, must be not only an estray, but either breachy or vicious.

APPEAL from Lane County.

The facts are stated in the opinion of the Court.

John Burnett and John Kelsay, for Appellant.

F. F. Watson, and Hill, Thayer & Williams, for Respondent.

By the Court, PRIM, C. J.:

This action was commenced by respondent to recover the possession of a bull, which he claims was taken from him by appellant about the 26th of August, 1870, under pretense of posting him as an estray.

It is claimed in the answer that the animal was both breachy and vicious, and was taken up and posted as an estray. The bill of exceptions develops the following facts: that appellant was a householder, and that he and respondent resided in the same neighborhood; that the animal in

question was breachy and vicious, and had been running at large about the premises of appellant for two months prior to the time when he was taken up; that appellant knew the animal in question was owned by respondent when he took him up.

At the trial in the Court below, the jury were instructed as follows: "If you find from the evidence that the bull in question was raised in that neighborhood, and upon that range, and Hawley knew to whom he belonged, and found him running at large on that range where he was raised, then he was not an estray.

"In order to authorize an individual to take up an estray, he must be a householder, and the owner of the estray must be unknown to him, or the animal must be off the range where he was permitted to run by his owner. An animal cannot be an estray when on the range where he was raised and permitted to run, and especially where the owner is known to the party who takes him up. The fact of being breachy or vicious has reference only as to when he may be taken up. That in order to enable defendant to take up an animal in the months of August or September, you must find not only that the animal was an estray, but that it was breachy or vicious. An animal running in its usual range where its owner lives, and where he is known by the person taking it up to exercise supervision and control over it, is not an estray, even though it is not confined in an enclosure.

It is claimed by counsel for appellant that these instructions of the Court were erroneous. Our statute provides that "any householder, about whose premises any estray may be in the habit of running at large, may take up the same, etc.; * * * *provided,* that no estray shall be taken in the months of May, June, July, August, September, October and November except breachy or vicious animals, which may be taken up in any month." (Mis. Laws, ch. 18, § 2.)

The statute does not define an estray, but merely provides who may take up and post them—how it shall be done and when—that is, during what months it may be

done. The person taking up and posting must be a householder, and the estray must be in the "habit of running at large about his premises." It can be done only between the months of November and May, "except breachy or vicious animals, which may be taken up in any month." Under this exception in the proviso of section two, it is claimed, on behalf of appellant, that any breachy or vicious animal running at large about the premises of a householder, may be taken up and posted during any month, although the owner of such animal may be well known to the person taking it up. On this proposition, we think the Court below properly held that the fact of an animal being breachy or vicious, has reference only as to when it may be taken up. In other words, to authorize the posting of an animal during the excepted months, it must be not only breachy or vicious, but an estray as well. An estray is defined by Burrell's Law Dictionary to be "an anmial that has escaped from its owner and wanders or strays about." This author says, it is usually defined "as a wandering anmial whose owner is unknown." (2 Kent, 351; 1 Bl. 297, 298.) According to this definition, an animal running on the range where it was raised, or where it was permitted to run by its owner, could not be considered an estray; because, in so doing, it could not be considered as having escaped or wandered away from its owner; and especially where, as in this case, the owner was known to the person taking it up.

A number of other instructions were asked by appellant, and refused by the Court, which we deem unnecessary to notice, as they were merely the converse of those given by the Court.

There being no error in the instructions and proceedings of the Court below, the judgment is affirmed.

DELIA B. LEWIS, Respondent, v. DAVID R. LEWIS, Appellant.

NOTICE OF APPEAL.— The notice of appeal from a decree need not specify the grounds of error.

SUFFICIENCY OF SURETIES.—Exception to the sufficiency of sureties to an undertaking on appeal must be made within five days from the filing of the undertaking.

APPEAL from Polk County.

This is a suit in equity. Defendant appeals from the decree entered in the Court below. The notice of appeal is as follows: "Notice is hereby given to said plaintiff and her attorneys of record, Sullivan and McCain, that defendant appeals from the decree of said Circuit Court, rendered on the first day of May, 1871, in favor of said plaintiff and against said defendant, for the recovery and possession of about eighteen acres of land described in said decree, to the Supreme Court of said State, at the next regular term thereof, on the first Monday of September, 1871; said defedant, D. R. Lewis, assigns error in the said decree and therefore appeals from the whole thereof." This notice was duly served on May 15, 1871. The undertaking on appeal was filed on May 17, 1871. On May 30, 1871, the plaintiff caused to be served upon the defendant a notice of exception to the sufficiency of the sureties on said undertaking. The sureties failed and refused to justify,—and now the respondent files her motion to dismiss the appeal for the reasons:

"First. That notice of appeal served in said suit is insufficient; it does not intelligibly refer to the judgment or decree rendered.

"Second. There is no undertaking filed, such as the law requires, for the reason that the sureties refuse to justify as required by the statute in such case made and provided."

Sullivan & Thompson, for the motion.

C. G. Curl, J. A. Applegate and P. C. Sullivan, contra.

By the Court, McARTHUR, J.:

Upon the first point presented, we are of the opinion that a notice of appeal which sets forth with reasonably certainty the decree appealed from, the Court in which the decree was rendered, the time when rendered, the names of the parties and the fact that one party or the other intends to appeal therefrom to the Supreme Court, is a sufficient notice in a suit in equity. If a party desires to appeal from a judgment in an action at law the grounds of error must be *specified*, but by reason of Subdivision 1, § 527 of the Civil Code it is otherwise when an appeal is taken from a decree in a suit in equity.

This being an appeal from a decree, we deem the notice of appeal sufficient.

The second point depends upon the construction of Subdivision 2 of § 527 (Laws 1870), which reads as follows: "Within ten days from the service of appeal, the appellant shall file with the Clerk an undertaking, as hereinafter provided. Within five days thereafter the adverse party shall except to the sufficiency of the sureties in the undertaking or he shall be deemed to have waived his right thereto." We are of opinion that the word "thereafter," used in said subdivision, refers to the time when the undertaking is filed. Exceptions, therefore, to the sufficiency of the sureties on the undertaking on appeal must be made within five days from the filing of the undertaking.

Hence the motion is denied.

W. J. ROBERTSON, Respondent, v. WM. GROVES and the CITY OF CORVALLIS, Appellants.

JURISDICTION OF MUNICIPAL CORPORATIONS TO TRY QUESTIONS OF CONTEST FOR MUNICIPAL OFFICE.—The city of Corvallis is not invested by its charter with authority to hear and determine a contest for a city office. The right to try a contest for a municipal office does not follow by necessary implication from the right to provide for the election of city officers. Neither does such right follow from the general authority to provide by laws and ordinances, not inconsistent with the laws of the United States or of this State, to carry into effect the provisions of its charter.

CONSTRUCTION.—The statutes creating municipal corporations are to be strictly construed against such corporation.

APPEAL from Benton County.

At an election for city officers, held in the city of Corvallis on the first Monday in May, 1871, Robertson and Groves were competing candidates for the office of City Recorder. Robertson was declared elected and a certificate of election was issued to him, under which he qualified and entered upon the discharge of the duties of the office. Thereafter Groves applied to the Common Council for leave to contest Robertson's election, which was granted, and a committee appointed to conduct the trial. The contest was determined in favor of Groves. Thereupon Robertson instituted proceedings by writ of review to reverse the decision of the Common Council, on the ground that the charter of the city did not authorize its proceedings. The Court below set aside the proceedings of the Council, and from this order of the Court an appeal is taken.

John Kelsay and F. A. Chenoweth, for Appellants.

The object of municipal governments is to enable them to legislate on all matters within their limits according to their own tastes and wants. (Title of Act of 1857 incorporating City of Corvallis.)

The right to provide for the election, etc., of city officers carries with it the right to provide for a contest. (5 Hill, 211; 27 N. Y. 514; 2 Story on Con., § 1907.)

There is no law in this State in conflict with the ordinance under which the contest was had.

There must in the nature of the case be many implied powers given to a city government. Courts have always so held. (15 Barb. N. Y. 193; Edwards on B. & N. 75; 5 Barb. N. Y. 43; 7 Cranch, 299; 3 McLean, 393; 4 Pet. 152; 1 McLean, 41; 9 How. 172; 4 Wheat. 518, 636; 5 McLean, 194; 4 Pet. 514; 28 Barb. N. Y. 65, 560; 25 Id. 146; 12 Id. 559.)

R. S. Strahan and John Burnett, for Respondent.

Whatever is not expressly granted in acts of incorporation is taken to have been withheld; and all acts of incor-

poration are taken most strongly against the corporation. (Sedgwick Const. Law, 338, 339, 341, 342, 466; 11 Peters, U. S. 420; 4 Peters 152, 168, 514; 13 Cal. 580; 18 Cal. 643; *Dalles Manufacturing Co. v. Dalles Lumbering Co.*, 3 Ogn. 527; 2 Met. R. 220; 4 Gray R. 107; 1 Ogn. 218; 18 Cal. 643; 13 Cal. 580.) Under the Code the writ of review issues to any inferior Court, officer or tribunal. (Civ. Code, § 573; 2 Ogn. 35, 298.) It extends not only to inferior Courts but to persons invested with power to decide on the property rights of individuals, even in cases where they are authorized by statute finally to hear and determine, if the jurisdiction be not taken away by express words. (2 Cai. R. 179; 20 Johns. R. 430; Id. 80; 16 Id. 8; 23 Wend. 277.) A void proceeding can be cancelled by this writ. (24 Wend. 249; 16 Johns. R. 49; 22 Wend. 132.)

By the Court, BONHAM, J.:

The material, and really the only question in this case, is one of jurisdiction. Has the Common Council of the city of Corvallis authority under its charter and the ordinances passed in pursuance thereof, to hear and determine contests for city offices?

It is not claimed by the appellants that the Legislative Assembly has ever directly or expressly conferred such authority upon the city of Corvallis, but they do claim that by necessary implication the city authorities possess such right. And whether that position be correct is the question which we are called upon to decide.

In the Act incorporating the city of Corvallis (Act of January 28, 1857, §6), amongst the powers enumerated as conferred upon the Common Council, it is provided that they shall have exclusive power "to provide for the election and qualification of officers and for filling vacancies in office." It is also provided in the same section of said Act that the Common Council shall have authority "to make by-laws and ordinances not inconsistent with the laws of the United States or the Territory, to carry into effect the provisions of this charter," etc. And it is presumed that it was under these provisions that the city authorities assumed to pro-

vide by ordinance the mode of proceeding to determine contests for city offices. And it is by virtue of these provisions of the Act referred to that appellants claim the authority to proceed in the manner they have done in this case.

The exercise of the authority claimed by the city of Corvallis is a judicial act. Sec. 1 of Art. VII of our State Constitution provides that "the judicial power of the State shall be vested in a Supreme Court, Circuit Courts and County Courts, which shall be Courts of record having general jurisdiction, to be defined, limited and regulated by law in accordance with this Constitution. Justices of the Peace may also be invested with limited judicial powers, and municipal Courts may be created to administer the regulations of incorporated towns and cities."

Sec. 9 of the same Article also declares that "all judicial power, authority and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court, shall belong to the Circuit Courts, and they shall have appellate jurisdiction and supervisory control over the County Courts and all other inferior Courts, officers and tribunals."

The jurisdiction, then, of all municipal Courts created for the government of towns and cities is only such as has been clearly delegated, defined and limited by legislative enactment; and the well-established rules of the strict construction of the powers of such tribunals apply.

In the Act incorporating the city of Corvallis, certain powers are specifically enumerated as legitimately belonging to the city authorities, and those powers which are not thus enumerated, and which are not *absolutely necessary* to the enjoyment of such enumerated powers, are to be taken to have been withheld. In cases like this, and in fact in all conceivable cases of like character, jurisdiction is conferred upon the Circuit Courts to determine the same.

Sec. 354 of our Civil Code declares that an action at law may be maintained, etc., "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any

office in a corporation, either public or private, created or formed by or under the authority of this State."

If there were no general provision of law for determining a contest for a municipal office, there would then be more reason for claiming that the charter of the city of Corvallis conferred that right upon the Common Council by necessary implication. But ample provision has at all times been provided by general laws, Territorial as well as State, for the determination of questions of this character. As a matter of public policy, there can be no good reason for providing a great number of Courts with concurrent jurisdiction, or a great number of concurrent remedies for the adjudication of cases like the one at bar. To do so is, to a greater or less extent, to mystify the avenues to public justice.

But the real question in this case is, whether the Legislature has ever conferred upon the authorities of the city of Corvallis jurisdiction to determine contests for city offices. Doubtless such authority might legitimately have been conferred. But we do not find language in the Act incorporating the city of Corvallis or in any of its amendments which in our judgment warrants the construction of the same, claimed by appellants. We think it the better rule, regarded upon principle as well as authority, that statutes creating municipal corporations should be strictly construed against such corporations. The people of a city, unlike those of a State, have no reserved rights as such, but all powers and authority to maintain a municipal government within a city is delegated to it by the Legislature, either by express authority or *necessary* implication.

But the people of the State at large have a reserved right, if they choose to retain it, and a direct interest in the good government of all its incorporated towns and cities. And yet, while it is usual as a matter of public convenience to delegate to city authorities full power to regulate and control their local and domestic concerns, we do not think that the authority claimed by the city of Corvallis, in this instance, has been conferred upon it by the Legislature. Such power certainly has not been expressly

delegated, and we do not think that it can be successfully maintained that it is derived by *necessary* implication from the authority before referred to, and through which appellants claim that it is deduced.

The judgment of the Court below is affirmed.

SEPTEMBER TERM, 1872

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

SEPTEMBER TERM, 1872

JANE ROBERTS, Respondent, v. FENDEL SUTHERLIN, Appellant.

MORTGAGEE IN POSSESSION.—A mortgagee who obtains possession of mortgaged premises with the assent of the mortgagor, after default of the latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor so long as the mortgage debt remains unpaid.

ALLEGATION OF ASSIGNMENT.—The allegation, in complaint, that the mortgage in question "has been duly assigned and transferred to this defendant," is a sufficient allegation of assignment. It is otherwise, however, where it appears that there is a note or other contract of indebtedness, independent of the mortgage. In the latter case the mortgage is the incident of the debt, and the transfer of the latter carries with it the former.

APPEAL from Douglas County.

This is an action of ejectment to recover the possession of premises to which plaintiff claims title in fee. The answer denies that plaintiff is entitled to the possession of the premises described, or that she is the owner in fee or otherwise, except as is further stated. The answer further alleges that defendant is the owner in fee of the premises,

"subject to a right of redemption by said plaintiff, by virtue of a defeasance clause in a certain deed or mortgage executed by plaintiff and one Jesse Roberts, jointly, to one J. F. Sutherlin, on the 4th day of February, 1860, to secure payment of a certain sum of money, which mortgage has been duly assigned and transferred to this defendant, and upon which said mortgage there is now due and payable about the sum of four thousand dollars." It is then alleged that defendant entered into possession of the premises with the full assent of plaintiff.

Plaintiff interposed a demurrer to the sufficiency of the answer, which was sustained, and the defendant failing to further plead, judgment was rendered as prayed for in the complaint; from which defendant appeals.

L. F. Mosher and W. W. Thayer, for Appellant.

It has always been held that in the absence of any statutory provision to the contrary, a mortgagee could maintain ejectment against the mortgagor upon default in the payment of the mortgage debt. (Adams on Ejectment, 105; 10 Wall. U. S. 530.) The mortgagee has been permitted to maintain such action for the reason that the mortgagee in possession can always be made to account for the rents and profits and to apply them upon the debt and interest. (*Strange v. Allen,* 44 Ill. 428.) A mortgagee out of possession could apply in equity for the appointment of a receiver to secure the rents and profits which have not been collected. (*Astor v. Turner,* 11 Paige R. 436.)

Since the case of *Jackson v. Willard* (4 John. 41,) in 1809, the Courts of the State of New York have, as a general rule, held that a mortgage was a mere security for a debt; and at the same time have held that a mortgagee, after default, was entitled to the possession of the mortgaged premises until the payment of the debt. (4 Kent, 174.) Before the Revised Statutes, he could maintain ejectment for the possession, and after that remedy was taken away, he could retain possession, if he could in any way acquire it, until the debt was paid. (*Pell v. Ulmar,* 18 N. Y. 142, and cases there cited; 42 Mo. 138; 44 Ill. 30; *Woods v. Helderbrand,* 46 Mo. 284, reported in 2 Am. R. 515; 4 Minn. 499; 14 Tex. 142.)

The deduction from this is that the right of the mortgagee to recover or retain the possession of the mortgaged premises does not depend upon the question as to whether the mortgage passes title to the freehold; but it is a right to recover or retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. (*Kortright v. Cady*, 21 N. Y. 364; *Dutton v. Warschauer*, 21 Cal. 625; *Pollock v. Mason*, 41 Ill. 516.)

If the mortgagee is lawfully in possession, after condition broken, he will not be turned out until his debt is paid (2 Black U. S. 579), and this is held even where the debt is barred by the Statute of Limitations. (*Reed v. Shipley*, 6 Vt. 602.)

Section 323 of the Civil Code, which provides that a mortgage shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession, does not change the rights of parties where the mortgagor assents to the mortgagee's taking possession. It simply took away a remedy which has been regarded as harsh and severe. (3 Am. Rep. 256.)

W. R. Willis and Watson & Lane, for Respondent.

The mortgagor in this State is the legal owner of the mortgaged premises, and is entitled to the possession of the same. (9 Cal. 365; 18 Cal. 482; 2 Washburn on Real Property, 550; 26 Ga. 197.)

In this State the mortgagee has no interest in the mortgaged premises, futher than as a security for his debt; he is not entitled to the possession of the same, and must foreclose his mortgage and sell the premises before he can take possession of the same. (Civ. Code, § 323; *Anderson v. Baxter, ante*, p. 105; 17 Cal. 589; 22 Cal. 255, 266.)

Our statutes require the defendant in ejectment to plead his estate or interest in his answer with the same certainty as is required in the complaint. (Civ. Code, § 316; Deady's R. 104; 30 Cal. 685, 687.)

By the Court, BONHAM, J.:

The principal question presented in this case is, what is the legal effect of an entry made upon mortgaged premises by the mortgagee with *assent* of the mortgagor? Is the possession thus acquired by the mortgagee lawful, and a good defense against an action of ejectment brought by the mortgagor? These questions, so far as we are advised, are new in this State.

The case of *Anderson v. Baxter,** reported in Session Laws of 1870, page 265, is cited by respondent's counsel in support of their position on these questions; but on a careful examination of that case, as well as the manuscript opinion of this Court by Thayer, J., on appeal from a rehearing of the same cause, on amended complaint, in 1871, it will be observed that those cases do not determine the material questions involved in this.

In the first case of *Anderson, v. Baxter,* the only questions determined were, that a suit to foreclose a mortgage must be commenced within ten years from the time the cause of suit accrued; that the execution of a mortgage does not vest in the mortgagee any title to, or interest in, the mortgaged premises, but that it is only security for a debt similar to that created by a judgment. It was also held in that case that the time of the absence of the mortgagor from the State should not be computed in the period of limitation for the commencement of the suit to foreclose the mortgage; and these, are, substantially, the only questions determined in that case.

In the second case of *Anderson v. Baxter* determined by this Court and hereinbefore referred to, the plaintiff, to avoid the effect of the Statute of Limitations, applied to and obtained leave of the Court below for a rehearing upon his amended complaint, setting forth that Anderson, the assignee of the original mortgagee in that case, was then, and for a number of years prior thereto had been, in the *peaceable* possession of the mortgaged premises in question, and also that he (Anderson) had applied

*Ante, p. 105.

the rents and profits of the mortgaged premises so occupied by him to the partial payment of the mortgage debt, and thus sought to take his case out of the operation of the Statute of Limitations. This Court also held in that case that such an application of the rents and profits being without authority from the mortgagor, did not amount to a voluntary or authorized payment by him so as to effect the object sought by the plaintiff.

But in the case at bar the defendant Sutherlin avers in his answer that he entered into the possession of the mortgaged premises with the full *assent* of the plaintiff, the mortgagor.

It is true, that under our Code (Civ. Code, § 323) a mortgagor cannot against his will be divested of his possession of the mortgaged premises, even after default, without a foreclosure and sale. But we know of no law or of any good reason to prevent the mortgagor from placing his mortgagee in possession of mortgaged premises if he chooses to do so. Such proceeding would frequently operate beneficially to both parties by avoiding the expense of a foreclosure suit. And where the duration of the possession of the mortgagee thus acquired is not limited by his agreement with the mortgagor, we think that the legal effect of the same is, that he may retain it until his mortgage debt is paid. And we do not think that this doctrine conflicts with the rule that a mortgage is simply a security for a debt and vests in the mortgagee no legal title to or interest in the mortgaged premises. At all events, this doctrine is clearly maintained in a great number of well-authenticated cases in different States.

Judge Comstock, in *Kortright v. Cady* (21 N. Y. 365), in speaking of the modification of the common law rule on this subject, says: "When the Legislature, by express enactment, denied this remedy to mortgagees (the right to eject the mortgagor after condition broken), they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet, I see nothing inconsistent or anomalous in allowing the pos-

session once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is as before in the mortgagor without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor or creditor, between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer."

The result of this construction of the law of mortgages is simply declaratory of the true doctrine that the people should not be unnecessarily trammeled or restrained in their right to deal with their property according to their own judgment of what may be for their best interests. If a mortgagor chooses to retain the possession of his mortgaged premises until a foreclosure and sale, he may do so; if he thinks that his interests will be promoted by investing his mortgagee with possession before that time, he is bound by his act according to the terms and legal effect of his agreement. We think this is the correct doctrine upon principle as well as authority.

Respondent's counsel also object to the sufficiency of the answer, for the following further reasons, to wit: The defendant does not sufficiently deny that the plaintiff is the owner of the premises in dispute, and that there is not a sufficient allegation of the assignment of the mortgage in question to the defendant. These objections, we think, are not well taken. On the latter point, the defendant avers that the mortgage was duly assigned and transferred to him.

While it is true that where a note or bond exists independent of the mortgage, and which it is given to secure, the latter is regarded as the incident of the former, and such note or bond must be assigned to carry the mortgage. But in this case it does not appear that any such note or bond was given.

We think that defendant's answer, if true, constitutes a de-

fense to plaintiff's cause of action, and that the Court below erred in sustaining the demurrer.

Judgment is reversed, and this cause remanded for further proceedings according to law.

FRANCIS S. MATHEWS, Respondent, v. HIRAM EDDY Appellant.

DESCRIPTION IN DEED.—A clerical error in the description of a tract of land will not vitiate a deed where the intent of the parties can be ascertained with certainty from the instrument, when considered in connection with the situation of the parties and of the subject-matter.

JUDGMENT SALE OF MORTGAGED PREMISES.—Where a judgment was obtained in an action at law upon a promissory note, and a tract of land, which had been mortgaged to secure the note, was sold on the execution without foreclosure of the mortgage, and the sale had been confirmed: *Held*, that the sale is not void, and that it cannot be attacked collaterally.

ORDER CONFIRMING SHERIFF'S SALE.—An order of Court, confirming a Sheriff's sale on execution, may be regarded as a final adjudication touching the regularity of all proceedings taken in the execution of final process.

APPEAL from Polk County.

This was an action of ejectment to recover certain real property which each of the parties claimed to own in fee. The land in dispute is described in the pleadings as follows: "Beginning twenty chains north, and fourteen and thirteen one-hundredths chains west of the quarter-section corner-post on the east and west line, between sections 9 and 16, in township 9 south, range 4 west, and running thence west forty-five and eighty-seven one-hundredths chains; thence south forty-three and sixty one-hundredths chains; thence east forty-five and eighty-seven one-hundredths chains; thence north forty-three and sixty one-hundredths chains, to the place of beginning."

The cause was tried by the Court without the intervention of a jury.

On the trial, the plaintiff having shown title in his grantor, and introduced mesne conveyaces from his grantor to himself, rested his case, and the defendant offered and read in evidence a judgment for money, rendered in the Circuit

Court against the plaintiff's grantor, on execution issued to enforce the judgment, the Sheriff's return thereon of a sale of the premises to satisfy the judgment, and a Sheriff's deed executed in pursuance of the sale to one Marshall, under whom the defendant claims; all of which were received subject to the plaintiff's objection.

The Sheriff's return on the execution shows that only three notices of sale had been put up; that the property was sold at the court-house in Polk County, where the land was situated, and it contains the following recital, "There being occupant of the premises." The defendant offered to prove further that at the time of the levy and sale the plaintiff had no personal property and that no person was occupying the premises, but the Court refused to permit such proof.

The defendant also offered in evidence a deed from Marshall to the defendant in which the land conveyed is described the same as the tract in controversy, except that in describing the beginning of the boundary, the following words are used: "Beginning twenty north, fourteen and thirteen one-hundredths chains west of the quarter-section post," etc. This testimony was rejected.

In rebuttal, the plaintiff was allowed to prove that the note upon which the judgment was rendered, under which the execution sale to Marshall was had, was secured by a mortgage upon the premises in dispute and that such mortgage had not been foreclosed.

Judgment was rendered in favor of the respondent.

The other facts are stated in the opinion of the Court.

Benj. Hayden and Boise & Willis, for Appellant.

Plaintiff in an action of ejectment must recover on the strength of his own title. (Taylor on Ejectment, 63, 72, 577, 774.)

A recital of service in a judgment is conclusive as to service. (34 Cal. 391.)

The equity of redemption may be sold on execution to satisfy the mortgagee's debt without a foreclosure. (15 Ohio, 467; *Pierce v. Potter,* 7 Watts, 475; *Porter v. King,* 1 Green-

leaf, 297; 2 Johns. Ch. 130; 7 Paige, 438; 1. Hilliard on Mortgages, 417.)

R. S. Strahan, John Burnett and John Kelsay, for Respondent.

Notice of the sale on execution was required to be given by posting four notices. (Laws of Oregon of 1855, p. 124, § 20.)

The Sheriff who sells under a judgment and execution exercises a statutory power, by virtue of which alone his deed can operate upon the title to the land sold. (11 N. Y. 76; 7 Abb. Dig. 298; 35 Mo. 225.) The statute is imperative as to the notices, and no title can pass unless the law is strictly complied with. (20 Barb. N. Y. R. 149; 7 Conn. 229, 350; 5 Conn. 592; 42 Maine, 414; 13 Mass. 487; 5 Cow. R. 400; 7 Cow. R. 229.) Parol evidence will not be admitted to cure a defect or supply an omission in the officer's return. (2 Mass. 154; 7 Id. 388; 9 Id. 241; 13 Id. 487.)

A Sheriff's deed that does not recite the recovery of a judgment, the issuing of execution, and the posting up of notices of sale as required by law, is fatally defective. (24 Cal. 418; 25 Id. 230; 4 Pet. R. 88; 9 Curt. U. S. R. 8; 11 Wend. R. 436.) Nor is the plaintiff estopped by recitals in the deed. (1 Cal. Dig. 246, § 66.) A confirmation of the sale by the Court did not make the deed valid. (1 Cal. Dig. 250, § 114; 24 Cal. 585.)

A deed to be valid must be certain to a common intent, so that a surveyor can find the corners and trace the boundaries. If the description is illegible or unintelligible, the deed is inoperative. (18 Johns. R. 107; 13 Id. 97, 537; 10 N. Y. 509.)

An equity of redemption may be sold under legal process only in favor of third persons, or other creditors of the mortgagor than the mortgagee. (1 Hilliard on Mortgages, 407; 17 Pick. 139; 4 Ben Monroe, 143; 2 Washb. on Real Prop. 1521; Id. 646; 24 Mo. 249; 23 Miss. R. 206; 24 Ala. R. 476; 2 Doug. R. 176; 4 Eq. Dig. 672; 7 Dana R. 66.)

By the Court, UPTON, C. J.:

In this case it is conceded that the plaintiff, who is respondent in this appeal, is entitled to the premises in controversy, unless the defendant has acquired title through the sale on execution under the judgment against the plaintiff's grantor, S. B. Mathews, in favor of Henry Marshall. One of the objections to the defendant's chain of title is that the deed from Marshall to the defendant is void for want of a sufficient description of the land it purports to convey.

All the other deeds offered in evidence describe the initial point by the words "beginning twenty chains north and fourteen and thirteen one-hundredths chains west" of a certain post, but the deed objected to uses the words "beginning twenty north, fourteen and thirteen one-hundredths chains west" of the post.

The language first above quoted occurs in all the preceding title-papers under which the respective parties claim, several of which have been read in evidence; it also occurs in the Sheriff's return on the execution, and in the deed executed by the Sheriff to Marshall, the defendant's grantor. A comparison of the deed under consideration with other deeds put in evidence shows an identity of language in every other descriptive particular, and the exact and literal correspondence of this deed in so many minute particulars with the other deeds leads to the conclusion that the draftsman in writing this deed attempted to copy from some one of the antecedent title-papers, or from the description contained in them; in other words, that he was engaged as the agent of the constructing parties in an attempt to describe the tract of land in question in the language employed in the old deeds. If that was the intent, the question is, has he made a writing which, being read by the light of surrounding circumstances, will identify the property sought to be conveyed? We find the discrepancy in language consists in omitting the word "chains" and the word "and" from the description contained in other deeds under which each of these parties claim title.

It is said in argument that the Court has no power to add to the language employed by the parties in their written contract, and it is correctly said that it is the province of the Court to ascertain the meaning of the language of the written contract, and not to make a contract for the parties. If we attempt to find a meaning different from that claimed by the defendant, we shall not succeed without some liberality of construction. There is no force in the suggestion that "20.00" may refer to the course and not to a distance; the course being unqualifiedly north, cannot be either 20 degrees east or 20 degrees west of north, and we are driven to the alternative either to treat the description of the initial point as meaningless, or to resort to recognized rules of construction, to ascertain from the language of the deed, if possible, what the parties intended.

It is not sufficient that the interest can be proved by evidence which is independent of the language contained in the instrument. But if surrounding circumstances throw such light on the subject and on the language employed, as to leave no doubt what parcel of land is referred to in the written description, proof of those circumstances is not proof tending to contradict the writing. These proofs show that the grantor had previously bought a parcel of land, the boundary lines of which correspond exactly in course and in length with those mentioned in this deed. By the letter of these descriptions each deed must refer to the same initial point of boundary, or the one initial point must be directly north or south of the other, and there is nothing in the instrument, or in the circumstances, indicating the existence of more than one parcel that can answer to this description. When examined by the light thus thrown upon the subject, the instrument shows to a moral certainty what parcel of land was the subject of this contract.

Under such circumstances, the substance of the written instrument is to be regarded, notwithstanding clerical errors or inaccuracy of expression. In construing contracts, Courts are sometimes required to reject words (27 Maine, 285), or insert them (17 Vt. 479, 486), or to restrict the meaning of a word (12 Mass. 330; 13 Pick. 284; 11 Wheat.

412), or to substitute words (11 Vt. 366), or to repeat words (8 Pick. 563).

A mere clerical error will not vitiate a contract where the interest of the parties can be ascertained with certainty from the instrument, and even when there is no clerical error, inasmuch as the same words are not always employed to express a given idea, and given words and phrases are not used by all persons, or by the same person, in all circumstances, in the same sense. Particular expressions must be compared with the context, and if it can be ascertained with certainty, from the instrument, what the parties intended, the instrument must be so construed as to give effect to the intent.

In the deed under consideration, the "chains" is the only unit of distance mentioned. The word "chains" is frequently used, and it occurs once in the description of the initial point. The failure to repeat it would be no departure from common modes of expression, and would scarcely attract attention if the word "and" had been retained where it occurs in this connection in the preceding deeds.

It is morally certain, from the language of this deed, when examined in connection with the situation of the parties and of the subject-matter, that in executing the deed the parties were contracting in reference to the land in controversy. This is the same degree of certainty that the most precise and formal language would produce, and is all that is required to constitute a valid contract.

The cases cited by the respondent contain nothing in conflict with the views here expressed. The first two of these, *Jackson v. Rosenfelt* (13 John. 97), and *Jackson v. Livingston* (Id. 537), are to the effect that on a sheriff's sale no property will pass under the general description, "all the lands and tenements of the defendant, situate, lying and being in the Hardenburg patent." In *Jackson v. Ransom* (18 John. 107), it was held that where a lot is once sufficiently described, mentioning the lot by an erroneous number does not vitiate the deed.

In *Peck v. Mallams* (10 N. Y. 509), a sheriff's deed recit-

ing that he exposed to sale a parcel of land, describing it by boundaries, supposed to contain four hundred acres, "whereof one hundred acres was struck off to J. W.," and then proceeding to grant to J. W. "the before-mentioned premises," was held void for uncertainty. The defects in the last and in the two first deeds referred to are such that evidence of surrounding circumstances will not render the language of the instrument certain as to the parcel of land sold, but we do not think the deed under consideration is subject to that objection.

Another objection to the sufficiency of the defendant's title arises out of the circumstance that the judgment upon which the Sheriff's sale was based, was obtained in an action at law upon a promissory note, to secure the payment of which a mortgage had been given on the same lands that were sold. It is claimed that the mortgaged premises were not subject to such sale. The sale under execution was made June 21, 1862. This was before the present Code took effect and some nine years before the commencement of this action. The Court is called upon to determine whether such a sale made under the statute of 1854 shall be treated as void, assuming that the statute did not contemplate sales of mortgaged premises without foreclosure of the mortgage; that the practice under the statute of 1854 should have been that which prevailed when the mortgage was a conveyance of the legal title; and that the right of the mortgagee did not merge in the judgment when he proceeded by action on the note or bond which the mortgage is given to secure; the question arises whether the departure from regular practice rendered the sale absolutely void, and the Sheriff's deed a nullity.

In *Waller et al. v. Tate et al.* (4 B. Monroe 143), the assignee of notes secured by mortgage, who held them as collateral security, had proceeded at law and sold the mortgaged premises and had applied the proceeds in part payment. The mortgagee redeemed the notes from the assignee and brought suit to foreclose the mortgage for the balance due on the notes. Four years had elapsed since the sale, and the purchaser at Sheriff's sale had conveyed

a part of the land to another. The Appellate Court reversed a decree which directed the land to be sold to satisfy the mortgage, after first refunding the amount that had been bid for the part thus conveyed, and directed the bill to be dismissed as to the latter purchaser.

It would seem that the proceding on the execution was not deemed void, notwithstanding that under the law then prevailing the mortgage conveyed the legal title.

Cases are cited from Massachusetts in which it is held that the mortgaged premises should not be sold except upon foreclosure. In these cases the ruling was put expressly on the ground that a purchaser at a sale under a decree of foreclosure would, by the statute, have two years in which to redeem, and a purchaser under a judgment would have a much less time. Such difference as to the time in which the premises may be redeemed does not exist in this State, and did not exist at the time of making the sale which is now under consideration. (*Atkins v. Sawyer*, 1 Pick. 351; *Washburn v. Goodwin*, 17 Pick. 137.)

In the cases cited by the respondent, to show that in the State of New York a judgment creditor is not entitled to sell mortgaged premises under a judgment thus obtained, it was held that the sale, although erroneous and voidable was not void, and the title thus obtained was held valid.

The confirmation, in this case, was made in November, 1862, and the regularity of the proceedings is now questioned for the first time, being attacked collaterally in an action at law. If the Circuit Court has power in this action to determine the questions of fact, as to the existence and character of the mortgage, and the question of law as to its being a ground for exempting the mortgaged premises from sale, the same questions must have been within the jurisdiction of that Court when they became pertinent on the motion to confirm the sale. On the hearing of that motion the Court was proceeding within its jurisdiction, and if there had been such departure by the Sheriff from ordinary modes of proceeding that it was error to confirm the sale, and if the sale would have been enjoined in equity, or set aside, on motion by the Court out of which the execution issued,

it does not follow that the proceeding was void. In the case under consideration there was an execution directing the Sheriff to sell the debtor's property, and it does not appear that it was shown to the Court, or to the officer, that the land had been mortgaged to secure the debt, nor that any objection was made to the confirmation. If a reason existed why this particular parcel of land should not be sold, the debtor should have brought the matter to the attention of the Court.

Upon this point and upon some other alleged irregularities in the mode of conducting the sale, the respondent's argument proceeds on the assumption that the power to sell on execution is to be classed with those powers in which the jurisdiction and authority is created by and derived, solely from the statute, that any departure from the mode prescribed renders the whole proceeding void. In this argument little weight is given to that feature of our practice which subjects these proceedings to judicial examination.

The practice at the time of the sale in question, as well as the present practice, contemplated a judicial determination of all questions of regularity in the execution of the process, and the decision of a Court having jurisdiction is conclusive of the point decided, unless reversed. (*Nagle v. Macy*, 9 Cal. 426; *Tustin v. Gaunt*, present term, *post.*)

The same may be said in regard to objections made to the form of the Sheriff's deed, which fails to recite in direct terms the rendition of the judgment, but in place of doing so recites the substance of the execution and the proceedings upon the levy and sale. There is also an omission of the word "no" in the Sheriff's return of the sale. The statute then in force required lands that were occupied to be sold on the premises, and unoccupied lands to be sold at the court-house door. By what seems beyond a doubt a clerical error, the return, which shows a sale at the court-house door, contains this clause: "There being occupant of the premises."

Another point is made that the recitals in the Sheriff's return and in the deed, in regard to posting notices "in

three public places in this county," do not show a compliance with the statute which requires (Stats. 1855, p. 123, § 18) notice to be posted "in three public places of the county where the property was situated, and also where the property is to be sold." The respondent construes this as requiring the posting of notices in four places.

Conceding that the language imports that one of the notices should be at the place of sale, rather than that the three notices should be in the county where the land is situated and where it is to be sold, the letter of the law may be complied with by posting at three public places, one of them being the place of sale.

But aside from any such question, on the principle above suggested, the construction of the statute was a question for the Court on the motion for confirmation; and the decision of the Court confirming the sale, even if it was erroneous, ought not to be treated as a nullity. (*Griffith et al. v. Bogert et al.*, 18 How. 158.)

The effect of an order or decree of confirmation having been involved in some other cases heard at this term, as well as in this case, the subject has been very fully discussed by counsel, and after a very full and careful examination of all the authorities presented on this point, this Court entertains the opinion that without doing violence to any principle of law, an order of confirmation may be regarded as a final adjudication, touching the regularity of all proceedings taken in the execution of final process.

If confirmations are not to be thus respected, an approval under the Act of January 7, 1854, or an order of confirmation under the present Code, is an idle ceremony, and the statute which requires such approval is enacted to no purpose. By giving that respect to these decisions which should attach to the final orders, judgments and decrees of judicial tribunals, titles to real estate are fortified and holders of real property are relieved from the danger of vexatious litigation, which would become formidable if every judicial sale should be treated as the exercise of a naked statutory power in which the title must rest on a literal

compliance with the statutory directions that may from time to time be enacted, regulating the mode of conducting sales.

A new trial should be granted.

DAVID TAGGART, Respondent, v. ORVILLE RISLEY et al., Appellants.

GRANTOR WHEN ESTOPPED.—If the seizin or possession of a particular estate is affirmed in a deed, either in express terms or by necessary implication, the grantor and all persons in privity with him will be estopped from ever afterwards denying such seizin or possession.

DEED CONVEYS AFTER-ACQUIRED TITLE—WHEN.—If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty.

IDEM.—Where a grantor covenants to warrant the premises against all persons claiming by, through or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee.

Per Thayer, J., dissenting:

CONVEYANCE.—The office of our modern conveyances is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenant.

IDEM—EFFECT OF THE WORDS "GRANT, BARGAIN AND SELL."—The words "grant, bargain and sell" in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed.

IDEM—COVENANTS IN.—A covenant to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property conveyed, against the claims of the covenantor or persons claiming under him, necessarily refers to existing claims, not to those which the covenantor may thereafter acquire. The object of such a covenant is to defend the grantee against acts done or suffered to be done by the covenantor, whereby the title conveyed may be jeopardized; nor does such a covenant operate as a personal obligation of the covenantor not to buy an outstanding claim against the property, and he is not estopped by such covenant to buy and assert such an outstanding claim. Matter in a deed to operate as an estoppel must be of such a character that, if untrue, the party alleging it would be liable in some form of action, either in law or in equity, to respond in damages to the party injured for a covenant broken or for a deceit and fraud.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Hill, Thayer and Williams, for Appellants.

A special covenant for quiet enjoyment, limited to the claims of the covenantor and those claiming under him, does not estop such covenantor to afterwards acquire and assert against his covenantee an adverse title which was in a third person at the time the covenant was made, unless such third person derived his title from the covenantor. (Rawle on Covenants, 413; 3 Washb. on Real Prop. 665; *Lownsdale v. Portland,* 1 Ogn. 395; *Farnum v. Loomis,* 2 Ogn. 29; *Jackson v. Bradford,* 4 Wend. 622; *Comstock v. Smith,* 13 Pick. 116; *Miller v. Ewing,* 6 Cush. 34; *Lamb et al v. Burbank,* 1 Sawyer, 227; *Clark v. Baker,* 14 Cal. 612.)

If a deed contains false representations, even in the form of recitals, that the grantor was seized of the premises in fee, the grantor will be estopped to take advantage of the falseness of his representations and claim the land against his grantee who relied upon their truth in making his purchase. The estoppel in such case is based upon the false representations, and not upon the covenant. (3 Washb. on Real Prop. 468; *Douglass v. Scott,* 5 Ohio, 198; *Clark v. Baker, supra.*) If in such case the grantor was permitted to assert the after-acquired title against his grantee, the grantee would immediately have his action against the grantor for the fraud. (*Culver v. Avery,* 7 Wend. 380; *Haight v. Hagh,* 19 N. Y. 464.) But the Courts settle the matter at once by applying the doctrine of estoppel, thus avoiding circuity of action, and it is upon this principle of avoiding circuity of action that the doctrine of passing title by estoppel is based. (*Jackson v. Bradford, supra; Jackson v. Waldron,* 13 Wend. 178; *Bush v. Cooper,* 26 Miss. 599.) The words in the granting clause—"grant, bargain, sell, alien, remise, release and convey"—imply nothing except an intention to pass whatever title the grantor had (Rawle, 434); while the covenant which follows, and which is to be considered in construing the deed (*Cole v. Hawes,* 2 Johns. Cas. 203), plainly indicates that the grantor did not intend to become a guarantor of the goodness of the title.

Mitchell & Dolph, for Respondent.

Where a deed bears upon its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a particular description, the grantor will be estopped from ever afterwards denying that he was the owner of the particular estate at the time of the conveyance, whether there are any recitals or covenants in the deed or not. (*Lamb v. Davenport*, 1 Sawyer, 609; 2 Washb. on Real Prop. 477; Rawle on Cov. 455; *Doe v. Oliver*, 2 Smith L. Cas. 738; *Van Rensselaer v. Kearney*, 11 How. 325; *Clark v. Baker*, 14 Cal. 629; *Jackson v. Waldron*, 13 Wend. 178; *Dennison v. Ely*, 1 Barb. 610; *Fitzhugh's Heirs v. Tyler*, 9 B. Monroe, 561; *Fairbanks v. Williamson*, 7 Greenleaf, 96; *White v. Erskine*, 1 Fairfield, 306; *Kimball v. Blaisdell*, 5 N. H. 533; *Trull v. Eastman*, 3 Met. 121; *Bean v. Welch*, 17 Ala. 722; *Wright v. Reynolds*, 24 Miss. 689.)

It is apparent from the face of the deed that the parties were dealing with the fee. The covenant for quiet enjoyment is conclusive upon the question as to what estate was intended to be conveyed, and indicates that the intention was to convey the land absolutely. (*Doe v. Oliver*, Smith's L. Cas. 740; *Smith v. Baker*, 1 Young and Collier Ch. 223; *Robertson v. Nelson*, 38 N. H. 48; *Chauvin v. Wagner*, 18 Mo. 531.)

The covenant to warrant and defend the grantee, his heirs and assigns in the peaceable and quiet possession of the lot, extends to all acts of the covenantor, whether tortious or under claim of title. (Rawle on Cov. 167, 170; *Sedgwick v. Hollenback*, 7 John. 376; *Mayor of New York v. Mabie*, 3 Kern. N. Y. 156; *Crosse v. Young*, 2 Shower, 425.)

The covenant in this deed is not simply a covenant of *non claim;* but even as a covenant of *non claim* it would estop Risley from asserting an after-acquired title. (*Gee v. Moore*, 14 Cal. 472; *Kimball v. Blaisdell*, 5 *N. H.* 533; *Trull v. Eastman*, 3 Met. 121; *Gibbs v. Thayer*, 6 Cush. 33; *Newcomb v. Presbry*, 8 Met. 406.) A covenant of warranty against the grantor and his heirs will estop them from setting up an after-acquired title. (*Sweet v. Green*, 1 Paige, 473.)

By the Court, MCARTHUR, J.:

This suit was instituted by Taggart against Risley and others, to quiet the title to lot 7, in block 212, in the city of Portland, and to compel the execution of conveyances thereof by the appellants. It appears from the pleadings that, on June 25, 1850, D. H. Lownsdale, being then in possession of the lot aforesaid, executed a deed conveying all his interest in said lot to W. W. Chapman, wherein he covenanted to warrant and defend the same to said Chapman, his heirs and assigns, against all persons except the United States; and also, that should he afterwards obtain title to said lot *from the United States,* he would convey the same to said Chapman, his heirs and assigns, by deed of general warranty. On November 8, 1852, Chapman executed a conveyance of said lot to Risley, and he (R.), on December 18, 1860, for a valuable consideration, sold the said lot to Charles Goodnough, and executed to him a deed therefor. Risley's wife joined in this conveyance, which reads as follows:

"This indenture, made the 18th day of December, 1860, between Orville Risley and Amelia, his wife of the county of Multnomah and State of Oregon, of the first part and Charles Goodnough, of the county of Multnomah and State aforesaid, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight hundred dollars, lawful money of the United States to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released and conveyed and by these presents do grant, bargain, sell, alien, remise, release, and convey, unto the said party of the second part, and to his heirs and assigns forever, the following described property, to wit: Lots No. 7 and 8, in block No. two hundred and twelve (212), in the city of Portland, in the county of Multnomah and State of Oregon, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and also

all the estate, right, title, interest, property, possession, claim and demand as well in law as in equity, of the said parties of the first part of, in and to the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the above-described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part, for themselves and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns against the said parties of the first part and their heirs, lawfully claiming, or to claim, the same, shall and will warrant and by these presents, forever defend.

(Signed) "ORVILLE RISLEY. [SEAL.]
"AMELIA RISLEY. [SEAL.]"

This deed was duly witnessed and acknowledged. The interest thus acquired by Goodnough in and to said lots passed by a chain of regularly executed mesne conveyances down to Taggart who purchased on November 8, 1870. On May 30, 1861, Lownsdale, having obtained title to the undivided one-fifth of said lot No. 7, from the United States, and of another undivided one-fifth from Isabella Gillihan, executed to Risley a deed of quit-claim to said lot. Under this deed Risley claims to be the owner of one undivided one-fifth of said lot — that of said Isabella Gillihan.

Risley, in his separate answer, denies the deed from himself to Goodnough, as alleged, and pleads Lownsdale's deed of June 25, 1850, and his own deed to Goodnough of December 18, 1860, attaching them as exhibits. He also avers that Lownsdale had no interest in, or right to, the lot in controversy when he executed the deed of June 25, 1850, except the mere naked possession, and did not pretend to have any greater interest. That he (L.) did not afterwards obtain title from the United States, except for the undivided one-fifth of said lot, and was not bound by his covenant, in the deed of 1850, to convey to Chapman,

or his assigns, any more than said one-fifth, and that he (Risley) had no interest beyond the said undivided one-fifth when he and his wife executed the deed to Goodnough. That afterwards, in 1861, by deed from Lownsdale, he (Risley) became the owner of the undivided one-fifth which Lownsdale had acquired from Isabella Gillihan and that his right thereto was unaffected by his deed to Goodnough.

A demurrer was interposed to this answer, which, after argument, was sustained, and from the order sustaining the demurrer, and the decree thereon rendered, the said Risley appeals.

The deed of June 25, 1850, is simply a deed of release and quit-claim with the addition of the covenants mentioned above.

The main question in this case is briefly this: Does the deed from Risley to Goodnough estop Risley to claim the after-acquired *one-fifth,* which Lownsdale acquired from Gillihan and conveyed to Risley after the execution of the deed to Goodnough by Risley and wife? After much reflection a majority of the Court has reached the conclusion that, from the language employed in the deed of December 18, 1860, the parties were evidently dealing with the fee, and that Risley did not intend merely to convey lots 7 and 8, in block 212, by way of release or quit-claim, but that he intended to convey, and the grantee expected to become invested with, the very land itself, as an entirety, with the absolute ownership thereof with the fullest possible estate, the fee simple. It is important at this point to note again that there is in this deed the following covenant: "And the said parties of the first part, for themselves and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

It cannot but be considered that the claim which Risley now seeks to set up under the confirmatory deed from Lownsdale, of May 30, 1861, is entirely inconsistent with his own deed of December 18, 1860; and although there are

no recitals or covenants of title in the deed of December 18, 1860, yet, under the authorities, Risley is estopped to assert that any outstanding title existed inconsistent with what he undertook to sell and convey to Taggart, more especially in view of the personal covenant not to disturb the grantee in his possession.

In *Van Rensselaer v. Kearney* (11 How. 325), the Court after reviewing a number of English and American cases, says: "The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance, must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood,

and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

Thus it will be seen that the ancient doctrine that estoppel grows out of warranty has been departed from by the Supreme Court of the United States, and it is now held that a deed without warranty may operate as an estoppel, in order to prevent a failure of the purpose with which it was executed. (*Van Rensselaer v. Kearney, supra; Fitzhugh's Heirs v. Tyler,* 9 B. Mon. 559.)

The question is one of intention (3 Met. 121; 6 Cush. 33), and the whole instrument must be taken together, and effect must be given to its meaning as derived from each and every part of it. If the terms of a deed plainly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantee had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, though it contain no warranty. (*Fairbanks v. Williamson,* 7 Greenleaf, 96; *White v. Erskine,* 1 Fairfield, 306; *Kimball v. Blaisdell,* 5 N. H. 533; *Trull v. Eastman,* 3 Met. (Man.) 121; *Bean v. Welch,* 17 Ala. 772.)

In *Doe v. Oliver* (2 Smith's Ldg. Cases, 637), it is said that these decisions abandon the technical ground, taken in some of the earlier cases, that estoppel grows out of warranty, and rest it upon the broader basis of giving effect to the intention of the parties as expressed in the deed. No reason exists, under this view of the law, for attributing a more conclusive effect to the covenants in a deed than to any other portion of its contents.

Nor can Risley avoid the consequences of his covenant for quiet enjoyment. He and his heirs are certainly bound by that covenant; and as limited covenants of this character are good as against the persons named therein, he is estopped to set up the after-acquired title, for by being permitted to do so he would disturb the possession and enjoyment of his own grantee. Even in the case of a quit-claim deed the law is that where the grantor covenants to warrant the premises against all persons claiming by or under himself, and he subsequently acquires the legal title to the

premises, that legal title will inure to the benefit of the grantee. (*Sweet v. Green*, 1 Paige, 47.)

Decree affirmed.

THAYER, J., dissenting:

It appears from the pleadings in this case that on the 25th day of June, 1850, one D. H. Lownsdale, being then in the possession of a certain tract of land embracing the lot in question, to wit, lot No. 7, in block No. 212, in the city of Portland, conveyed by deed in writing, under seal, to one W. W. Chapman, all his right, title and interest in said lot, and covenanted in and by said deed to warrant and defend the same to said Chapman, his heirs and assigns, against all persons, except the United States, and that should he afterwards obtain a title thereto from the United States he would convey the same to said Chapman, his heirs and assigns, by deed of general warranty; that on the 8th day of November, 1852, said Chapman conveyed to Risley, the appellant herein, said lot; that on the 18th day of December, 1860, said Risley and his wife conveyed said lot to one Goodnough by deed of that date, the granting clause of which contains in substance the following language: "That the said parties of the first part, for and in consideration of the sum of eight hundred dollars, etc., grant, bargain, sell, alien, remise, release and convey unto the said party of the second part, and his heirs and assigns forever, lots 7 and 8, block 212 etc., together with all and singular the hereditaments and appurtenances thereunto belonging or in any way appertaining, and all the estate, right, title and interest, property, possession, claim and demand, as well in law as in equity, of the parties of the first part, of, in and to the above-described premises, and every part and parcel thereof, with appurtenances;" and which said deed also contains the following covenant: "And the said parties of the first part (Risley and wife), for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to

claim the same, shall and will warrant, and, by these presents, forever defend."

That the interest which Goodnough acquired in said lot, passed by a chain of mesne conveyances, duly executed, to Taggart, the respondent herein, who purchased in November, 1870; that said Daniel H. Lownsdale had no interest in, or right to, said lot, when he made the deed of June, 1850, and only acquired from the United States one-fifth interest therein; that in May, 1861, said Lownsdale having acquired from one Isabella Gillihan another one-fifth interest in said lot, executed to appellant a quit-claim deed of the same.

It is admitted that the deed from Risley and wife to Goodnough, executed December, 1860, operated to pass the fifth interest in said lot which Lownsdale acquired from the United States, and the respondent claims that appellant is estopped by said deed from claiming title to the fifth interest acquired from Lownsdale in May, 1861. This presents the only question in the case, and it resolves itself into this proposition: Does the deed from Risley and wife to Goodnough, of December, 1860, operate to estop Risley from asserting the title which he acquired from Lownsdale in May, 1861?

It is conceded that when a deed of real property contains an averment or recital, that the grantor is the owner of a particular estate therein, or of any other fact that becomes material, said grantors will ever after be estopped from disputing said averment; and it is also conceded that when a deed to real property contains a general covenant of title, it will operate as an estoppel against an after-acquired title included in the terms of the covenant. But it is denied that the appellant is estopped from claiming the after-acquired fifth interest in said lot, obtained from Lownsdale under the deed of May, 1861, in consequence of any terms, recital, averment, or covenant, contained in the deed of December, 1860. The language of the granting clause, in said last-mentioned deed, is very strong. It contains more words than necessary to pass the actual interest Risley had; but does it, in legal effect, purport to convey anything more

than the interest Risley then had? The authorities seem to be somewhat conflicting upon the question, as to whether there is a difference between a deed granting the right, title and interest of the grantor, and one which grants the premises. The office of our modern conveyances is simply to convey the estate which the grantor has. At common law, such conveyance would only operate to raise a use; but, by form of the statute of uses, the use was transferred into possession, and the interest of the *cestui que use* into a legal estate.

There was also at common law, in certain deeds, an implied covenant of title. This, however, depended upon the phraseology of the granting clause. When the words "I have given" (*dedi*) were used certain covenants were implied, but not so when the word grant (*concessio*) was employed (2 Caine's R. 188); but our statutes have abolished implied covenants in all cases (Mis. Laws, ch. 6, § 6), and have provided that a deed of quit-claim and release, of the form in common use, shall be sufficient to pass all the interest which the grantor could lawfully convey by a deed of bargain and sale.

It seems to me from principle, as well as from express enactment of statute, that it is the policy of the law to bind a party to a deed only by express stipulation covenant. The office of a deed is ordinarily performed when it operates to transfer to the grantee the existing title of the grantor to the thing granted.

Under this view of the case, I cannot believe that the words in the granting clause of the deed of December, 1860, show any intent to convey from Risley and wife to Goodnough any better or further title than the grantor then had.

I cannot imagine how there could have been any other interest, unless it be claimed that the terms "grant, bargain and sell," etc., used in said deed in reference to the property in question, imply that the grantors were the absolute owners of said property, and this I would regard as contrary, at least, to the spirit of the provisions of our statute, and to the principles of law on that subject.

The next question I propose to consider is as to the effect of the covenant contained in the deed of December, 1860.

This is a special covenant of quiet enjoyment, not as against all the world, but against the grantors and their heirs lawfully claiming or to claim the same. It was contended by the counsel for the respondent, and with much reason, that the appellant undertook, by the terms of the covenant, to warrant and defend Goodnough, his heirs and assigns, against any claim the appellant, or his heirs, might attempt to assert; that it would be a violation of the undertaking in that behalf to buy an outstanding title and attempt to claim under it.

If it could be reasonably supposed that the covenant referred to was intended as an indemnity against personal acts of the covenantor there would be more force in the position. But a covenant in a deed to real property must, it seems to me, be presumed to relate either to the condition of the title or to a further assurance regarding it; at least I am of the opinion that the covenant in question relates in some form to title, and was not intended as a personal engagement. The question then is, what is its legal effect? If it had been a general covenant to warrant and defend the grantee in the quiet and peaceable possession of the lot in question it would undoubtedly operate as an estoppel against the appellant and all persons claiming under him. But have we the right to give a covenant of the description of the one under consideration the same legal effect? I cannot so conclude. The covenant in question only is to defend the grantee, his heirs and assigns, in the quiet and peaceable possession of the property against the claims of the covenantor, or persons claiming from him, and must necessarily mean existing claims, not claims which the covenantor might thereafter acquire. That could not have been the intention, for it would certainly be no more damaging for the covenantor to acquire an outstanding claim and assert it, than for the holder of such claim to assert it; and I think it not only a reasonable construction, but the obvious intention of the parties, that appellant

should only warrant and defend against claims he had created—in other words, against his own act done or suffered, whereby the title conveyed might be jeopardized. He had purchased from Chapman the lot in question, but acquired no title except actual possession and the conditional covenant of Lowndsdale before mentioned, and Lownsdale never acquired any title to said lot from the United States except one-fifth interest.

In this condition of affairs, the appellants made the deed of December, 1860, to Goodnough, in which they bound themselves concerning the title by the covenant contained therein. If it had been intended by the parties that appellants should be bound to defend Goodnough, his heirs and assigns generally, and against every one, why did they not have a general covenant to that effect inserted in said deed? It appears very plain to me that the parties to that deed only intended to pass to Goodnough, his heirs and assigns, the unincumbered title, interest or right which Risley had acquired from Chapman, and undoubtedly a party might be bound by personal obligation not to buy any outstanding claim against property. But I do not believe that is the effect of this covenant, or was so intended by the parties. If I am correct in this, then the appellant can assert the claim to the fifth interest in said lot which he purchased from Lownsdale without violating the terms of the covenant in question, and the deed to Goodnough cannot in any event operate as an estoppel. The general theory upon which the law of estoppel by deed is applied, is to prevent circuity of action, and I believe this to be the true doctrine.

Senator Tracy, in the case of *Jackson v. Waldron* (13 Wend. 208), says: "That the best, most rational, and only general principle which can be extracted from the numerous and contradictory decisions upon the subject is, that in order for a matter to operate as an estoppel in a deed, it should be such matter, and so alleged, that if untrue, the party alleging it would be liable in some form of action, either in law or equity, to respond in damages to the party injured for a covenant broken, or for a deceit and fraud."

This view, to my mind, is a very satisfactory test. I am

aware, however, that it has been attempted recently to place the rule on different grounds—to place it upon the basis of giving effect to the intentions of the parties as expressed in the deed, and I would have no objection to its application in such cases, provided such intentions were clearly expressed; but to speculate as to what the parties to a deed intended to convey in the absence of averment, recital or covenant, would be uncertain indeed. In the case under consideration, there would be a breach of the covenant in question, had Lownsdale made the claim to the fifth interest, instead of transferring it to the appellant, and I cannot think it is any such breach for the appellant to acquire it and assert a claim thereto. This is so, at all events, if the construction I place upon the covenant is correct. The deed could not, therefore, operate as an estoppel upon the principle of avoiding circuity of action, and if claimed upon the other ground, it is necessary to establish that the parties to the deed intended to convey this after-acquired interest, and that such intention is expressed in the deed. Viewing the transaction by the light of surrounding circumstances, as shown by the pleadings in the case, and considering the various parts of the deed when taken together, I do not think such intention is shown. The question is by no means free from doubt, but I think the doubt arises more from the peculiar, and I might say awkward, language employed in the deed, than from any embarrassment in construing covenants of this character. A covenant against a grantor has had a long and well-established signification, and I am not aware that the Courts have attempted to construe said covenant as meaning anything more than I have indicated; that is, that the grantor and his heirs will defend against his past acts. The parties to this deed have chosen that kind of covenant, and I do not think its effect should be extended unless the language is unmistakable, and, as I have before remarked, it could not have been the intention of the parties that the grantor undertook merely to disqualify himself and his heirs from asserting an outstanding title, leaving all other persons free to do so. When the appellant procured title from Lowns-

dale of the fifth part of the lot in question, he succeeded to all the rights of Lownsdale respecting it, and if Lownsdale or his grantor had the legal right to demand this interest, why should not the appellant be permitted to do so?

For the foregoing reasons the decree of the Court below should be reversed.

H. K. HANNAH, District Attorney of the First Judicial District, Respondent, v. GILES WELLS, Jr., JOHN W. WELLS, WM. SONGER and GILES WELLS, Sr., Appellants.

AUTHORITY OF THE DISTRICT ATTORNEY TO SUE IN HIS OWN NAME.—The District Attorney is authorized by statute to sue as plaintiff in a civil action brought on an undertaking given as bail in a criminal case.

COMPLAINT IN AN UNDERTAKING.— In a civil action on an undertaking in the nature of bail for defendant's appearance in a criminal case, the complaint should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another.

CHARGE NEED NOT BE IN WRITING.— Where a defendant is brought before a committing magistrate on a charge of felony, it is not essential to the jurisdiction that the charge should be in writing.

Per McArthur, J., dissenting:

STATEMENT OF CRIME CHARGED IN AN UNDERTAKING ON ARREST.—It is not necessary, in order to create a liability against the sureties on an undertaking on arrest for crime, that the crime for which the person is admitted to bail should be set forth or described in the undertaking of bail with the same exactness that is required in an indictment or commitment. It is sufficient if the crime is referred to in general terms.

IDEM.—Every killing of a human being is presumed to be unlawful. The words "shooting and killing" describe a crime generally, and, in an undertaking, in a criminal proceeding, are a sufficient description of the crime charged to create a liability against the sureties thereon.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

E. Steel, for Appellants.

J. H. Stinson and J. R. Neal, for Respondent.

By the Court, UPTON, C. J.:

This appeal is from a judgment of the Circuit Court overruling a demurrer to the complaint in an action on an undertaking as bail in a criminal case.

The demurrer specifies two points of objection, the first being that the State and not the District Attorney should have been plaintiff in the cause, and the other that it does not appear on the face of the complaint that the Court in which the undertaking was required had jurisdiction of the subject.

The action is brought in the name of H. K. Hannah, District Attorney of the First Judicial District, as plaintiff, and the appellants claim, in support of the first point, that the case is within the provision of § 27 of the Civil Code, that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in § 29." The appellants rely on the circumstance that § 27 and the following sections specify certain exceptions, and they claim that the express mention of these exceptions excludes all others, and shows that the Legislature intended there should be no other exceptions than those there mentioned.

The respondent relies on § 342 of the same Act, which provides that "fines and forfeitures may be recovered by an action at law in the name of the officer or person who by law is authorized to prosecute for them." The rule invoked by the appellant that express mention of specific exceptions raises an inference against all other similar exceptions, is an acknowledged rule of construction in all cases where it is applicable; but the present case is not within the rule. The respondent's right to appear as plaintiff is not based upon an inference, but upon a direct affirmative enactment, and the exceptions above referred to include "persons specially authorized by statute" among those who may sue, although not the real parties in interest.

Penal statutes frequently direct what disposition shall be made of fines recovered, and various statutes provide different modes of disposing of the money thus obtained. In some cases fines or forfeitures go to a particular municipal

corporation; in other cases, to a particular fund or object; and, in still other cases, the money recovered on a fine or forfeiture may be devoted to several different purposes; and it may be in some cases a matter requiring much consideration to determine who may be the real party in interest. Section 342 (Civil Code) simplifies the proceeding by permitting the action, in all these cases, to be brought in the name of the officer who is authorized to sue. It being expressly provided that actions of this class may be brought in the name of the officer, and the provision not being repugnant to the more general provision above referred to, the Court is of the opinion that the action is properly brought in the name of the officer.

On the second point, that, by the complaint, it does not appear that the Court, in which the undertaking was required, had jurisdiction, it is necessary to observe a distinction between a statement of the essential facts, and a statement of the evidence that will sustain or establish a cause of action. As the case is now presented, the Court is not called upon to determine whether the evidence mentioned in the complaint, and which the plaintiff claims the right to introduce, is sufficient to establish a cause of action.

The complaint alleges that on an examination had before a Justice of the Peace, Joseph Wells was held to answer the charge of "shooting and killing one James Dennis;" that these defendants entered into an undertaking for the appearance of the said Joseph Wells in the Circuit Court, etc., to answer the charge of shooting and killing one James Dennis, and that the said Joseph Wells afterwards made default.

The principal point made in this connection by the appellants is, that it is not shown by the complaint that Joseph Wells was charged with a crime; that it should be alleged that the examination was upon a charge of murder or manslaughter, or at least that the prisoner was charged with some crime known to the law, otherwise the Justice would have no jurisdiction, and the undertaking would be void.

The complaint also avers that the Grand Jury found an in-

dictment charging said Wells with the crime of murder in shooting and killing James Dennis, and sets out copies of the undertaking and of the entry of default, but it is not directly alleged that Wells had been charged with murder at the time he was admitted to bail on the undertaking in question.

It was admitted on the argument that the undertaking recites that Wells was held to answer on a charge of "shooting and killing James Dennis," and that there was no written complaint on file charging a crime in other language than that used in the recital, and the case has been argued on the theory that unless the allegations of the complaint in this cause can be sustained as setting forth a cause of action, no action can be maintained upon the undertaking.

It is assumed that if there was not a written complaint laid before the magistrate, sufficient of itself to be sustained as charging a crime, there can be no proof that the magistrate had jurisdiction.

The respondent claims, substantially, that the defects in the complaint and in the recitals, set out in the undertaking, are defects in form only, which should be disregarded, and that inasmuch as the complaint sets out correctly the circumstances that transpired in the Magistrate's Court, it is in proper form and presents the merits of the case. Assuming that all the material facts that can be proved are now before the Court, he urges that parties who have entered into an undertaking of this kind should not be permitted to defeat their contract because of a mere matter of form; that the objections to the form of charging the crime should have been made before the committing magistrate, and that the informality of the charge should be deemed waived. He cites authorities to the effect that an admission in the recitals of an undertaking that the defendant was duly held to bail will estop the sureties. If it is true, as this argument assumes, that the defendant Wells was legally in custody, charged with felony, and was released at the request and on the undertaking of the defendants, not only public policy but correct practice requires the Court to sustain a complaint setting out those facts; and if

it were clear that this complaint states all the essential facts that can be proven, in regard to the nature of the charge and the magistrate's jurisdiction, this Court would be disposed to go to the limit of its discretion in sustaining its allegations; but the complaint states circumstances and leaves the important fact, in regard to the arrest and custody being on a charge of felony, to be inferred. The respondent asks the Court to infer, from the circumstances set out, a fact which is not alleged; namely, that the defendant was charged with a felony. The pleader should state the essential facts which he thinks will be inferred from the proof, and leave the circumstances to be adduced on the trial in support of the truth of what is alleged.

One branch of the fact necessary to constitute the cause of action is, that the defendant Wells was charged with a crime — that an examination was had, and he was held to answer, or at least that he was in custody on the charge. The pleader should have charged these facts, if he believed them to be true, and he should not insert in the complaint what he believes to be the proofs, and omit the material fact which he thinks those proofs will establish.

If an averment that Wells was charged with a crime shall be put in issue, and a question arises on the trial as to the sufficiency of the evidence to prove that he was charged with murder, the question whether the complaint against the prisoner was sufficient can be finally determined on the trial. I am of opinion that the complaint in this cause cannot be sustained, but that final judgment on the merits of the cause should not be rendered in favor of the defendants at the present time, because it is evident from the arguments of counsel that the subject-matter that was intended to be litigated is not before the Court. I cannot assent to the position assumed by the counsel of the appellant, that the defect in the form of the complaint filed in the Justice's Court is fatal to the jurisdiction of the committing magistrate. In cases where a felony is charged, the law does not require that the complaint shall be in writing before the magistrate can have jurisdiction to proceed in the discharge of his duties. It is of constant occurrence that persons are

brought before magistrates without warrant, and charged with crime by persons who perhaps are unable to write, and much less able to draw up a criminal charge in apt words. Any person who sees a felony committed is authorized to arrest a felon without a warrant and take him before a magistrate; and there is nothing in the statute, or the nature of the proceeding, to render it necessary, or reasonable, that the magistrate should set about drawing up a formal written charge before he commences the examination of witnesses.

Under § 383 he has power, if a continuance becomes necessary, to commit the defendant or to discharge him upon his giving bail, before the examination is commenced, and if no continuance is required he proceeds immediately with the examination. Bail may be taken before a formal written charge is filed. Before a defendant can be put upon his trial in a criminal case there must be a written complaint (Crim. Code, §§ 82 and 83); but when application is made for a warrant of arrest under § 343 of the Criminal Code, or when a defendant charged with felony is brought before a magistrate for examination upon an arrest without a warrant, under § 379, the law does not require that the complaint shall be in writing before the magistrate has jurisdiction to take evidence in the former case, or to proceed with the examination in the latter. The complaint may be oral —the magistrate must inform the accused of the charge; but it is not made essential to the jurisdiction that the charge shall be previously reduced to writing. Section 401 of the Act provides that "if it appear from the examination that a crime has been committed, and that there is sufficient cause to believe the defendant guilty thereof," the defendant must be held to answer; and it has been held under similar statutes that when the evidence fails to show that the crime specially charged or designated in the warrant has been committed, but the acts proven against the defendant constituted a different crime from the one designated, the magistrate should hold the defendant to answer for the crime disclosed on the examination. There is not the same reason for requiring the charge to be reduced to

writing previous to such preliminary examination, as for requiring it in cases where the hearing is to be followed by final judgment, and I think our statute is in conformity with the general course of practice in the United States in failing to require a written complaint before the nature of the transaction is ascertained from the examination.

This being the rule prescribed by statute, it is not necessary to the jurisdiction of the committing magistrate that there should be a written complaint charging the crime with that certainty that is required in an indictment, and this Court would not be justified in assuming that under proper allegations the plaintiff must fail for want of proof. The question is not before us, and this Court does not, at the present time, undertake to determine in what manner the jurisdiction of the committing magistrate may be proved on the trial, nor do I wish to be understood as expressing an opinion on the questions whether a written complaint or an order holding a defendant to answer, couched in the terms set forth in the complaint, ought to be received as proof on the trial. The demurrer must be sustained on the ground that the complaint fails to show that the prisoner, for whose release the undertaking was given, was charged with crime.

For reasons above stated, the cause will be remanded, that the respondent may have an opportunity to make such application to the Circuit Court as he may deem proper.

MCARTHUR, J., dissenting:

I am unable to concur with the views expressed and the conclusion reached by my brethren upon the second point discussed in the opinion just read by the Chief Justice. Assuredly the undertaking of bail was a contract, and one, too, which must be construed most strongly in favor of the State, and the parties signing the same must strictly comply with its terms. (*Barney v. Newcolm,* 9 Cush. 56; *Champlain v. The People,* 2 N. Y. 82.)

I am of opinion that it is not necessary, in order to create a liability, that the crime for which a person is admitted to bail be set forth or described in the undertaking of bail

with the same exactness as is required in an indictment or a commitment, and that it is sufficient if the same is referred to in general terms. (*State v. Marshall,* 21 Iowa, 143.)

What is the object of an undertaking of bail? Certainly not to charge a person with a crime for the purpose of entering upon an examination therefor, but simply that the sureties will secure the attendance of the party in conformity with the terms of their contract.

It is said that "one branch of the facts necessary to constitute the cause of action is that the defendant Wells was before a magistrate charged with a crime, that an examination was had, and that he was held to answer;" and it is obvious that the complaint is held insufficient upon the assumption that it does not show that Wells was charged with the commission of a crime. The undertaking recites, and the complaint, following the written instrument, alleges, that Wells was held to answer "on a charge of shooting and killing James Dennis." I am wholly satisfied that "shooting and killing" and "homicide" are convertible terms. Of course I concede that an indictment charging Wells with simply "shooting and killing James Dennis," without other allegations of intent, malice, etc., would be insufficient. But the case in hand is not that of an indictment. Wells was before the magistrate for examination, and that officer, having sufficient cause to believe that he had shot and killed James Dennis, held him to answer and admitted him to bail.

The rules governing common law recognizances are from analogy applicable to these statutory undertakings, and at common law it was only necessary to set out in the recognizance the kind or class, and not the particular degree of the crime for which the party was to answer. (1 Stew. and Port. 465; *Simpson v. Commonwealth,* 1 Dana, 523; *Commonwealth v. West,* Id. 165.)

I cannot appreciate the force of that reasoning which enables a surety to avoid his liability upon an undertaking, after default of the principal, upon the ground that the crime is not set out technically, when our statute itself only

requires a brief statement of the nature of the crime to be inserted in the undertaking. (Crim. Code, § 267.)

The contract was a voluntary contract. By it the sureties became the friendly jailers of the principal. It stands on its own terms, and is independent of any previous proceedings. (*McCarty v. The State,* 1 Blackford, 339.) I have already stated its object, and, in construing it, that object should certainly not be lost sight of. (*Blossom v. Griffin,* 13 N. Y. 569; *Atwood v. Cobb,* 16 Pick. 229.)

It seems to me that the whole case turns upon the solution of the question whether in using the words "shooting and killing," the draftsman filled the measure of the statute, which provides that in an undertaking of bail the crime may be briefly described or generally designated. If "shooting and killing" is not a crime, if the words do not describe a crime generally, the allegation in the complaint predicated thereon is insufficient and the demurrer is well taken, otherwise not.

I have said that "shooting and killing" and "homicide" are convertible terms. In 1 Hawkins, Pleas of the Crown, ch. 8, § 2, homicide is described to be "the killing of a man by a man." Wells shot and killed Dennis; therefore, Wells committed homicide. Is homicide a crime? From the time of Sir Michael Foster, who first collected and systematized the principles of the modern law of homicide, down to the present day, the law has been, and now is, that every killing of a human being is presumed to be unlawful. (Hawkins, vol. 1, ch. 31, § 32; Gilbert, Ev. 234; Blackstone, 4 Com. 201; Phillips, 1 Ev. ch. 10, § 2, and Greenleaf, 1 Ev. § 34.) Even Bishop (2 Cr. Law, § 616 *et seq.*), admits this to be the undoubted law. Nor are we left to the text writers alone; the reports are full of cases directly and emphatically in point. In *State v. Anderson* (2 Tenn. 6), the broad doctrine is laid down that homicide is presumed to be murder unless extenuating circumstances are shown. In the celebrated Selfridge case Ch. J. Parker told the jury that when a homicide is committed the law implies malice. In *People v. McLeod* (1 Hill, 377-436), it was held that "all homicide is presumed to be malicious, and, therefore, mur-

der, until the contrary appears from evidence." In *Hill v. Commonwealth* (2 Gratt. 594), the law was laid down to be that every homicide was *prima facie* murder; so also in *Choice v. The State* (31 Geo. 424, 464), and *Clarke v. The State* (35 Geo. 75). The same rule was held in a late capital case in England. (*Regina v. Maloney*, 9 Cox, Cr. Ca. 6.) The presumption that all homicide is unlawful prevails in Ohio (*State v. Turner*, 1 Ohio St. 422, and *State v. Town*, Id. 75); in Mississippi (*Hogue v. The State*, 34 Miss. 616); in Illinois (*Murphy v. The People*, 37 Ill. 447); in Minnesota (*The State v. Shippey*, 10 Minn. 223); in Kentucky (*Smith v. Commonwealth*, 1 Duvall, 224); in Pennsylvania (*Cathcart v. Commonwealth*, 37 Penn. 108; *Coin v. Drum*, 58 Penn. 9). It is useless to multiply citations; even a cursory examination will show that the whole current of authorities supports the proposition.

I am aware that the force of some of the authorities cited is broken by the provision of our Criminal Code, § 519, which provides that "there shall be some other evidence of malice than the mere proof of killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony." In this State the mere fact of killing does not raise so strong a presumption of malice as to warrant a conviction of murder in the first degree, but it may warrant a conviction of murder in the second degree, or of manslaughter.

For the foregoing reasons I think the judgment of the Court below should be affirmed.

AUGUST DERKENY, Appellant, v, LOUIS BELFILS, Respondent.

INSTRUCTIONS.—Where issue is joined on the merits in an action for goods sold and delivered, it is error to instruct that if the plaintiff had sold the demand before the commencement of the action he cannot recover.

APPEAL from Benton County.

The facts are stated in the opinion of the Court.

John Kelsay and R. S. Strahan, for Appellant.

John Burnett and W. W. Thayer, for Respondent.

By the Court, UPTON, C. J.:

This appeal is from a judgment of the Circuit Court for Benton County, rendered in favor of the defendant in an action for goods, wares and merchandise sold and delivered.

The answer denies the sale and delivery of the goods, but alleges that the defendant received of the plaintiff certain goods to be sold by the defendant, and to be paid for by him as fast as he should sell them; and alleges that the defendant retained the privilege of returning to the plaintiff any of the goods remaining unsold whenever the defendant should demand a return. The replication denies that the goods mentioned were received by the defendant upon the terms set forth in the answer, and puts in issue all the affirmative allegations of the answer.

The record contains several assignments of error, but the only assignment it is necessary to notice here is the exception taken to an instruction to the jury, to the effect that if the jury found from the evidence "that the plaintiff sold the account sued on before the commencement of this action, and that the same had not been purchased back by him, the verdict must be for the defendant." The Circuit Court, by giving this instruction, authorized the jury to determine the controversy upon a question of fact not put in issue by the pleadings, and this Court cannot assume, if the instruction was improperly given, that the error did not affect a substantial right of the plaintiff.

The distinction between pleas in abatement and defenses in bar of the action has been recognized and sustained in this State constantly since the subject first came before this Court in the case of *Hopwood v. Patterson* (2 Ogn. 49), where it was held that answers in the nature of pleas in abatement should be pleaded separately, and be disposed of before an answer to the merits is considered. We cannot sustain the position taken by the respondent in this case unless we not only disregard the rule laid down in that

case, but go further and hold that one who has pleaded to the merits may have all the advantages of a defense in abatement of the action without having plead in abatement or in any manner apprised the plaintiff of the defendant's intention to contest the plaintiff's right to sue upon the demand.

The respondent urges that objections to the competency of evidence cannot be raised for the first time in the Appellate Court, and that no objection was made to the introduction of evidence tending to show that the plaintiff had sold the *chose in action* upon which he sues. The bill of exceptions is silent as to whether such evidence was introduced, and we cannot assume error, in support of the verdict and judgment, that irrelevant testimony had been received without objection, and that the plaintiff had thus waived his right to except to the instructions. For aught that is disclosed by the record, the error was committed without any fault or negligence of the plaintiff.

The error disclosed was not only calculated to affect a substantial right, by diverting the attention of the jury from the questions they were called to try, but it was calculated to place the plaintiff in the attitude of being bound by a final judgment on the merits, when the fact found could properly have no greater effect than that of abating the action.

[The judgment of the Court below was reversed, and a new trial ordered.—REP.]

R. H. MOORE, Appellant, v. S. F. FLOYD et al., Respondents.

JUDGMENT.—A party cannot claim the benefit of a judgment, and at the same time appeal from it.

APPEAL from Jackson County.

The facts are stated in the opinion of the Court.

J. F. Watson, and Thayer & Williams, for the motion.

B. F. Dowell and W. R. Willis, contra.

By the Court, MCARTHUR, J.:

At the November term, 1871, of the Circuit Court for Jackson County, in an action at law, Moore obtained a verdict and judgment against the respondents for five hundred dollars, and costs and disbursements duly taxed. Upon the trial certain exceptions were reserved, and the bill thereof was allowed and signed December 12, 1871. On January 2, 1872, the judgment, costs and disbursements were paid, and full satisfaction thereof was entered on the margin of the journal by Kelly, one of Moore's attorneys. On May 17, 1872, Moore, by his attorney, B. F. Dowell, filed notice of appeal to this Court, which notice was duly served.

Upon this state of facts we are of opinion that Moore waived his right to appeal. A party cannot claim the benefit of a judgment and at the same time appeal from it. (*Kelly v. Bloom,* 17 Abb. Pr. 229.) The right to proceed on the judgment and enjoy its fruits, and the right of appeal, are not concurrent; on the contrary, they are totally inconsistent. An election to take one of these courses was, therefore, a renunciation of the other. (*Bennett v. Van Syckel,* 18 N. Y. 484.) The election was made when the amount of the judgment, costs and disbursements was accepted and satisfaction thereof entered. In this case the judgment became a dead record long before the notice of appeal was filed, and was not, nor could it be revivified by the filing thereof. The motion must be granted, and the appeal dismissed.

Appeal dismissed.

WILLAMETTE FREIGHTING COMPANY, Respondent, v. SAMUEL STANNUS, Appellant.

ASSESSMENTS OF STOCK IN PRIVATE CORPORATION.—When a sufficient amount of the capital stock of a private corporation has been subscribed to authorize the stockholders to proceed to the election of Directors, after the election thereof assessments may be legally made upon the unpaid stock so subscribed, and this though the corporation

has increased its capital stock and the entire amount of the shares of the original stock and of the increased stock has not been subscribed. It is otherwise, where subscription to the entire number of the shares of the original as well as any contemplated increase of stock has been made a condition precedent to the exercise of the power of levying assessments.

STOCKHOLDERS MAY BECOME LIABLE BEFORE THE WHOLE AMOUNT OF STOCK IS SUBSCRIBED.—Stannus subscribed for and took twenty shares of stock in a private corporation, and promised to pay the company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws and in the instrument signed by subscribers to the stock, which "provided only that no assessment upon the shares subscribed should become due prior to the first of April, 1870," all the assessments having been made subsequent to that time. *Held*, that his liability to pay for the shares so subscribed was not upon condition that he should not become liable until the whole stock was subscribed. *Held, also*, that the doctrine "that a subscription for stock in a corporation whose captial stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscribers shall not become liable until the whole stock is subscribed," cannot apply in this case, for the proportion of stock necessary to be subscribed before the election of Directors, or rather before the organization of the company, was duly subscribed and taken before the business of the company was proceeded with.

IDEM.—Subscription to the entire amount of stock of the corporation is not a condition precedent to legal corporate existence in this State. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments, is in harmony with the general incorporation laws of this State.

DENYING LEGALITY OF ASSESSMENTS—STOCKHOLDERS, WHEN ESTOPPED.—Where assessments upon stock were levied by the stockholders by virtue of a by-law framed and adopted by the stockholders, a stockholder who assisted in framing the by-law and gave his voice for its adoption, is estopped from questioning the legality of the assessments.

APPEAL from Benton County.

This action was instituted by the Willamette Freighting Company, a private corporation organized under the general incorporation law of this State, to recover from Samuel Stannus, the aggregate amount of five separate assessments upon twenty shares, valued at one thousand dollars, of the capital stock of the company, which shares Stannus subscribed for and agreed to take. The complaint alleges that the respondent, who was plaintiff in the Court below, is a

corporation, duly organized under the laws of this State on March 16, 1869. That the enterprise in which it proposed to engage was the navigation of the Willamette River and its tributaries. That on March 31, 1869, the appellant, who was the defendant in the Court below, executed with certain other persons the following instrument in writing, viz.: "We, the undersigned, and each of us, do hereby subscribe for and take the number of shares set opposite our respective names, of the capital stock of the Willamette Freighting Company, of Benton County, Oregon, and undertake and promise to pay to said company therefor, in United States gold or silver coin, the sum of fifty dollars per share—the capital stock of said company being represented by three hundred shares, and each share representing the sum of fifty dollars; and we subscribe for and take said stock on the terms, conditions and limitations set forth in the articles of incorporation and by-laws of said company; *provided only,* that no assessment upon the shares subscribed shall become due prior to April 1, A. D. 1870."

Subscribed:

"Samuel Stannus, twenty shares, $1000;" and divers other persons.

That the defendant became thereby a subscriber for twenty shares of said stock, and a stockholder in the corporation; that the only provision of the company, in regard to the assessment of the stock, is Article 10 of the By-Laws, which provides as follows:

"ARTICLE 10. All assessments exceeding ten per cent. on the capital stock shall be made at a regular meeting of the stockholders, or a special meeting, and it shall require a majority of all the stock or shares to form a quorum to do any business required to be done by virtue of this organization (votes by written proxy being allowed); *provided,* that the directors are hereby authorized to make assessments, not exceeding ten per cent., on the capital stock of the company."

That in pursuance of the articles of incorporation, the by-laws, and the said agreement, the plaintiff, at regular

meetings of the stockholders and directors, at which the defendant was present and assented, duly levied assessments from time to time upon the capital stock of said company, and that the aggregate amount thereof upon the shares of the defendant was six hundred dollars, which he became liable to pay, but of which sum he has paid only fifty dollars. The complaint also sets out three assessments made by the directors of the company, aggregating twenty-five per cent. of the stock, and two made by the stockholders, aggregating thirty-five per cent.

The answer denies every material allegation of the complaint, except that the defendant signed his name to the agreement referred to, and placed twenty shares opposite thereto. The answer then sets up, as a further defense, that on January 22, 1870, at a meeting of the stockholders of the company, called and held at the town of Monroe, in Benton County, for that purpose, they (the stockholders) by a vote of a majority of the stock increased the capital stock to $50,000. That thereafter, and ever since, the capital stock of the Willamette Freighting Company has been and is $50,000, which amount has never been subscribed for or taken. That not exceeding $19,000 of the stock has been subscribed for or taken; and that during all the time the said pretended assessments were made, the capital stock of the company was untaken and unsubscribed for. That said pretended assessments were all attempted to be made for the general objects and purposes of the plaintiff, to wit, the construction of the necessary boats to navigate the Willamette, Long Tom and other tributaries of the first-named stream, from Portland to Eugene City.

The reply admits that the capital stock of the company was increased on January 22, 1870, at a stockholders' meeting, to $50,000; and that, at the time the several assessments mentioned in the complaint were levied, the capital stock was $——; and that not exceeding $19,000 of the same had ever been subscribed for or taken; and that the alleged assessments were made for the general objects of the company.

The trial in the Court below resulted in a verdict for the

plaintiff, upon which a judgment was rendered. The defendant appeals from said judgment, and assigns numerous errors. The errors relied upon are stated in the opinion of the Court.

R. S. Strahan and John Kelsay, for Appellant.

The stockholders had no power to make assessments upon the stock. (Mis. Laws, ch. 7, §§ 5, 9; *McCullough v. Moss,* 5 Denio, 567, 575, 584; 19 N. Y. 216; Angell and Ames on Cor. 266, § 279; Abbott's Dig. Laws of Cor. 25, § 7; 568, § 1; 569, § 14.)

The powers of all corporations are to be strictly construed. What is not expressly granted is withheld. (Sedg. on Con., etc. 338; 11 Pet. 420; 9 How. U. S. 184; and 2 Black. 723.)

Capital stock must be subscribed before the corporation can go forward with its general business. (Session Laws 1868, § 6, p. 179; 9 Pick. 187; 6 Gray, 87; 10 Pick. 142; 10 Foster, 390; and 32 N. H. 363.)

The by-laws were made by the stockholders and being without power to make them and all assessments being predicated thereon, the whole are without authority of law and are void. See the authorities cited on the first point.

The subscription must be construed as if all the provisions of the statute affecting the liability of the subscriber were incorporated in his agreement. (2 N. Y. 335; 17 Barb. 581; 1 Green's R. 13; Abb. Dig. Laws of Cor. 169, § 205; 15 How. Pr. 209, 210.)

Where the number of shares of a corporation is fixed, either by its charter or its own vote, no stock is valid till the whole is subscribed for. (5 Pick. 23; 14 N. H. 543; 2 Gray, 277, 278; 6 Cush. 50; 9 Cush. 423 *et seq*; Angell & Ames on Cor. §§ 543, 544; 10 Mass. 384; 6 Gray, 87, 88; 8 Cush. 110 *et seq.;* 45 Maine, 524; Abb. Dig. Laws of Cor., p. 26, § 22; 9 Pick. 195 *et seq.,* 39 Maine, 571.)

It was error to instruct the jury that the plaintiff was entitled to recover for all legal assessments. (Session Laws 1868, 154, § 198; 20 N. Y. 129, 130.)

Plaintiff should have proved demand before instituting the action.

F. A. Chenoweth, W. W. Thayer, and John Burnett, for Respondent.

A corporation in this State has a right to increase or diminish its capital stock or the amount of the shares thereof. (Mis. Laws, ch. 7, § 19.)

Whenever a corporation is capacitated to prosecute its business, it has the right to levy assessments. (*H. & D. P. R. Co. v. Rice,* 7 Barb. 157; 21 Barb. 56; 11 N. Y. 102; 16 N. Y. 457; 18 Ind. 452; 34 Maine, 360 *et seq.;* 40 Id. 172; 41 Id. 572.)

As appellant assisted in making the by-laws, and as he subscribed for stock upon the terms referred to therein, he should not be heard to complain.

No demand was necessary before action brought. (Abbott's Dig. Laws of Cor., §§ 258, 259.)

A stockholder may waive a condition, upon the observance of which he might have insisted, and thereby estop himself to question an irregularity. (Abbott's Dig. Laws of Cor., §§ 58, 59; 31 Barb. 323; 35 Mo. 26, 27.)

By the Court, MCARTHUR, J.:

When the Willamette Freighting Company was organized the capital stock was fixed at thirty thousand dollars. No question is made but that, of this amount, fifteen thousand dollars were subscribed and taken before the Company increased its capital stock to fifty thousand dollars. We are led, therefore, to conclude that such was the fact, and it is alluded to at this time as it has an important bearing in considering the legality of the increase of the capital stock. By virtue of the proviso in § 6 of the Act in relation to private corporations (Mis. Laws, ch. 7), it is lawful for such corporations to proceed to elect directors after one-half of the capital stock has been subscribed. After this important step is taken the organization of the corporation is so far complete as to enable the Board of Directors to proceed with the transaction of any and all business, always of course being controlled by the articles of incorporation, the by-laws, and the character and neces-

sities of the enterprise. The Board of Directors, when once legally elected, may proceed to levy assessments, increase or diminish the capital stock, and do any other act necessary to promote the object of the corporation. (Mis. Laws, ch. 7, § 19.) In this case the proportion of the capital stock required by law had been duly subscribed, and the Board of Directors legally elected; they were, therefore, invested with full authority to increase the capital stock, and the assessments which it levied were legal and binding upon the subscribers to the oriignal stock. If an incorporation sees fit to increase its capital stock, it is not necessary to wait until all the shares of the original stock, and of the increased stock also, are subscribed and taken before assessments can be levied upon the shares of the original stock which have been subscribed for. Of course the subscription to the entire number of shares of the original, as well as any contemplated increase of stock, can be made a condition precedent to the exercise of the power of levying assessments. In this case there was no agreement or stipulation to that effect. The subscription of Stannus was absolute. He subscribed for and took twenty shares of stock, and promised to pay the Company therefor at the rate of fifty dollars per share in gold coin. The only conditions upon which the subscription was made were those contained in the articles of incorporation and the by-laws, and in the instrument signed by those subscribing to the stock, which "provided only that no assessment upon the shares subscribed shall become due prior to the first of April, 1870." All the assessments having been made subsequent to that time, there was, of course, no violation of this proviso. We are aware of the full import of the authorities cited from Massachusetts. It is held there that a subscription for stock in a corporation whose capital stock is fixed at a certain amount, or is to be determined by the Directors, is conditioned that the subscriber shall not become liable until the whole stock is subscribed. This rule places the Directors in such a position as to prevent them from transacting any business until all the stock is subscribed. This doctrine cannot apply in

this case, for, under our statutes, the proportion of stock necessary to be subscribed before the election of the Directors, or rather before the organization of the Company, was duly subscribed and taken before the business of the Company was proceeded with. The general principle, that a subscription of the whole amount of stock is not a condition precedent to legal corporate existence, except when made so by general statute or expressed in the charter (4 Eng. L. and Eq. 455), is recognized in Massachusetts (6 Pick. 23; 9 Id. 187; 10 Id. 142); and this fact furnishes incontestible proof that the Massachusetts rule invoked by appellant's counsel grew out of legislative enactment. Its application is not universal, but is limited to those States whose legislation is of like character. The doctrine that whenever a corporation is so organized as to be capacitated to prosecute its business, it has, through its Board of Directors, the power to levy assessments (*S. & S. P. R. Co. v. Thatcher,* 11 N. Y. 107), is in harmony with the general incorporation laws of this State. We are of the opinion, therefore, that the assessments levied by the Board of Directors upon the stock subscribed for by Stannus, were valid and lawful, and that the increase of the capital stock of the Company in no way prejudicially affects the right of the Company to maintain this action. The right of action of the Company is based upon the original contract, which, as has been before stated, was absolute. (*H. D. P. R. Co. v. Rice,* 7 Barb. 164; *S. & S. P. R. Co. v. Thatcher,* 11 N. Y. 107.)

It appears that two assessments, aggregating thirty-five per cent., were levied by the stockholders by virtue of Article 10 of the by-laws. These by-laws were framed and adopted by the stockholders, and Stannus assisted in framing them and gave his voice for their adoption. It is urged that the law in relation to corporations must be strictly construed; that as these assessments were not made by the Board of Directors they were illegal, and that they derive no legality or validity from the by-law authorizing stockholders to levy certain assessments, for that by-law itself is violative of the statute which places the control of the

affairs of the Company in the hands of the Board. It will not be denied at this day that it is the duty of Courts to strictly construe the law touching the rights, duties and obligations of corporations in all cases arising between corporations and third parties, and in very many cases arising between corporations and individual stockholders. But it is not always that such construction can be insisted upon by the stockholder in an action by or against a corporation. When a corporation is organized, the principles of the law of partnership may in very many respects be held to govern the stockholders in their conduct in respect to each other and in respect to the corporation. (31 Barb. 323; 35 Mo. 26, 27.) The bill of exceptions shows that Stannus was a stockholder in the Company, and that he was one of the principals of the enterprise. He assisted in making the by-law by virtue of which these assessments were levied by the stockholders, and now seeks to avoid its affect, and insists upon his right to have the statute strictly construed. We are of opinion that he is not in a position to justly ask for that strict construction. He had a right to waive, and did waive the condition fixed by law that the Directors must make all orders levying assessments, and by his acts he has estopped himself to question any irregularity in the levying of the assessments of which he complains.

We do not think it necessary to pass upon the question of demand and notice as presented.

Judgment affirmed.

PATRICK FARLEY et al., Plaintiffs and Respondents, v. P. C. PARKER and J. F. SUTHERLAND, Defendants and Appellants.

BURDEN OF PROOF.—In an action to recover real estate, where plaintiffs allege title in themselves, and this allegation is denied in the answer of the defendant, the *onus probandi* is upon the plaintiffs to show title in themselves.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

W. W. Thayer, for Respondents.

W. R. Willis and A. C. Gibbs, for Appellants.

By the Court, PRIM, J.:

This was an action at law in the Circuit Court of Douglas County to recover the possession of a certain piece of real estate.

The plaintiffs alleged in their complaint that they were the heirs of Michael Farley, deceased, and as such were the owners in fee of the one undivided sixth of the premises described in their complaint, and that the defendants wrongfully detained the same from their possession.

One of the defendants (C. P. Parker) filed a separate answer, in which he denied that the plaintiffs were the owners in fee of the premises described, or that they were entitled to the possession thereof. Defendant, for further answer, alleged the title and the right of possession to the premises in dispute to be in himself, which was put in issue by the replication of the plaintiffs. The other defendant filed a disclaimer, and the action was dismissed as to him.

At the trial the plaintiffs offered in evidence a patent certificate to the premises in dispute, issued to Michael Farley by the Register and Receiver at Roseburg, Oregon.

One of the plaintiffs (Thomas Farley) was sworn as a witness on behalf of the plaintiffs, who testified that the plaintiffs were the brothers and sisters of Michael Farley, who died without leaving either wife, children or father.

Plaintiffs having rested, the defendant produced in evidence a deed from Michael Farley to E. Colvin, also one from E. Colvin to Thomas S. Colvin, both of which were duly executed and recorded. Other deeds were then offered by defendant to complete his chain of title; but two of them were defective,—one of them failing to include the land in dispute, and the other having but one witness.

The defendant having rested, plaintiffs offered some evidence in rebuttal, tending to show the insanity of Michael Farley at the time of executing the deed to E. Colvin.

The Court instructed the jury that, "under the pleadings, the defendant must show title in himself, and, having failed to do so, they must find a verdict for plaintiffs." This instruction, we think, was erroneous, and calculated to mislead the jury.

The plaintiffs having alleged title in themselves, and this allegation having been denied in the answer of defendant, the *onus probandi* rested on the plaintiffs instead of the defendant; therefore, under the pleadings, it was incumbent upon the plaintiffs to prove title in themselves before they could recover in the action. It further appears from the bill of exceptions, that the Court prepared the verdict for the jury, and then called upon one of them to sign it as foreman, who did so. The Court then said to them: "Gentlemen of the Jury, I instruct you that this is your verdict."

It was undoubtedly proper that the Court should instruct the jury, that if they found for the plaintiffs, what should be the form and substance of the verdict; but we think the instruction given was entirely too strong.

We deem it unnecessary to look into the other questions raised in the record, upon the admission of certain evidence tending to show the insanity of Michael Farley, as we think the case should be reversed and a new trial granted on account of the instructions already alluded to.

It is, therefore, ordered that this cause be reversed, and remitted to the Court below for a new trial.

A. P. ANKENY, Appellant, v. MULTNOMAH COUNTY, Respondent.

INDEBTED WITHIN THE STATE—WHAT CONSTITUTES, WITHIN THE MEANING OF THE STATUTE.—That part of the Act of December 19, 1865, which declares, "It shall be the duty of the Assessor to deduct the amount of indebtedness within this State, of any person assessed, from the amount of his or her taxable property, given under oath," construed. *Held*, 1. That there is an ambiguity in the language of the Act requiring judicial construction: 2. That the language "indebtedness within this State," has reference to the *locus in quo* of the creditor, rather than the place of the payment of the debt; 3. That although the debt sought to be deducted from the value of taxable property

may have been contracted and made payable within this State, and although the creditor, at the time the debt was contracted, resided therein, yet if, at the time of the assessment, the creditor is a non-resident of the State, the indebtedness cannot be deducted.

APPEAL from Multnomah County.

An assessment for the year 1871 was duly levied upon the property of A. P. Ankeny, the appellant, a resident of Multnomah County, consisting of lots in the city of Portland, valued at $8050. Ankeny was indebted to one Jemima Wheeler upon a promissory note for $15,000, executed in Portland, and made payable there, secured by mortgage on a portion of said lots. At the date of the loan, and for some time prior thereto, said Wheeler resided in Multnomah County; but at the time the assessment was made and the subsequent proceedings relating thereto were had, her residence was to Ankeny unknown. She was reported to have gone to Washington Territory, whether for permanent residence or not does not appear. Ankeny sought to have his said indebtedness deducted from his assessment. The Assessor refused to allow the deduction to be made. The application having been renewed before the County Court for Multnomah County, sitting as a Board of Equalization, was again refused. These proceedings of the County Court were certified to the Circuit Court on a writ of review, and were there affirmed. From the decision of the Circuit Court, affirming the action of the County Court, this appeal is taken.

Shattuck & Killen, for Appellant.

Addison C. Gibbs, for Respondent.

By the Court, BONHAM, J.:

This case simply involves a question of statutory construction.

The language of the Act of December 19, 1865, (Mis. Laws, ch. 57, § 16), authorizing the deduction of indebtedness from the assessed value of taxable property, is as follows: "It shall be the duty of the Assessor to deduct

the amount of indebtedness, within this State, of any person assessed, from the amount of his or her taxable property given under oath."

It is claimed, by counsel for appellant, that the question whether the indebtedness is within the State is determined by the place of payment. That it having been agreed, in this case, that the indebtedness of Ankeny to Wheeler was payable at the city of Portland, therefore it was an *indebtedness within this State,* and should have been deducted from his assessment. On the other hand, counsel for respondent claims that whether the debt be *within the State* or not, depends on whether the creditor *resides in the State.*

It is claimed, by counsel for appellant, that the language of the statute, "indebtedness within the State," is so plain and conclusive that it is not susceptible of the construction claimed for it by respondent's counsel, without an invasion by the Court of the prerogative of the lawmaking power.

It is conceded, however, by counsel for appellant, that if the statute read, "indebtedness *to persons* within the State," then respondents construction would be correct; and it might, we think, with equal propriety, have been admitted, by counsel for respondent, that if the statute read "indebtedness *payable* within the State," that then the construction claimed by counsel for appellant would be correct. But, unfortunately for those who are called upon to incur the expense of finding out what the Legislature did mean, the restrictive words above suggested were not used by our lawmakers, which, if they had been, would have placed the langugae of the statute beyond the necessity of judicial construction.

It is a well-settled rule of statutory construction that such meaning is to be attached to the language of the lawmaker (especially in the case of remedial statutes), as will effectuate the object and purpose of the law. And we cannot agree with counsel for appellant that the meaning of this statute, as held by the County and Circuit Courts for Multnomah County, was not a legitimate exercise of judicial construction. It is true that it is the duty of Courts to determine the intention of the Legislature from the fair import

of the words of the statute, and not to presume or conclude that something was intended which the language of the law does not warrant. Yet it often occurs from the hasty action or inadvertence of the lawmaker that language is employed which is more or less ambiguous, and it then becomes the duty of the Courts to determine, by the established rules of statutory construction, what was intended.

Chancellor Kent, in discussing this subject, says (1 Kent's Com. 11th edition, p. 501): "The true meaning of the statute is generally and properly to be sought from the body of the Act itself. But such is the imperfection of human language and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions arising from the ambiguity that attends them. It requires great experience as well as the command of perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt and criticism upon its meaning."

And the same author further says (Id. 502): "It is an established rule in the exposition of statutes that the intention of the law giver is to be deduced from a view of the whole and of every part of a statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. * * * When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion."

See, also, *People v. Utica Ins. Co.* (15 Johnson, 357), and *Whitney v. Whitney* (14 Mass. 92.)

So far then as the specific directions of a statute are clouded by ambiguity, it is the province of the Courts to determine, from the general import of the language used, and the obvious intention of the lawmaker, what was intended in any given particular. In this case, in speaking of "indebtedness within the State," our lawmakers omitted

to express directly whether they meant indebtedness *to persons* within the State, or indebtedness *payable* within the State.

Now, in order to ascertain the true meaning of the words of the statute employed as referred to, let us inquire what was the obvious intent and object of the Legislature in passing the Act of December 19, 1865. The only rational object, and the only one that we have the right to presume was had in view by the Legislature, was the important and equitable consideration of the equalization of taxes. This the Constitution of the State requires of the Legislature, wherein it says (Bill of Rights, § 32), "All taxation shall be equal and uniform." The presumption in the absence of proof to the contrary is, that all officers do their duty. It was and is the duty of the Legislature as far as practicable to see that "all taxation shall be equal and uniform;" hence that must have been their object in passing the law authorizing the deduction of indebtedness within the State from the value of taxable property therein.

If A. buys a tract of land of B. for $5000 and not having the means to pay for it, executes to B. his note secured by mortgage on the land for the purchase price, to require that A. should be taxed for the land, and that B. should be taxed on his note and mortgage, would virtually be a double assessment of the same property. And inasmuch as B's note and mortgage are taxable, and A. does not absolutely own any property, because his creditor B. has a lien upon it for its whole value, it would be making taxation equal and uniform to exempt A. and require B. to pay the tax. But again, as a safeguard to the State, the law must provide that the property shall be *once* taxed in every assessment year; because it is situated within the jurisdiction of the State, and is subject to protection by the law. Hence the creditor must be within the jurisdiction of the State, and liable to taxation to exempt the property of the debtor. This is in harmony with our *ad valorem* system of taxation, as well as with the provision of our State Constitution referred to. To hold that the debtor should be exempt when the creditor was a non-resident of the State (as was ad-

mitted to be the fact in this case), would be to hold that the property might not be taxed at all.

But it may be said that, in this case, when the debt in question was contracted, Ankeny's creditor was a resident of the State of Oregon, and that he was not shown to be privy to the subsequent removal of Mrs. Wheeler from the State. To this we answer, that in case of this kind, the creditor might be considered as the hostage of the debtor; and if the latter desires to avail himself of the benefits of the Act of December 19, 1865, he must see that his creditor remains within the jurisdiction of the State, or at least that he is there at the time of the assessment of the debtor. To give this law the construction claimed for it by counsel for appellant, would be to open a door to fraud, evasion and inequality in taxation, which experience teaches that it is the duty of the lawmaker to guard against.

For illustration, suppose again that A., being a resident of Marion County, where taxes are now twenty-five mills on the dollar, and, having property therein worth $50,000, should conclude, just before the Assessor should come around, to borrow $50,000 of his friend B., giving his note therefor payable at Salem, and with the understanding between debtor and creditor that the latter should remove temporarily from the State. By this transaction A. would realize the snug sum of $1250, although B. might return to the State within a few days afterward and collect his $50,000 from A. And such also would be the result if appellant's position be correct, if B. were, in the first place, a non-resident of the State.

It might be proper to remark, that the foregoing illustration was not suggested by the facts in this particular case, but it is given to illustrate the facility with which the spirit of the law might be evaded by an act of shrewd financiering, which it is to be feared, would be too often resorted to if the law in question is to be construed as claimed by appellant.

We think that the language of the statute, "indebtedness within the State," has reference to the place of residence of the creditor rather than the place of the payment

of the debt (*Johnson v. City Council of Oregon City*, 3 Oregon, 13) and that a debtor, at the time of his assessment, must be able to show that his creditor is a resident of the State in order to entitle him to the deduction of his indebtedness under the statute.

Judgment affirmed.

STATE OF OREGON, Respondent, v. THOMAS SLY, Appellant.

JURISDICTION.—The Circuit Court has jurisdiction of the crime of assault and battery.

PLEA IN BAR TO INDICTMENT.—A conviction under a city ordinance for "disturbing the peace," or for "fighting in the streets," cannot be pleaded in bar to an indictment in the Circuit Court for the assault and battery committed at the same time. The two offenses are not identical.

APPEAL from Jackson County.

On December 20, 1870, Thomas Sly was tried and convicted before the Recorder of Jacksonville, for the offense of disturbing the peace, by fighting one John Pelling in the public street, in violation of a certain duly adopted ordinance of said city. He was fined ten dollars, which fine, together with the costs, he paid. Afterwards, at the November term of the Circuit Court of the State of Oregon for the County of Jackson, he was indicted for an assault and battery—the indictment charging that on December 20, 1870, he did assault and beat one John Pelling. Upon this indictment he was convicted and fined in the sum of ten dollars. From said judgment of conviction Sly appeals.

B. F. Dowell and John Kelsay, for Appellant.

J. R. Niel, District Attorney, and J. H. Stinson, for Respondent.

By the Court, MCARTHUR, J.:

The question as to the jurisdiction of the Circuit Courts over the crime of assault and battery must, we think, be answered in the affirmative. Section 537 of the Criminal

Code, which took effect from and after May 1, 1865, made the crime of assault and battery indictable in the Circuit Courts, and punishable by imprisonment in the county jail not less than three months, nor more than one year, or by fine not less than fifty nor more than five hundred dollars. By § 2, Subd. 2 (Code of Procedure in Justices' Courts, ch. 1, § 2) of the Act regulating the civil and criminal procedure in Justices' Courts, which Act went into operation May 1, 1865, jurisdiction of the crime of assault and battery, not charged to have been committed with intent to commit a felony, was also given to the Justices' Courts. The jurisdiction was therefore concurrent in all cases of assault and battery not charged to have been committed with intent to commit a felony. The sixth subdivision of the section last referred to, as amended in 1865, provided that in case of assault and battery, over which a Justice's Court had jurisdiction, the punishment should be by fine of not less than five nor more than fifty dollars. This amendment does not deprive the Circuit Courts of jurisdiction in this class of cases.

By virtue of the Act of the Legislature, incorporating Jacksonville, the common council was invested with the power to pass and enforce ordinances, punishing any and all parties who might disturb the peace by fighting in the streets, and we are of the opinion that the judgment of conviction of the offense of fighting in the streets, or disturbing the peace, pronounced by the recorder under a city ordinance, cannot be pleaded in bar to an indictment in the Circuit Court, for the assault and battery committed at the same time; for the reason, that before a defendant can avail himself of the plea of *autrefois convict,* he must show the identity of the offense and of the person. (1 Chitty's Crim. Law, 462; *Wilson v. The State,* 24 Conn. 57; *Duncan v. Commonwealth,* 6 Dana (Ky.) 295; *Commonwealth v. Wade,* 12 Pick. 496; 4 Black. Com. 336.) The crimes, to be identical, must be the same in law and in fact. (*Commonwealth v. Roby,* 12 Pick. 502; *Commonwealth v. Bubser,* 14 Gray, 84.)

The offenses above referred to are not identical. The one is a violation of a police regulation of the municipality;

the other a violation of the criminal code of the State. Though the Recorder of Jacksonville is *ex officio* a Justice of the Peace, and might have proceeded under the State law to punish the appellant for the crime of assault and battery, yet it very plainly appears that he did not. He saw fit only to exert his authority as Recorder, and to punish him solely for the infraction of the city ordinance. Conceding, however, that the offenses are identical, that fact cannot in this case avail the appellant, for we deem the correct view of the subject to be that taken by the Court in *Shafer v. Mumma* (17 Md. 331), wherein it was held that the imposition of a fine by the mayor of a city in the exercise of his police power, will not relieve the offender from liability to the State. And this is analogous to the well-settled doctrine which holds an offender liable to be doubly punished, by the United States and by a single State, for an act violative of both a law of Congress and a State law. (*Fox v. Ohio,* 5 How. U. S. 410; *Moore v. Illinois,* 14 How. U. S. 13; *Levy v. The State,* 6 Ind. 281; *Waldo v. Wallace,* 12 Ind. 569; *Gardner v. The People,* 20 Ill. 430.)

It follows that the judgment of the Court below must be affirmed.

Judgment affirmed.

ABRAM BLAKESLY and THERESA BLAKESLY, Appellant, v. FRANCIS CAYWOOD and J. C. CAYWOOD, Respondents.

THE DONATION ACT IS A PRESENT GRANT.—The language of the Donation Act of September 27, 1850, operated in favor of the actual settler, who was under no disability, as a present grant, and vested in the donee a legal title to the land before the issuing of the patent.

IDEM—DONEE TAKES UPON CONDITIONS SUBSEQUENT.—By the operation of the Donation Act the donee acquires the land in fee subject to the conditions specified in the Act. They are conditions subsequent, and it is in the power of the donee to render the estate absolute by performance of the conditions.

IDEM—GRANT IS NOT VOID WHERE ALIEN DIES BEFORE NATURALIZATION.—The proviso in the fourth section of the Act that no alien shall be entitled to patent until he becomes naturalized does not render the grant void upon the death of such alien without naturalization.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

John Kelsay, R. S. Strahan and Boise & Willis, for Appellants.

The Donation Law is in words of present grant. (2 Ogn. R. 266; 12 How. 75.)

Charles P. Matt, up to the time of his death, had complied with all the terms and conditions of the Donation Law. The widow and heirs in such case take the share or interest of the deceased in equal proportions. (Donation Law, § 4.)

The plaintiff, Theresa, was born in Oregon, December 26, 1849, and was and is a citizen of the United States. (1 Sandf. Ch. 583, 639: 1 Abbott's Dig. p. 63, § 11; 2 Kent's Com. 16.)

The widow and heirs, being citizens, could demand the patent without proof of their citizenship; they take as purchasers of the United States. (*Fields v. Squires,* Deady, 383; 2 Black. Com. 1.)

The Donation Law is to be construed liberally in favor of the grantees. (*Silver v. Ladd,* 7 Wallace, 224.)

Mallory & Shaw, for Respondents.

The latter clause of the first provision of § 4 of the Act of September 27, 1850, applies only to those aliens who made their declaration of intention after the passage of the Act. This proviso confers a special privilege upon the heirs which was not possessed by the ancestor; they could obtain patent without proof of naturalization.

Without a special provision the heir cannot take by descent a greater estate than the ancestor held. The ancestor, Matt, could take no title to the land until he produced record evidence of his naturalization. If that was necessary for him, it is necessary for the heirs to make the same showing.

The relation of the United States with Great Britain, growing out of the joint occupancy of the Territory of Oregon, did not tend to promote friendly feelings between the citizens of two countries.

British subjects in Oregon had no sympathy with the United States Government, therefore it was not the policy of the United States to give them land. If the United States had bounties to bestow they proposed to make citizens, and not aliens, the recipients of them. Aliens then in the country would accept the grant and insist upon their loyalty to a foreign power. It was to deprive them of that right that this proviso was inserted into the fourth section. The debates in Congress, at the time the law was before it for its consideration, show what was intended by the language of the proviso. (Speeches of Humphrey Marshall, Samuel R. Thurston, James B. Bowlin and Willard P. Hall, Part 2, 1st Session, 31st Congress, Cong. Globe, 1078, 1080; Speech of Cyrus L. Dunham, Id. 1094; Marshall's Amendment, Id. 1095; Discussion on motion to strike out Amendment, Id. 1096; Speeches of Dawson, Douglas, Benton and Felch, Id. 1845, 1846.)

By the Court, UPTON, C. J.:

This is a suit to compel the defendants to convey to the plaintiffs a parcel of land claimed under the Donation Act of September 27, 1850. The defendants demurred to the complaint, stating as ground of demurrer that it does not state facts sufficient to constitute a cause of suit, and the Circuit Court having sustained the demurrer, the plaintiffs appeal to this Court.

The plaintiffs claim through Charles P. Matt, the father of the plaintiff, Theresa Blakesly, who settled upon the land in controversy in 1844, and continued to reside upon it with his wife until 1851, at which time he died intestate, leaving a widow and an only child—the plaintiff Theresa. The defendant claims under one G. W. Taylor, who entered upon the land after the death of Charles P. Matt, and has since obtained a patent for the land from the United States.

The complaint sets out fully the proceedings taken by Matt and by Taylor in their efforts respectively to obtain title from the Government, and the sufficiency of the pleading depends upon an alleged disability on the part of Charles P. Matt, and those claiming under him, to take and hold the

lands as a donation. Charles P. Matt was not a native of the United States, and never became naturalized, but in the year 1849 he declared his intention to become a citizen, and his daughter, the plaintiff, is a citizen of the United States. The question of disability—the only controverted question in the case—rests upon the construction to be given to the several provisions of the Donation Act bearing upon the rights of aliens and those claiming under them. Section 4 of the Act specifies the qualifications of the donee in this respect, in the following language: "Being a citizen of the United States, or having made a declaration, according to law, of his intention to become a citizen, or who shall make such declaration on or before the 1st day of December, 1851."

The same section contains the following:

"*Provided,* that no alien shall be entitled to a patent for lands granted by this Act until he shall produce to the Surveyor-General of Oregon record evidence that his naturalization as a citizen of the United States has been completed. But if any alien having made his declaration of an intention to become a citizen of the United States after the passage of this Act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this Act, shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue."

One of the principal inquiries involved in this case is whether this explicit declaration that no alien shall be entitled to a patent until he shall produce evidence of his naturalization, is to be regarded as annexing a condition to the estate granted, the breach of which will amount to a forfeiture and annul the grant. If by the terms of the Act nothing passed to the donee until the issuing of the patent, the subject would be easily disposed of; for in that case, denying a patent would be denying all right and interest in the land. If becoming a citizen was thus made a condition precedent, the proposed grant would become a nullity upon the death of the party without naturalization. But in this case, Charles P. Matt, being qualified as a donee

within the terms of the Act, and being settled on the premises at the time, a present interest in the land passed directly to him by the terms, "there shall be and hereby is granted to every white settler or occupant of the public lands * * * having made a declaration, according to law, of his intention to become a citizen of the United States * * * now residing in said territory, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this Act, the quantity of one-half section, or three hundred and twenty acres of land." It is, I think, too well settled to be open to argument that in favor of the actual settler, who was under no disability, this language operated as a present grant, and vested in the donee a legal title to the land before the issuing of the patent.

The title thus conferred on the donee was encumbered with conditions and liable to be defeated by the failure of the donee to perform; but it was nevertheless a present grant vesting the title, notwithstanding the estate was upon conditions subsequent and might be defeated by non-performance; and we are to consider whether, by the terms of the grant, failure to become naturalized was such breach of a condition subsequent as to defeat the grant. Up to the last moment of the life of the donee the delay was no breach of condition there being nothing in the Act requiring the donee to be naturalized within a specified time. On the contrary, the effect of naturalization would have been the same had it been accomplished on the last day of his life as if done at a former period and had he complied with all other requirements of the Act and lived until the present time without becoming naturalized, all the right and interest in the land that were his immediately after the Act took effect would still be his. Should an alien so circumstanced became naturalized hereafter, the disability in regard to receiving a patent would thereupon disappear, and he would then stand in respect to the title and in respect to receiving a patent in the same position as a native citizen. It is clear, therefore, that during the lifetime of Charles P. Matt his rights were not divested because of his failure to become

naturalized, and if the land has reverted to the Government, because of his failure, it reverted at his death. The donee in this case, although an alien, was within one of the classes of persons entitled, under the specifications of the Act, to take as a donee, and he was within the description of persons of whom it is enacted that if "either shall have died before patent issues, the survivor and children, or heirs, shall be entitled to the share or interest of the deceased." The land donated must be within that general provision, unless there is some special provision making the donee, who had before the passage of the Donation Act declared his intention to become a citizen, an exception to the general rule relating to the disposition of the property on the death of the donee.

There is, in the language first above quoted, a special provision in regard to aliens who made the declaration of intention *after* the passage of the Act, and it is a peculiar and noticeable feature of the provision that it omits to mention the survivor, and enacts that if one of that class "shall die before his naturalization shall be completed, the possessory rights acquired by him under the provisions of this Act shall descend to his heirs at law." No such special reference is made to the disposition of the property of those who had *previously* declared the intention. On the hearing it was argued that an inference arises from omitting to make special provision touching the latter class, that the share or interest granted them would not descend, but would terminate with the life of the donee. Such an inference might arise if no general rule had been made broad enough to include the latter class, but inasmuch as the scope of the general provision for disposing of property on the death of the donee does include the class of aliens not mentioned in this exception or special provision, the only presumption thus raised is that no special provision is intended in regard to that class, and the only logical deduction is that on the death of an alien of that class the disposition of the property is within the general rule. The circumstance that the land of the other class is made to descend in an exceptional manner leads to the same conclusion.

On the argument, reference was made to the circumstance, that at the time of the passage of the Act there was a class of settlers who were not in sympathy with our Government, and it was claimed that the proviso first above quoted was inserted in the Act for the purpose of discriminating against that class of settlers and, that the Act should be so construed as to give it that effect. It is difficult to perceive that the construction contended for would tend to favor such discrimination. If one of the objects sought to be accomplished by the Act was to discriminate against such British subjects as were unfriendly to our Government, that object would not be advanced by favoring the heirs of those who should thereafter declare the intention to become citizens, and entirely cutting off the heirs of those who had previously done so, especially as it is not to be supposed that many of those not in sympathy with our Government had made such declaration of intention previous to the passage of the Act. The object would have been better effected by dealing liberally with those who had already taken the incipient step, and by denying a donation to those who had not done so, or placing the grant to them under severe restrictions. Want of sympathy with the Government on the part of a portion of the alien settlers does not afford a reason in favor of the construction that would cut off the children or heirs of those who had declared their intentions before the passage of the Act.

The provision of the Donation Act that indicates an intention to diseriminate against aliens of any class, is that part of the proviso above quoted which declares that an alien shall not be entitled to a patent until he produces proof of his naturalization, and the right of the plaintiff to the relief prayed for in this case depends upon the question whether the death of Charles P. Matt, while he labored under the disability as to receiving a patent, forfeited the right to the land.

There are several provisions in the Act itself that show that its framers did not conceive that issuing a patent to the donee was indispensable to the operation of the grant; as, for instance, the provision of the fourth section, by which

the rights of one class of aliens descend to the heirs at law; that of the same section by which the share or interest descends to the survivor and children or heirs, in case the settler has "complied with the provisions of the Act so as to be entitled to a grant," and dies before patent issues; that of the eighth section, by which, on the death of a settler before the expiration of the four years' continued possession, "all the rights of the deceased under this Act shall descend to the heirs at law of such settler, including the widow, where one is left," and the similar provisions found in § 1 of the amendment of 1853. In case of aliens who declared their intentions after the passage of the Act, the property descends to the heirs at law, although the heirs may be aliens, and possibly may not even declare their intention to become citizens. The language of the fourth section assumes that settlers who die before patent issues, may and do become entitled to the grant, and it would seem obvious from the tenor of the Act, if it were not already judicially determined, that the donee takes an estate in the land before the patent issues. The interest thus acquired is something more than a bare possession, the donee has a right which even the Government cannot annul or disregard—it is a property in the land, held by him in his own right, and it is not a mere life estate; the Act contemplates that he may devise it. It is true, his interest at its incipiency is an estate encumbered with conditions, but they are conditions subsequent, and it is in his power to render the estate absolute. If he complies on his part, it is not in the power of the Govèrnment to divest it; he must, therefore, be deemed the holder of the legal title, as well before as after the patent issues. In the lifetime of Charles P. Matt, and while his naturalization was delayed, his estate did not remain in abeyance for the lack of a patent, and the Act by its terms directed to whom the land should go in case of his death. Withholding the patent from the heir does not necessarily divest the rights of the heir nor the title which the law has cast on the heir. There is nothing in the Act to prevent the patent issuing to the heir if the heir is or becomes a citizen; nor is it indicated in the Act that the

grant shall become inoperative the moment of the death of the donee, in case a patent has not issued prior to that time. The grant not being limited to an estate for the life of the donee, the grant remained in operation, in the absence of a patent as well at the moment of the death of the donee as, during any other part of the time in which the patent was delayed or retained because the grantee was not entitled to receive it.

We find in §§ 4 and 8 of the original Act, §§ 1 and 8 of the second Act, and § 5 of the third Act, such manifest intention to deal liberally with the heirs and widows of those who are prevented by death from complying with the conditions which Congress deemed it necessary to impose, that nothing short of a clear manifestation of such intention can reasonably be construed to place a particular class of persons in an attitude so opposite to that in which the framers of the law have evidently sought to place those deemed worthy to receive a donation.

The case before us presents this state of facts: A British subject settled upon the land in controversy in 1844, and, with his family, continued to reside upon it until his death, in 1851, prior to which time he made the usual application at the Land Department, he having in 1849 made declaration of his intention to become a citizen. At his death the plaintiff, Theresa Blakesly, who was his only daughter, still claimed the land in right of her father, and it was entered upon by the said Taylor, a stranger to the title, under claim that by the terms of the Donation Law the land which had been thus held by the plaintiff's father for seven years had reverted to the Government.

By the operation of the Donation Act, the plaintiff's father acquired the land in fee, subject to the conditions specified in the Act. (*Summers* v. *Dickinson,* 9 Cal. 554; *Kernan v. Griffith,* 27 Cal. 87.)

The only restriction contained in the Act bearing any relation to the facts before us, is that expressed in the words, "Provided that no alien shall be entitled to a patent to the land granted by this Act until he shall produce" evidence of his naturalization. It has been universally held that a

property was of the value alleged in the complaint is insufficient and amounts to an admission of the allegation. The denial should state the property is of no value, or the value as the party claims it to be. Upon this point see also *Baker v. Bailey,* 16 Barb. 54; *Salinger v. Lusk,* 7 How. Pr. 430; *Davison v. Powell,* 16 How. Pr. 467.

Another material allegation of the complaint is that the plaintiff was then, February 15, 1870, mentally infirm *and* not of sound mind, *and* so insane as to be wholly incapable of attending to business.

It will be observed that the facts in this allegation are stated conjunctively. The denial is as follows: "Defendant also denies that at the date of the 15th day of February, 1870, the plaintiff was mentally infirm *and* not of sound mind, *and* so insane as to be *wholly* incapable of attending to business." Thus the facts stated conjunctively in the complaint are undertaken to be answered by the defendant denying them as a whole, as conjunctively stated, as will be seen by placing the aggregated statement of facts in the complaint in juxtaposition with the answer made thereto.

This mode of answering is in violation of the common law rules of pleading, and also of the rule established by the Code, which provides that the answer shall contain a specific denial of each allegation of the complaint controverted, or a denial thereof, according to the defendant's information and belief. (*Busenius v. Coffee,* 14 Cal. 91; *Hensley v. Tartar,* 14 Cal. 508; *Blankman v. Vallejo,* 15 Id. 638; *Kuhland v. Sedgwick,* 17 Id. 123; *Canfield v. Sanders,* 17 Id. 569; *Brown v. Scott,* 25 Cal. 195; *Landers v. Bolton,* 26 Cal. 417; *Hopkins v. Everett,* 6 How. Pr. R. 159; *Salinger v. Luck,* 7 Id. 430; *Davidson v. Powell,* 16 Id. 467; *Sherman v. N. Y. C. Mills,* 1 Abb. 187; *Baker v. Bailey,* 16 Barb. 54.)

The defendant, using the language of the complaint, denies that the plaintiff was *wholly* incapable of attending to business, and also "denies that on a certain day he fraudulently took advantage of the plaintiff's incapacity, and, under pretense of making a loan to plaintiff, fraudu-

lently procured him (plaintiff) to sign and execute a certain writing of that date under seal, which purports to be a deed of such premises." And again he stops with the denial "that said note and the proceeds thereof was the only consideration thereof which the plaintiff received for said deed," without alleging what further or other consideration was received by the plaintiff, which he should have alleged if he relies upon any further consideration.

Under the rule just referred to, every one of these denials is insufficient, and the case is with the plaintiff on the pleadings. But inasmuch as counsel have submitted the entire case, together with all the depositions, to this Court, we have concluded to pass by the questions relating to the technical sufficiency of the pleadings and to decide this suit upon the merits.

We are of the opinion that the preponderance of testimony clearly shows that at the time the deed in question was executed, the plaintiff was of such weak understanding as to be incompetent to transact business, and that the consideration paid for the land in controversy was grossly inadequate. These conclusions of fact being reached, the question of law to be determined is, can equity afford relief?

In 3 Leading Cases in Equity, 136, it is said that "a Chancellor will not interfere under ordinary circumstances, on the ground of mental weakness, or of inadequacy of consideration, so long as either stands alone, and there is no reason for supposing that one has led to or resulted in the other. When, however, both these elements are present the case changes its aspect, and there will be ground for an inference that the inadequacy is due to the exercise of undue influence, or that undue advantage has been taken of the weakness, and equity will set the whole transaction aside unless this presumption is rebutted satisfactorily. Hence, while proof that the powers of one of the parties to a contract were decayed or enfeebled may be nothing in itself, it will be everything when the bargain is one that no man, in the full possession of his faculties, would have made, and that no man should have made with another who

had lost the power of taking care of himself." The authorities upon this point are overwhelming. The presumption alluded to has not, in our opinion, been satisfactorily rebutted, hence the doctrine applies to and must govern in this case.

The defendant's counsel insist that the conveyance was executed by the plaintiff to enable him to defraud his creditors, and that the rules of equity cannot be invoked to assist him in recovering the property. We have found that the plaintiff was at the time of weak understanding, and that he was overreached in the transaction by the defendant. His mental condition was such as would release him from moral responsibility, and equity will relieve him from the effect of the contract. It is settled, we think, beyond controversy, that where a party is of weak understanding, and is overreached in a transaction, Courts of equity will not enforce a rule for the prevention of fraud when, in so doing, a greater fraud would be sanctioned. (*Collins v. Blanton*, 1 Smith's L. C., pt. 1, p. 637; *Ford v. Harrington*, 16 N. Y. 285.)

In both these cases the numerous authorities bearing upon this question are cited and referred to.

We do not deem it necessary to pass upon the question of the intention of the plaintiff in executing the deed, for whether mortgage or deed absolute, the same causes which move us to relieve against the one would operate to relieve against the other.

It follows that the decree in the Court below must be reversed, and a decree in accordance with this opinion be entered here.

Decree reversed.

JEHIEL S. KENDALL, Respondent, v. W. H. McFARLAND, Appellant.

MECHANIC'S LIEN.—When judgment is rendered to enforce a mechanic's lien, an execution may be issued thereon to sell the premises.

IDEM.—Under the statute mechanics' liens have precedence over all other liens after the commencement of the building; but the statute must be strictly complied with in order to secure such precedence.

IDEM.—In an action to enforce such liens it should appear when the building was commenced, to enable the Court to determine when the liens attached.

IDEM.—If it nowhere appears in the judgment-roll when the liens attached to the building, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed.

APPEAL from Benton County.

Strahan & Burnett, for Respondent.

Chenoweth, Hill, Thayer and Williams, for Appellant.

By the Court, PRIM, J.:

This was a suit in equity commenced in the Circuit Court of Benton County, by respondent J. S. Kendall, to foreclose a mortgage on certain premises, situate in the town of Corvallis, with a building thereon known as "Hunt's Brewery." This mortgage was executed on June 30, 1870, by Joseph Hunt and Anna Hunt, his wife, to secure the payment of one thousand dollars. W. H. McFarland, John Hunt, Bernard Hunt and Henry Solle were also made defendants to this suit. The appellant, W. H. McFarland, not being united in interest with his co-defendants, filed a separate answer, claiming to be the absolute owner of the premises embraced in the mortgage.

The title claimed by appellant was obtained as follows, to wit: He and six others claimed to be the holders of mechanics' liens against the said premises, in different amounts, for labor and materials furnished for the construction of the building thereon known as "Hunt's Brewery." Prior to the commencement of this suit these lien-holders had commenced separate actions at law against said Hunt to recover the respective amounts due them, and to enforce their respective liens against said premises. Each of them succeeded in obtaining a judgment against Hunt for the amount due him, and also a judgment that the premises be sold and the proceeds thereof applied to the discharge of his said lien. The aggregate amount of these judgments was $2245.65 exclusive of cost and disbursements. Three of these judgments were docketed on the 9th day of Decem-

ber, 1870, two of them on the 28th of November, 1870, and two on the 7th day of December, 1870. The mortgage was executed and recorded prior to the time when these judgments were docketed, and it nowhere appears in the records of these judgments when the building was commenced or when the mechanics' liens attached.

Executions were issued on each of these judgments against Joseph Hunt for the amount specified therein, and were levied upon the premises described in the mortgage. The notice required by law having been given, the premises were sold by the Sheriff, under and by virtue of said executions, to appellant for $2550. The sale was duly confirmed by the Court, and after the term for redemption had expired the Sheriff executed a deed to McFarland, who immediately took possession of said premises. These executions were not issued specially against the property upon which these parties claimed to hold mechanics' liens, but against Joseph Hunt, commanding the Sheriff "that out of the personal property of said defendant, or if sufficient cannot be found, then out of the real property belonging to said defendant, in your county, on or after the 7th day of December 1870, you satisfy the sum of ——— dollars." Upon the hearing of this cause the Circuit Court found the equities to be with respondent, and entered a decree in accordance with such finding, from which McFarland has appealed to this Court.

The question presented here is, what interest or rights did appellant acquire in the property in question, sold by the Sheriff under the executions issued upon these several judgments? If the parties desired to enforce their respective liens against the property upon which they were claimed they should have issued special executions to sell that property.

The statute, in providing how such liens may be enforced, provides that "if judgment be rendered for the plaintiff he may have an execution issued thereon to sell the premises." (Mis. Laws, ch. 32, § 6.)

The executions issued were not special, but general executions authorizing the Sheriff to sell such real property as belonged to Hunt on the day the judgments were docketed,

or at any time thereafter, upon the condition that sufficient personal property could not be found by said Sheriff out of which to satisfy said execution. But the mortgage of respondent having been executed and duly recorded, prior to the time when these judgments were docketed, Hunt, it appears, had parted with all his interest in this property, prior to that time, unless it might be the right of redemption. But it is claimed that the liens for which these judgments were given were mechanics' liens, and that it is provided by statute that such "liens shall have precedence over all other liens after the commencement of the building." (Mis. Laws, ch. 32, § 7.)

The statute undoubtedly has given priority and precedence to this class of liens over all other liens, but a party who wishes to secure such priority and precedence is required to proceed strictly in accordance with the provisions of the statute. It was held by this Court at a former term, that the remedy created by this statute is an extraordinary one, "created in derogation of common law and ought to be strictly construed." (*Dalles Lumber and Manufacturing Company v. The Wasco Woolen Manufacturing Company,* 3 Ogn. 527.)

No time having been specified in any of these judgments when the building was commenced, upon which the liens were claimed, the judgments could only operate as liens upon such property, the same as an ordinary judgment, from the time when they were placed upon the judgment-lien docket; and in consequence of these judgments failing to show when the mechanics' liens attached to the building, we are unable to see how any other or greater interest could have been sold under special execution than was owned by Hunt in the property on the day when the judgments were docketed.

In an action to enforce a mechanics' lien, if the party desires his lien to be enforced from the commencement of the building upon which the lien is claimed, the time when the building was commenced should be averred in the complaint, so that it may be determined and adjudged by the Court at what time said lien attached to the building.

To enable appellant to hold the premises against the mortgage of respondent, it should have appeared in the judgments and proceedings under which he claims title, that these mechanics' liens attached to the building in question prior to the time when respondent's mortgage was executed and recorded. The time when these liens commenced to have an existence was one of the main questions to be ascertained and judicially determined in said action. If no time was mentioned in said proceedings when said liens attached, we are unable to see how it can be done here after said judgments have been executed.

Again, if this mortgage was executed prior to the commencement of these actions to enforce these mechanics' liens, respondent was entitled to have the summons served upon him, so that he might become a party defendant to said actions, if he desired to do so. This, however, not having been done, these judgments could not conclude any rights defendant may have had in said premises.

It is ordered that the decree of the Court below be affirmed.

ADOLPH and MARGUERITE JETTE, Appellants, v. HONORE and CELESTE PICARD, Respondents.

DONATION LAW—RIGHTS OF MARRIED WOMEN UNDER.—L. took up two hundred and sixty-three and fifty-three one-hundredths acres of land under § 4 of the Donation Law, and, being married at the time, held that his wife was entitled to have one-half thereof set apart to her. The right of the wife in no way depends upon the number of acres in the claim.

WILLS—CONSTRUCTION OF.—The intention of the testator must be looked to in construing a will. Wills operate upon what is found to actually belong to the estate of the testator.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Williams & Willis and R. P. Boise, for Appellants.

G. W. Lawson and Eugene Sullivan, for Respondents.

By the Court, McARTHUR, J.:

Tanisse Liard settled upon, claimed and commenced to cultivate land claim No. 95 in township 4 south, range 2 west, containing two hundred and sixty-three and fifty-three one-hundredths acres lying in and being parts of sections 20, 21, 22, 27, 28 and 29, in said township and range in 1846, and continued to reside upon and cultivate and possess said lands until his death. He filed his notification to hold said lands under the Donation Law (so called) in his own individual right without stating that he had a wife, and duly made his final proof of four years' residence and cultivation, as by the law required to entitle him to a patent from the United States. On December 29, 1851, after having made such final proof, he executed a will, and dying shortly afterward, said will was admitted to probate, September 2, 1852. Shortly afterward a certificate was issued by the proper officers to his heirs at law for all of said lands. The date of his marriage with Celeste (now intermarried with Honore Picard) was February 5, 1849, and he continued to live with her upon said premises from the date of their marriage until the time of his death, about March 15, 1852. Marguerite is the only child of Tanisse Liard and is the fruit of his marriage with Celeste. By the terms of the will he bequeathed and devised to his wife, Celeste, and to his daughter, Marguerite (now intermarried with Adolph Jette), each "one-half of all the personal property and real estate of which he should die possessed or seized."

In March, 1870, a petition was presented to the officers of the proper land office on behalf of Celeste, which was contested by Marguerite. After hearing the matters set out in the petition, the donation certificate, which had been previously issued to the heirs at law of Tanisse Liard, was, on September 20, 1870, corrected and changed so as to give the heirs at law the north half of the claim, and to Celeste, the widow of Tanisse, the south half thereof. This decision remains unappealed from and is in full force. Some time prior to the decision of the land officers this suit was instituted for partition of the premises, and was continued

from term to term, and finally at the June term, 1871, was heard. After hearing, the Court made a decree dismissing from consideration the south half of the claim, and ordering that the north half thereof be equally divided between Celeste and Marguerite. From this decree Marguerite appeals, and urges that she is entitled under the will to one-half of the entire tract.

When Liard availed himself of the provisions of the Donation Law he was at liberty to take up six hundred and forty acres, one-half of which would go to his wife. He could take any less number of acres, but could not so take as to preclude his wife from her share of what was taken. The right of the wife in no way depends upon the number of acres taken up. She has a clear right to half of whatever quantity of land he took. (Donation Act, § 4.) When he executed the will it seems he was laboring under the impression that his wife had no interest in the claim,—that is, nothing in her own right. There is nothing in the case which warrants any other conclusion than that he was simply mistaken; there is nothing at all which savors of fraud. The provisions of the will operate only upon the north half of the claim, for that is all that he owned at the time of its execution.

It is settled principle that the intention will govern in the construction of a will, but it is equally true that a man cannot devise by testament what he does not own. Courts cannot apply a will to any property, but that which is found to actually belong to the estate of the testator.

Decree affirmed.

EMILY C. PITTMAN, Appellant, v. WM. M. PITTMAN, Respondent.

WIFE'S RIGHT OF ACTION AT LAW.—A divorced wife cannot maintain an action at law against her divorced husband upon an implied contract arising during coverture.

APPEAL from Linn County.

The complaint alleges that on or about December 3, 1864, the defendant received from the plaintiff's father the sum of

one thousand dollars in gold coin to the use of the plaintiff; that demand for the payment thereof was made, but that the defendant has not paid any part thereof but is now justly indebted to the plaintiff in the sum of one thousand dollars. The answer denies specifically each affirmative allegation of the complaint and alleges that on July 4, 1858, the plaintiff and defendant were lawfully married, and continued to be husband and wife until July 14, 1870, at which date they were divorced by decree of the Circuit Court for Benton County. And further, that the plaintiff, as heir at law of Hetty Allen, deceased, was entitled to a certain one-fifth of said decedent's land claim. That the same was sold to one Chambers, the proceeds thereof being eight hundred dollars, and that Chambers, with the knowledge and assent of the plaintiff, paid the same to one Mulky's administrator, in discharge of a demand of said administrator against the defendant, and that there never was any previous agreement or understanding that the money should be refunded to the plaintiff. The Statute of Limitations is also pleaded. The new matter in the answer is denied in the reply, and therein it is further alleged that there was an understanding that plaintiff was to have the money to her own use; that she always claimed it; that the money was the proceeds of her interest in her mother's estate, and that at the time of instituting this action the plaintiff was a single woman.

Defendant moved for judgment on the pleadings; and from the order allowing said motion and dismissing the action the plaintiff appeals.

By the Court, MCARTHUR, J.:

A careful examination of the pleadings discloses that this is an action at law upon an implied contract for the payment of money, and that at the time of the transaction out of which the implication arises the parties were husband and wife. At common law, husband and wife were incapable of making any contract, express or implied, which a Court of law would countenance or uphold. Nor does the constitutional provision (Art. XV, § 5) break the force of this rule. That provision was adopted for the protection of the wife's prop-

erty from the debts or contracts of the husband. It does not enlarge her strictly legal rights so far as to allow her to sever her unity from her husband, and enable her to enter into contracts with him as with a mere stranger. The appellant cannot recover upon the implied contract pleaded in a Court of law. The only forum wherein the questions presented by this record can be properly examined into, and the adequate remedy afforded, is a Court of equity.

Courts of equity protect with great care the separate property of the wife and the proceeds thereof, and enforce against all persons any reasonable agreement concerning it. The beneficent rules which they now apply in this class of cases have tempered the harshness of those relics of feudalism which still find sanction in courts of law.

In this case the amount sought to be recovered was the proceeds of the sale of a parcel of land inherited by the appellant during coverture. Under no circumstances could the land, or the proceeds thereof, have been reached by any process issued at the instance of the creditors of the respondent. Being a pecuniary right, occurring during coverture, the respondent could not equitably appropriate it to his own use, or to the discharge of his liabilities, without the knowledge and assent of the appellant. If appropriated for such purpose by the husband without the wife's knowledge and assent, every consideration of morality and justice would lead a court of conscience to assert its jurisdiction, and order the husband to make restitution. If so applied with her knowledge and assent, we see nothing in the way of treating it as an equitable loan, unless the wife absolutely renounced all claim thereto.

In New York, where the property rights of married women are not more fully protected by legislative enactment than they are in Oregon by constitutional provision, it is well settled that a wife can loan money to her husband, and, before repayment by him, she has a claim against him which she can enforce in equity, though not in law. (*Savage v. O'Neil*, 44 N. Y. 302.) Transactions of this character are not *nudum pactum*. Where the money arises from the wife's separate property, over which she has com-

plete control, when the husband borrows it, there is in equity a valid consideration to repay it. (*Woodworth v. Sweet*, 51 N. Y. 10.)

Judgment affirmed.

JANUARY TERM, 1873.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

JANUARY TERM, 1873.

CALEB S. TUSTIN, Appellant, v. SAMUEL D. GAUNT, Respondent.

COUNTY COURTS—JURISDICTION OF.—The Constitution of this State provides that County Courts shall be Courts of record having general jurisdiction, to be defined and limited by law; and the Legislature having given them exclusive and original jurisdiction in all matters pertaining to Probate Courts: *Held*, that County Courts, in exercising judicial powers in such business, should be regarded as Courts of general and superior jurisdiction.

IDEM—PRESUMPTIONS.—Whenever their proceedings and judgments come in question collaterally, they are entitled to all the legal presumptions pertaining to the records of Courts of superior jurisdiction.

PROCEEDINGS IN COUNTY COURT, HOW IMPEACHED.—The proceedings and judgments of County Courts in probate matters import absolute verity, and whenever they come in question collaterally cannot be impeached by evidence *aliunde* the record; but may be impeached by evidence appearing upon the face of the record showing a want of jurisdiction in the Court.

RECORD.—Under the Code the record includes all the papers and proceedings contained in the judgment-roll.

WHEN WANT OF JURISDICTION WILL APPEAR.—When the record recites what was done, and the facts so recited are not sufficient to give the Court jurisdiction, a want of jurisdiction will appear upon the face upon the record.

WHEN THE RECORD IS SILENT.—Legal presumptions do not come to the

aid of the record, except as to facts touching which the record is silent. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done. If appellant was a minor, and had no guardian when the order of sale was made, it was the duty of the Court to appoint one before making such order; but the record being silent, the law presumes the Court did its duty. No evidence *aliunde* the record will be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction.

APPEAL from Yamhill County.

W. M. Ramsey, for Appellant.

R. P. Boise and P. C. Sullivan, for Respondent.

By the Court, PRIM, J.:

This was an action of ejectment in the Circuit Court of Yamhill County to recover the one-eighth of one hundred and ninety acres of land situate in the county of Yamhill, State of Oregon. Caleb S. Tustin, the appellant, claims title as one of the heirs of his father, Charles S. Tustin, who died intestate in said county in the fall of 1862, seized of the land in question, leaving a widow and seven other children besides appellant.

Respondent claims title to the land under a sale made by the administrator of the estate by said Tustin, deceased, in pursuance of certain probate proceedings and orders had and made in the County Court of Yamhill County. The title of respondent depends upon the validity of those proceedings and orders of the County Court and the sale made in pursuance thereof, as it appears that appellant was entitled to the interest in question as one of the heirs of his father, unless he has been divested of the title by this sale.

Respondent, to prove title in himself, offered in evidence the record containing the order of the County Court of Yamhill County, appointing David Smith administrator of the estate of the said Tustin, deceased; and also the proceedings and orders of said Court pertaining to the sale of the land belonging to said estate, including the land in question. Appellant objected to the admission of these proceedings, orders and sale made in pursuance thereof,

as incompetent evidence to prove title in respondent, upon the ground that the Court had no jurisdiction of either the subject-matter or of the parties interested in said estate at the time they were made, as he claims, and that, therefore, they are absolute nullities. He contends that the County Courts of this State, in exercising judicial powers in probate matters, should be regarded as Courts of inferior and limited jurisdiction, and that none of these orders and proceedings should have been admitted in evidence without first proving all the necessary facts authorizing such Courts in making such orders. Respondents, however, contend that they are Courts of record under the Constitution, with *original* and *exclusive* jurisdiction in all *probate matters*, and in exercising judicial powers in those matters should be regarded as Courts of superior jurisdiction, and that all their proceedings, orders and judgments are entitled to all the presumptions of law pertaining to such Courts.

This presents the main question to be decided in this case, that is, whether these Courts, in exercising judicial powers in probate proceedings, should be treated as Courts of inferior or as Courts of superior jurisdiction.

This is the first time in the judicial history of this State that this Court has been called upon to decide this question. We are aware that it has already been held by this Court in several cases heretofore decided and reported that "the County Court or Board of County Commissioners, so far as it exercises judicial powers, is a Court of special and limited jurisdiction," and, as a logical sequence, that the facts necessary to confer jurisdiction should appear upon the face of its record or its proceedings, whenever brought in question collaterally, are mere nullities. (*Thompson v. Multnomah County*, 2 Ogn. 37; *State of Oregon v. Officer, ante*, p. 180; *Johns v. Marion County, ante*, p. 46.)

It appears, however, that these were all cases in which the County Court was engaged as a Board of County Commissioners, in the laying out of county roads, which was purely county business as contradistinguished from probate business; consequently we are led to the conclusion that the

Court, in the use of the language above referred to, only intended to be understood as holding that these Courts were Courts of inferior and limited jurisdiction, when exercising judicial powers in the particular class of cases then under consideration.

Section 1 of Article VII of the Constitution provides, "That the judicial power of the State shall be vested in a Supreme Court, Circuit Courts and County Courts, which shall be Courts of record, having general jurisdiction, to be defined, limited and regulated by law in accordance with this Constitution.

"Justices of the Peace may also be invested with limited judicial powers."

Section 12 provides that "the County Court shall have the jurisdiction pertaining to Probate Courts and Boards of County Commissioners," etc.

Section 869 of the statute provides that "the County Court has the exclusive jurisdiction in the first instance pertaining to a Court of Probate," among which is enumerated the power "to grant and revoke letters of administration," and "to order the sale and disposal of real and personal property of deceased persons."

It will be seen that the same language is used in the Constitution in reference to the Supreme and Circuit Courts that is used in regard to County Courts, as to their being "Courts of record having general jurisdiction, to be defined, limited and regulated by law."

As the Constitution of the State provides that County Courts shall be Courts of *record* having *general jurisdiction*, to be defined and limited by law, and the law having fixed the limitation by giving them *exclusive* and *original* jurisdiction in *all matters* pertaining to *Probate Courts* we conclude that, in the transaction of such business, they should be regarded as Courts of superior jurisdiction, as contradistinguished from Courts of inferior and limited jurisdiction. Having arrived at this conclusion, we are to accord to their judgments and proceedings in such matters, whenever they happen to come in question collaterally, all the presumptions of law pertaining to the judgments and pro-

ceedings of that description of Courts.

"The true line of distinction between Courts whose decisions are conclusive, if not removed to an Appellate Court and those whose proceedings are nullities, if their jurisdiction does not appear on their face, is this:

"A Court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment, or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A Court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." (2 How. U. S. 341.)

"A judicial record" is defined to be "the record, official entry or files of the proceedings in a Court of justice." (Civ. Code, § 719.)

These proceedings and orders of the County Court, in the matter of the estate of Tustin, deceased, are "judicial records," as they come clearly within this definition of the Code; and whenever such a record is produced in evidence, during the progress of the trial, to establish some right in the party producing it, and is thus brought in question collaterally, it may be attacked or impeached by the opposite party, and the presumption arising therefrom overcome by evidence of a want of jurisdiction in the Court in which such record was made, for the record of any Court is absolutely void whenever it appears from such record that there was a want of jurisdiction in the Court, either over the subject-matter or parties in interest, to make such record. (Civ. Code, § 732; *Hahn v. Kelly*, 34 Cal. 407.)

When, however, the record of a Court of general jurisdiction comes in question, *a want* of jurisdiction cannot be shown by evidence *aliunde* the record, and "no facts or cir-

cumstances which do not appear upon the face of what constitutes the record," designated in our Code as the judgment-roll, can be used for such purpose, for the reason that "the record of a Court of superior jurisdiction imports absolute verity, and cannot, therefore, be collaterally impeached from without." (*Hahn v. Kelly*, 34 Cal. 402.)

It may be asked, in this connection, what is meant by a want of jurisdiction appearing upon the face of the record. We answer that a want of jurisdiction appears upon the face of the record "whenever what was done is stated in the record, and which, having been done, is not sufficient in law to give the Court jurisdiction."

In *Hahn v. Kelly*, the Court said: "We consider the true rule to be that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is *silent*. When the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done." "That the law conclusively presumes the jurisdictional facts in the case of a judgment of a Court of general jurisdiction, so long as the record shows nothing to the contrary, but does not make any such presumption in favor of the judgments of Courts of limited jurisdiction. The jurisdiction of such Courts, not being presumed, must depend upon actual facts, which, of course, are open to dispute, and not concluded by the record, for if the jurisdictional facts did not exist, the Court really had no jurisdiction, and its record is not, in the eyes of the law, an absolute verity, but a mere unauthorized narrative." (20 Conn. 199.)

Having arrived at the conclusion that the proceedings and judgments of our County Courts in the transaction of probate business are entitled to all the legal presumptions pertaining to the proceedings and judgments of Courts of general jurisdiction, it will be necessary to apply these legal presumptions to the proceedings and orders of the County Court produced in evidence in this case, in order to determine whether such orders are valid, or whether they were mere nullities on account of a want of jurisdiction in the Court at the time they were made.

The first order produced in evidence by respondent was the order granting letters of administration upon the estate of said Charles S. Tustin, deceased. To obtain this order under the statute in force at the time it was granted, it was necessary to file a petition showing two jurisdictional facts: first, the death of Tustin; and second, that he was an inhabitant of the county at the time of his death, both of which facts sufficiently appear from the language used in the petition filed to obtain the order, which is as follows, to wit: "The undersigned would respectfully petition the Hon. County Court of Yamhill County, Oregon, to be appointed administrator of the estate of C. S. Tustin, late of said county and State, now deceased."

We will next examine the proceedings and orders of the County Court pertaining to the sale of the realty of said Tustin, deceased, in order to ascertain whether a want of jurisdiction in the Court, either over the subject-matter or persons in interest, appears upon the face of the record. For it will be conclusively presumed that all the necessary jurisdictional facts did exist, and were made to appear to the Court, unless a want of jurisdiction appears upon the face of the record, or some portion of it.

This proceeding was had under the old statute of 1855, which provides that "when the personal estate in the hands of the administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, he may sell the real estate for that purpose upon the order of the County Court. To obtain such order he shall present a petition to such Court, and if it shall appear by such petition that there is not sufficient personal estate in his hands to pay the allowance to the family, the debts of deceased and expenses of administration, and that it is necessary to sell the whole, or some portion of the real estate, the County Court shall make an order directing all persons interested in the estate to appear, at a time and place specified in the order, to show cause why such order should not be made. A copy of such order is required to be served personally on all persons interested in the estate, or be published at least four successive weeks in such news-

paper as the Court shall order. If the Court shall be satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested that such sale is necessary for the payment of the debts, allowance to the family and expenses of administration, such order shall be granted." (Stat. of 1855, p. 360.)

It appears upon the face of this record that "the administrator, upon affidavit filed according to law, presented a petition to the Court for a license to sell the real estate of said estate," and, "it appearing to the satisfaction of the Court that there is not sufficient personal property to pay the debts of said estate, the necessary allowance to the family, and the cost of administration," etc., an order is then made directing all persons interested in said estate to appear at the time and place specified therein to show cause why such order should not be granted; also, directing this order to be published in the Oregon *Argus* for four successive weeks. The order of sale contains the further recital that this "petition came on for final hearing, and, it appearing to the Court that due notice of this hearing had been given to those interested in said estate; * * * and it further appearing necessary for the payment of the debts of the deceased that said real estate should be sold, it was therefore ordered," etc.

Thus it is seen that it not only appears upon the face of the record that the Court had jurisdiction of the subject-matter, but of the parties in interest. But it is, however, further claimed for the appellant that he was a minor at the time these proceedings were had, and that he had no general guardian and, that none was appointed for him by the Court to appear and take care of his interest in these proceedings, and therefore they are void as to him. It is true the statute requires that if any of the heirs of the deceased are minors and have no general guardian, the Court before proceeding to act upon such petition, shall appoint some disinterested person to appear and look after the interest of such minor in such proceeding. But to this proposition we reply that the record being silent as to whether any guardian was appointed for appellant or not, "the law

presumes that what ought to have been done was not only done, but rightly done." (*Hahn v. Kelly*, 34 Cal. 407.)

It was further proposed, however, by counsel for appellant, to impeach these proceedings of the County Court in relation to the sale of the land in question, by offering to prove by appellant that he was a minor under eighteen years of age at the time said proceedings were had in said Court; also that he had no guardian in the county, and none was appointed for him by the Court to take care of his interest in said matter, and that no notice of said proceedings was served upon him. This proposition was very properly overruled by the Court, as no evidence *aliunde* the record could be admitted to impeach the proceedings and orders of a Court of general and superior jurisdiction.

No substantial error having been committed in the trial of this cause by the Circuit Court, it is ordered that the judgment be affirmed.

E. BOHLMAN, Respondent, v. S. COFFIN and C. M. CARTER, Appellants.

REFEREE.—A referee is an officer of the Court. He is clothed with important powers, and some weight must be given to his certificate, and some dicretion allowed him in the manner of taking testimony and returning exhibits.

IDEM—CERTIFIED COPIES OF EXHIBITS BY.—When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof, and files and returns the certified copy as an exhibit, such exhibit will not be disregarded except in peculiar cases.

CONSTRUCTION OF DEED.—To properly construe a deed it must be taken by "its four corners," and the intention of the parties, when discovered, must be carried out.

NOTICE.—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, operates as notice.

IDEM.—Actual and unequivocal possession is notice.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

J. G. Chapman, for Respondent.

O. P. Mason and Whalley & Fechheimer, for Appellants.

By the Court, MCARTHUR, J.:

This is a suit to set aside a deed from Stephen Coffin to Charles M. Carter, of date August 20, 1870, and to compel the defendants to execute to the plaintiff a deed to lots two (2), three (3), and four (4), in block one hundred and fifty-six (156), in the city of Portland, in accordance with Coffin's covenant of further assurance, contained in the deed of date June 25, 1850, from Coffin, Lownsdale and Chapman, to Lownsdale, under which the respondent deraigns title. It appears that, on said last date, Coffin, Lownsdale and Chapman, as proprietors of the then town of Portland, by deed of conveyance for a valuable consideration, bargained, sold and conveyed to Lownsdale, the lots aforesaid, and that the said deed contained the covenant of the said parties, grantors therein, that if they, or either of them, should obtain a patent from the United States for said premises, he, or they, would convey the same to said grantee or his assigns, by deed of general warranty.

Lownsdale continued in possession of said lots until June 15, 1851, when he conveyed one of them, numbered two (2), and delivered the possession thereof to one John M. Breck. This lot Breck transferred to Hart by deed dated February 5, 1859. Hart transferred the same to Robinson by deed dated July 5, 1859. Robinson transferred the same to Gault by deed dated December 15, 1859. Gault transferred the same to Burchard & Powers by deed dated July 12, 1869, and Burchard & Powers transferred the same to Bohlman, the respondent, by deed dated October 11, 1870. Lownsdale continued in possession of lots numbered three (3) and four (4), in said block, from the date of the deed from Coffin, Lownsdale and Chapman to him (L.) until February 25, 1858, when he transferred them to Breck. Breck transferred them to Delschneider by deed dated September 2, 1859. Delschneider died February 25, 1862, and his heirs, Frederick, Hannah and Rosa, continued in possession. On June 5, 1862, Rosa intermarried with D. E. Buchanan, and shortly afterward, by a suit in partition, it was decreed by the proper tribunal that Rosa take said lots

three (3) and four (4), in block one hundred and fifty-six (156), as her share of the estate of her deceased father. The same being thus decreed in Rosa Buchanan, she, together with her husband, sold and transferred the said lots to Hart by deed dated June 30, 1866, and Hart transferred the said lots to Bohlman, the respondent, by deed dated August —, 1866.

In 1862 Coffin acquired title from the United States, and the patent embraces the lots in controversy. He, by deed of August 20, 1870, conveyed to Carter all his right, title and interest in said lots and divers other lots and parcels of land in Multnomah County. The testimony clearly supports the conclusion that Lownsdale and those claiming under him, down to and including the respondent, have been in the open and notorious possession of the property described.

The first question of importance is as to whether Coffin was bound by the covenant in the deed to Lownsdale of June 25, 1850. That was a good and valid deed as between Chapman and Coffin as grantors, and Lownsdale as grantee, and we are of opinion that Coffin is bound by the covenant of further assurance therein contained, and that it was his duty to have executed to the assigns of Lownsdale under the deed, a deed of general warranty, after he obtained his patent from the general government. Before proceeding to discuss the other more important feature of the case, it is deemed necessary to pass upon two propositions contended for by appellants' counsel in relation to the sufficiency of the testimony.

It seems that when the referee was taking the testimony herein, W. W. Chapman was sworn as a witness. He was shown the original deed of Chapman, Coffin and Lownsdale to Lownsdale, and testified positively that he saw Coffin sign and execute the same. Thus much the interrogatories and answers prove beyond all contention. The referee had a copy of the deed made and filed as an "exhibit," and that together with all the other exhibits was returned to the Circuit Court under the certificate of the referee. The referee is an officer appointed by the Court,

and by his appointment is clothed with very important powers, and some weight must be given to his certificate, and some discretion must be allowed him in the manner of taking and returning testimony and exhibits. He acts under oath and is presumed to be qualified to discharge his office conscientiously, and it cannot be presumed that the copy he has returned is not a true copy. Indeed, counsel practically admitted it to be a true copy but urged as this is a trial *de novo* the original ought to be here. It is true that it would be better in all cases coming here to be tried *de novo* for the original papers offered as exhibits to be sent up with the deposition, and in some cases it would be absolutely necessary; as where a question arises as to an erasure or an interlineation, in which case an inspection of the original might be necessary to properly pass upon the rights of the parties. But nothing of this kind is urged here, and this fact, taken in connection with the deposition of Chapman and the certificate of the referee, as well as the practical admission of its correctness by counsel in the argument, leads us to the conclusion that it would be improper to reject it.

There is also in this deed a defect, which the appellants' counsel claims overcomes the force of the covenant of further assurance. The language used is, "If the party of the second part obtains title from the United States they will convey the same to the party of the second part by deed," etc. We are called upon, therefore, to construe this part of the deed. This is not a difficult matter, for it is manifest from the context, from the subject-matter, and from the relation of the parties, that the use of the word *second* was a mere clerical error, and that the parties intended to use the word *first*. Under the technical canons of construction of the old common law this would not have defeated the deed or the covenant, still less would it do so when we apply the modern doctrine, which allows us to construe the whole deed together in order to discover the intention of the parties, and when discovered to carry out such intention. (*Ewing v. Burnet*, 11 Peters, 54.)

Taking the deed "by its four corners" the intention of

the parties is manifest. To hold that the covenant in this deed is not binding because the parties unintentionally used the words "second part" when it is apparent from the context that they intended to use the words "first part," would be as shocking to equity as anything we can well imagine. Common sense and common honesty forbid that we should do so. This covenant must stand.

The testimony conclusively shows that the respondent and those under whom he deraigns title were in the open and notorious possession of lots numbered three (3) and four (4) from the date of the original deed to Lownsdale down to the date of the deed from Coffin to Carter, and it also appears that the respondent's immediate grantors, Burchard & Powers, and those under whom they deraigned title, were in the open and notorious possession of lot numbered two (2) from the date of the original deed to Lownsdale down to the date of the deed from Coffin to Carter—Burchard & Powers conveying to the respondent after the date of said deed. All their equities passed with the land to Bohlman, and, as they affect his estate, he can assert them against Carter. Was this open and notorious possession notice to Carter, and if so, was his purchase from Coffin, with notice of the prior equities of the respondent and his grantors, a fraud upon his rights?

No equitable doctrine is better established than that laid down by Lord Chancellor Hardwicke in *Le Neve v. Le Neve* (2 Ldg. Cases in Equity, 160), over a century and a quarter ago, wherein it was held that the person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.

It was held in *Barnes v. McChristie* (3 Penna. 67), that it was not necessary in any case to constitute notice that it should be in the shape of a distinct and formal communication, and it will be implied in all cases where a party is shown to have had such means of informing himself as

to justify the conclusion that he has availed himself of them. It has frequently been decided by the American, as well as the English Courts, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, will operate as notice.

Early in the present century it was held that actual and unequivocal possession was notice, not so much because possession is evidence of actual ownership, as because it is the duty of one who is about to purchase real estate to ascertain by whom and in what right it is held and occupied. And this doctrine is settled beyond dispute, both in England and in the United States.

Carter therefore bought with notice of the prior equities of Bohlman in lots numbered three (3) and four (4) and with notice of the prior equities of Bohlman's immediate grantors in lot numbered two (2), and his purchase was a fraud on their rights. As has already been decided, the equities of Burchard & Powers passed with the land to Bohlman and he can assert them.

It follows that Carter stands in the same position as his grantor. He has the legal estate, but he holds it as the trustee of Bohlman, who is the equitable owner.

The decree of the Court below must be affirmed.

Decree affirmed.

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*A. M. WITHAM, Respondent, v. JOHN M. OSBURN, Appellant.

VOID STATUTE.—Sections 15, 16 and 17 of Chapter 50 of the Miscellaneous Laws of Oregon authorizing the establishment of private roads over the land of an individual without his consent, for the private use of another, are unconstitutional and void. The Constitution of the State provides that "private property shall not be taken for *public use* without just compensation," which implies that it cannot be taken for *private use*, whether compensation be made or not.

PRIVATE ROADS CANNOT BE CREATED BY LAW.—If a different class of public roads than is now provided for by statute, is needed for the convenience of persons who are so situated as to have no connection with any public highway, the Legislature may provide for their establishment by providing that they shall be public instead of private roads, and that they may be used by the public.

* See 18 Am. Rep. 287.

APPEAL from Benton County.

This was a suit to enjoin appellant from opening a private road across the land of respondent. The injunction was granted, and appellant brings his appeal.

The other material facts are stated in the opinion of the Court.

R. S. Strahan, John Burnett, and Boise & Willis, for Appellant.

The main objection urged against the constitutionality of §§ 15, 16 and 17 of Chapter 50 of the Miscellaneous Laws is, that the use is not public. Generally it is for the Legislature to determine when and in what cases the public interests require the taking of private property for public use. (Sedgwick on Stat. and Con. Law, 499.)

The question whether the use is public or private, is not a judicial question, but one that rests entirely with the Legislature. (*Bloodgood v. The M. & H. R. Co.,* 18 Wend. 9; 2 Dallas, 304; 2 Blatchford R. 95; 4 Pick. 460; *Spring v. Russel,* 1 Green R. 273; 7 Pick. 453, 466; 1 Am. R. 237, 241.)

The easement acquired under this law is of a public nature. The road, when opened, may be lawfully traveled by all who have occasion to pass over it. The respondent does not acquire any exclusive property in the road, or in the land upon which it is located, as against all other persons. The law is, therefore, free of all constitutional objection. (*Sherman v. Bruck,* 32 Cal. 241; *Metcalf v. Bingham,* 3 N. H. 459; *Allen v. Stephens,* 29 New Jersey L. R. 509; *Brewer v. Bowman,* 9 Georgia R. 37; *Harvey v. Thomas,* 10 *Watts,* 63; *Pocopson Road,* 16 Penn. State R. 15; *Hays v. Risher,* 32 Penn. State R. 169; 18 Ala. R. 482; 4 Met. Ky. R. 337; 9 Ind. R. 103; 31 Penn. State R. 12; 5 Harrington's Del. R. 21; Id. 448; 11 Rich. Law, S. C. R. 529; 3 Jones N. C. Law R. 23.)

If the law is susceptible of two constructions, one of which will place it in antagonism with the Constitution, and the other will not, that which will not thus place it

must be adopted. (*People v. Reed,* 6 Cal. 228; *People v. Langdon,* 8 Cal. 11; 7 Pick. 446; Sedg. on Com. Law, 482; 6 Cranch, 87; 5 Cow. R. 564; 3 Denio R. 381; 3 Seld. 109; 19 Barb. N. Y. R. 81; 26 Wend. R. 599; 16 Mass. 245, 269; 3 Scam. 238; 1 Am. Rep. 237.)

This class of roads has been recognized as legal in all the older States except New York, and the same system has been adopted by all the new States without objection. (11 Pick. 423; Washb. Eas. and Servts. 175; 2 Hilliard on Law of Real Prop. 21, 22, 23, §§ 92 to 96 and 100; 11 Mo. 513; 4 Harris, Penn. R. 15.)

The leading case in the State of New York, opposed to this view (*Taylor v. Porter,* 4 Hill, 140), was decided under a statute totally unlike ours.

The fact that the Act in question has been in force ever since the adoption of the Constitution, and has been acquiesced in by Legislatures, Courts, the Bar and the people, without opposition on the ground of its unconstitutionality, is a contemporary interpretation of the most forcible nature. (*Stewart v. Laird,* 1 Cranch, 299; Sedg. on Con. and Stat. Law, 487.)

John Kelsay, Thayer & Williams, for Respondent.

The law giving the right to obtain a private road is unconstitutional and void. (4 Hill, 140; 2 Seld. 368; 14 Johns. 384; Washb. on Eas. 327, § 3; 27 Mo. 374; 3 Comstock, 517; 25 Mo. 261; 11 Barb. N. Y. 30; 39 Ill. 110, 113; Sedg. on Stat. and Con. Law, 174; Smith's Con. of Stat. 477, §§ 325, 326; 25 Iowa, 540; 27 Id. 43; 1 Am. R. 161, 225; 3 Pars. on Con. 537, 542; Washb. on Eas. 401; Goddard on Eas. 52, 179; 24 Wisc. 89.)

By the Court, PRIM, J.:

It is provided by our statute that when any person's land shall be so situated that it has no connection with any public road, he may make application to the County Court for the location of a private road leading from his premises to some convenient public road. When such application is made, the Court shall appoint three disinterested house-

holders to view out and locate such road according to the application; and also to assess and report the damages which may be sustained by the persons over whose lands such road may be located. After three days' notice given to all persons through whose lands such private road is to be located, they shall proceed to locate and mark out a private road thirty feet in width from some point on the premises of the applicant to some point on the public road; such viewers shall also have the power to determine whether or not gates shall be placed at proper points on said road, and assess the damages in accordance with such determination. They shall also make a report to the County Court of the private road so located by them, and also the amount of damages, if any, assessed, and the persons entitled thereto; and if the County Court shall be satisfied that such report is just, and after payment of all cost of locating such road and the damages assessed by such viewers, the County Court shall order such report to be confirmed, and declare such road to be a private road, and the same shall be recorded as such. This is the substance of §§ 15, 16 and 17, of ch. 50, of the Miscellaneous Laws, and those three sections contain all the provisions of the statute upon the subject of locating and opening private roads in this State.

The private road in question was located over the lands of respondent by the County Court, under the provisions of these sections of the statute. It is claimed by respondent that the proceedings of the Court in relation to the location of the road in question are not only irregular and defective in not complying with the provisions of the statute in such cases made and provided, but that they are absolutely void upon the ground that those sections of the statute authorizing such proceedings are unconstitutional and therefore void.

Section 18, of Article I, of the Constitution, provides that "private property shall not be taken for public use * * * without just compensation."

The Constitution of nearly every State in the Union contains a provision in substance like this, which has been generally construed by the Courts to imply that private

property may be taken for public use by making just compensation to the owner thereof, but that private property cannot be taken for private use whether full compensation shall be made or not.

"All separate interests of individuals in property are held by the Government under the tacit agreement, or implied reservation, that the property may be taken for public use upon paying a fair compensation therefor, whenever the public interest or necessities require that it should be so taken." "The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for full compensation, when the public interest will in no way be promoted by such transfer." (*Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige, 73; *Varic v. Smith*, 5 Paige, 159.)

In *Taylor v. Porter* (4 Hill, 140), it was held that the New York statute, authorizing a private road to be laid out over the lands of a person without his consent, was unconstitutional and void, upon the ground that the Legislature had no authority "to authorize the transfer of one man's property to another without the consent of the owner."

Mr. Justice Bronson says: "The right to take private property, for public purposes, is one of the inherent attributes of sovereignty, and exists in every independent government. But even this right of eminent domain cannot be exercised without making just compensation to the owner of the property. * * * But there is no provision in the Constitution that just compensation shall be made to the owner when his property is taken for private purposes," or if it can be taken at all for private purposes, it can be taken without regard to compensation.

In *Wilkinson v. Leland* (2 Peters, 657), Mr. Justice Story says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. * * * We know of no case in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as

inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

In the Matter of Albany Street (11 Wend. 149), Chief Justice Savage said: "The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another."

But, by looking into the cases in which statutes like ours have been upheld, it will be seen that it is admitted that private property cannot be taken for strictly private purposes without the consent of the owner; but it is denied that such statutes, in authorizing the location of private roads, conflict with this general rule. It is insisted that they are not private but *public* roads, and when established may be used by so many of the public as may have occasion to use them. This was the position assumed by the Supreme Court of California, in *Sherman v. Bruck* (32 Cal. 253).

The provisions of the California statute, in relation to the location of private roads, are very similar to ours. In delivering the opinion of the Court, Mr. Justice Sanderson said: "The Legislature has no power to lay out and establish private roads, in the sense that they are to be the private property of particular individuals." Such action, on the part of the Legislature, it was admitted, would be simply null and void. The Court, however, held the statute to be valid, upon the ground that such roads, when established, were not private but public roads, and might be used as such by the public. But by what process of reasoning the Court arrived at this conclusion we are unable to comprehend. The statute contains no provision indicating that when established, they shall be public roads, or that they may be used by the public; nor does it contain any provision whereby such roads may be kept open for the use of the public, if the private individual, at whose instance they were established, should see proper to close them. They are not only called private roads in the statute, but are established on the application and at the expense of private individuals.

Bouvier (2 vol. 488) says: "Private roads are such as are used for private individuals only, and are not wanted for the public generally. Public roads are kept in repair at the public expense, and private roads by those who use them." Thus it will be seen that the private roads provided for in our statute, correspond very well with Mr. Bouvier's definition of "private roads."

It has been argued that many persons are so situated as to have no connection with any public highway, and that such persons will be put to great inconvenience, unless private roads can be established for the use and benefit of such persons. In answer to this argument, we would suggest that the Legislature may meet the necessity by providing for the establishment of a different class of public roads than are now provided for by law. The Legislature, undoubtedly, has authority to authorize the taking of private property for the establishment of as many public roads as may be needed for public use. The Courts, in sustaining that class of roads called private roads, have been compelled to assume that they were public roads, although called private roads in the very Act in which they are provided for.

Having reached the conclusion that the Legislature exceeded its authority under the Constitution, in authorizing the establishment of private roads over the land of an individual, without his consent, for the private use of another, we therefore hold that so much of such statute as authorizes the location of such roads, is void.

It is therefore ordered that appellant be perpetually enjoined from further proceeding in the matter of the location of said private road over the land of respondent.

STATE OF OREGON, Respondent, v. SAMUEL VOWELS, Appellant.

MAYHEM.—Any offense made punishable by § 527 of the Criminal Code, may be denominated mayhem in indictments.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

George H. Durham, District Attorney, C. A. Ball and S. C. Simpson, for Respondent.

W. W. Page and W. W. Thayer, for Appellant.

By the Court, McARTHUR, J.:

The indictment in this case charges Samuel Vowels with the crime of mayhem, alleged to have been committed as follows: "The said Samuel Vowels, on the 25th day of December, 1870, in the county of Multnomah and State of Oregon, did purposely, maliciously, and feloniously, tear off the left ear of Joseph Taylor."

The only question to be considered arises upon the sufficiency of the indictment to support the conviction had thereon in the Court below. It is contended, by counsel for appellant, that under §§ 69 and 70 of the Criminal Code, the crime charged to have been committed must be named in the indictment, if it have a name, or, if it have no general name, it must be indicated by a brief description, as given by law. Of the correctness of this position there can be no doubt. But it is further urged that there is no such crime known to the laws of Oregon as the crime of "mayhem." Of this let us inquire.

The indictment herein is based upon § 527 of the Criminal Code, which provides that "if any person shall purposely and maliciously, or in the commission or attempt to commit a felony, cut or tear out or disable the tongue, or put out or destroy the eye, or cut or slit or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable the limb or member of another, such person, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for not less than one nor more than twenty years." It may not be amiss to state that this section is based upon the English statute of 22 and 23 Car. II, ch. 1, commonly known as the Coventry Act, the circumstances which led to the passage of which are recounted by Lord Macaulay (Hist. Eng., vol. i, 8vo. ed. p. 77).

Although the crime of tearing off the ear of another is not embraced within the crime of mayhem, as known to the common law, and although our Courts have no right to assume jurisdiction of common law offenses not included in our Criminal Code, yet we conceive the ground taken by appellant's counsel to be untenable, for the reason that the crimes made punishable by the section cited are, by the Criminal Code, itself, declared to be mayhem. The Criminal Code, fully chapterized, sectionized, and, with the syllabi of the different chapters, was submitted to the Legislative Assembly, and, by that body, passed in exactly the shape in which it now stands upon the statute-book. These syllabi became parts of the law, and furnish the highest source from whence to draw information in relation to the nomenclature of the said Code. In the syllabus of chapter 2, § 527, is referred to as describing the crime of mayhem and prescribing the punishment therefor. We are, therefore, of opinion that any offense made punishable by said section may, in the indictment, be denominated mayhem.

It follows that the judgment of the court below must be affirmed.

JAMES W. KING and J. P. O. LOWNSDALE, Administrators of Estate of WM. M. KING, Deceased, Respondents, v. HAMILTON BOYD, Appellant,

OBJECTIONS NOT WAIVED BY FILING ANSWER.—Objections to the jurisdiction of the Court and to the sufficiency of the complaint to constitute a cause of suit, are not waived by answer to the merits.

ADMINISTRATOR—AUTHORITY TO SUE.—An administrator has no authority to institute a suit to set aside a conveyance of real estate made by his decedent in his lifetime, without leave first had and obtained from the County Court or Judge thereof.

IDEM—RIGHT TO POSSESSION OF REAL ESTATE OF DECEDENT.—The right of an administrator to the possession of the real estate of his decedent is temporary, and is limited to the purposes of administration. It would be an unsafe rule to allow an administrator of an estate upon his own motion and without any showing of a necessity therefor, for the purposes of administration, to engage in litigation concerning the title to the realty of an estate. In such cases the heirs at law are the real parties in interest, and should be allowed to control such litigation.

APPEAL from Multnomah County.

On the 9th day of November, 1869, Wm. M. King, a resident of the city of Portland, died intestate, and respondents, James W. King and J. P. O. Lownsdale, were, on the 4th day of February, 1870, duly appointed administrators of his estate.

On the 8th day of October, 1869, said Wm. M. King, for the expressed consideration of $3,000, conveyed by deed of warranty lots Nos. 1, 2, 3 and 4 in block No. 221, in the city of Portland to appellant Boyd.

Respondents allege that appellant fraudulently obtained the execution of said deed; that said King at the time of such execution was very old and infirm, both in body and mind, and was so imbecile in mind that he was not legally capable of contracting or of properly transacting business. That appellant Boyd, well knowing the same, took advantage thereof to overreach and defraud said Wm. M. King out of said lots, and that in fact he only paid thereon the sum of about $136.66, the same having been paid by appellant since the death of said Wm. M. King for certain improvements on a street adjacent to said lots. Respondents further allege that the price agreed to be paid by said Boyd for said lots was greatly inadequate; said lots being at the time of said pretended sale worth $5000. That before the commencement of this suit they (respondents) tendered to said Boyd the sum of $136.66, paid out by him as aforesaid, with interest thereon since the date of said deed, and demanded a reconveyance of said lots, all of which appellant refused.

The complaint concludes with a prayer for a decree of the Court setting aside said deed as fraudulent and void, etc.

The defendant demurred to the complaint on the grounds that (1) it does not state facts sufficient to constitute a cause of action, and (2) it appears from the complaint that the plaintiffs have not legal capacity to sue.

This demurrer was overruled by the Court and defendant filed his answer, denying substantially the material allegations of the complaint. The issues of fact were submitted

to a jury, which returned a special verdict in favor of the plaintiffs, on which a decree was rendered by the Court for the relief prayed for in complaint.

Defendant appealed, assigning errors as occurring during the course of the trial, but upon the argument in this Court relied only on the questions of law raised by the demurrer, which it is claimed were not waived by the answer.

D. Logan, for Appellant.

It does not appear from the pleadings or evidence that Boyd was ever in possession of the property in controversy. or that he ever kept respondents out of possession or from taking possession.

At common law administrators have no concern with the real estate of their intestate. So far as they have or ever had any control over real estate, it is in consequence of positive enactment. (3 Ohio, 556.)

The first modification of the common law gave the administrator power to sell the real estate for the payment of debts; but this power (Civ. Code, § 1113) gives no right to its possession or control by the administrator (16 N. Y. 281, 283). Our statutes have given this additional right to the executor or administrator (Civ. Code, § 1088).

But this provision only gives a possessory right to the administrator for the purposes of the administration. The seizin is in the heirs from the moment of the death of the intestate, subject to the possession of the administrator, and to be divested by a sale for the payment of debts, as clearly appears from § 1160 of the Civil Code: "The real property of the deceased is the property of those to whom it descends by law, or is devised by will, subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate, as in this chapter provided."

Thus, with the exception thus stated, the special character of the administrator, as known to the common law and familiar statutes, is still preserved. Beyond the rights of action that may arise to the administrator from the right to the possession and control, his rights and powers must

remain the same as they were before, and as he could not previously maintain an action, either in law or equity, for the recovery or maintenance of either possession or title, so his right to the possession only enlarges his right of action to that extent; and it must still be held not his province to vindicate or clear up, or remove adverse claims to title. (*Smith v. McConnell,* 17 Ill. 142; 23 Mo. 99; *Streeter v. Patton,* 7 Mich. 350; 11 Id. 382.)

An administrator suing must have a cause of action *as administrator.* He does not represent the heirs or their interests. He has but a naked interest in the possession of the real estate coupled with a power to sell. His duties are strictly limited and defined, and his rights of action cannot be broader.

Hill, Thayer & Williams, and J. H. Reed, for Respondents.

This suit is properly brought by the administrators, they being entitled to the possession and control of the real as well as the personal property of the deceased until administration is complete. (Civil Code, § 1088; *Curtis v. Sutter,* 15 Cal. 259; *Teschemacher v. Thompson,* 18 Cal. 20; *Harwood v. Marye,* 8 Cal. 580.)

By the Court, BONHAM, J.:

Although after the overruling of the demurrer, an answer filed in this case and a trial had upon the merits, resulting in favor of the claim of respondent, yet it is conceded that if the demurrer was in the first place well taken, it may be insisted upon, and would operate as a reversal and a dismissal of this cause upon appeal. (Civil Code, § 70.)

The question in this case is, has an administrator authority, by virtue of his office or position as such, to litigate questions of title, concerning the real estate of his decedent, upon a showing such as is set out in plaintiff's complaint?

It is claimed by counsel for respondents that an administrator has such authority, derived from § 29 of the Civil Code, and from the other sections of the statute, cited by

them in their brief, defining the powers and duties of executors and administrators. On the other hand it is urged, by counsel for appellant that the only authority over or concern with the real estate of his decedent which an executor or administrator possesses is derived from statute, and is limited to his right to the temporary possession of the same during the course of administration for the purpose of preserving the land from waste, with the right to temporarily lease the same and collect the rents and profits, and, if necessary, after exhausting the personal assets upon a proper showing, to obtain an order from the County Court to sell the same, or so much thereof as may be necessary to pay claims against the estate and expenses of administration.

The authority of an executor or administrator, over the real estate of his decedent, being in derogation of the common law, we think is, and ought to be, strictly limited to his rights and powers as created and defined by statute. And we think it would be an unwise and unwarranted construction of the authority of executors or administrators to infer from any language found in the statute on that subject that they might, upon their own motion, institute suits to set aside conveyances, or remove clouds from titles to real estate, without any showing as a condition precedent, that the possession of the same was wrongfully withheld, or that there was any necessity for selling the same, or any part thereof, to satisfy claims against the estate.

The *rule*, as declared by our Practice Act, and conclusively sustained by reason, is that all actions or suits shall be prosecuted in the name of the real party in interest. There can be no question about the wisdom of this rule, and it should be strictly adhered to in all cases which do not come within the exceptions to it, as declared by statute.

No one is better qualified to litigate the title to real estate than the person who owns it. An administrator who has no direct interest in the result of a suit, who personally loses nothing if the suit be injudiciously instituted and adversely determined, is not as safe a person to entrust with the right to litigate as he who is the owner of the property

which is the subject of litigation and the one who must suffer if the determination of the cause be adverse to him. A due regard for the rights of both heirs and creditors of estates, we think, demands that the limitations of our statute, on the authority of executors and administrators, to institute suits, affecting the title to real estate, should be carefully guarded so that estates may not be subject to be consumed by the costs and expenses of ill-advised lawsuits.

In this case, whatever the facts may have been, so far as anything appears in the pleadings, or any of the proceedings, Boyd, the appellant, never wrongfully or otherwise withheld the possession of the land in controversy from the administrators, and there was no occasion or necessity for the sale of the same, or any part thereof, to pay claims against the estate. In the absence of any showing by the administrators, that there was some necessity for their interference with the lots in question, for some purpose of administration, recognized by the statute, they had nothing to do with the same, and it was by the law the absolute property of the heirs of Wm. M. King, to whom it descended.

But there is another provision of our statute on this subject which is not referred to in the briefs of counsel which we think is conclusive of this case. Section 1135 of the Code reads: "Whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration, and the claims against the estate, and the deceased shall in his lifetime have made or suffered any conveyance, transfer or sale of any property, real or personal, or any right or interest therein with intent to delay, hinder or defraud creditors, or when such conveyance, transfer or sale has been so made or suffered, that the same is void in law as against creditors, or when the deceased in his lifetime has suffered, consented or procured any judgment or decree to be given against him with such intent, or in such manner as to be likewise void, it is the duty of such executor or administrator to make application by petition to the County Court or Judge thereof for leave to commence and prosecute to final judgment or decree, the necessary and proper

actions, suits or proceedings, to have such conveyance, transfer, sale, judgment or decree declared void, and the property affected thereby discharged from the effect thereof." (Civ. Code, §§ 1136, 1137.)

The object and effect of § 1135 of the Code as above quoted, we are clearly of the opinion is to declare that an executor or administrator shall not, upon his own motion, and without any showing of a necessity therefor, for the purpose of administration, institute or maintain suits to determine questions affecting the title to the real estate of decedent.

We think that appellant's demurrer was well taken, for the reason that the complaint does not state facts sufficient to constitute a cause of suit in respondents as administrators of the estate of Wm. M. King, deceased. And the decree of the Court below should be reversed and this cause dismissed without prejudice.

JULY TERM, 1873.

BARTLETT WHITLOW v. GEORGE H. REESE et al.

COUNTIES CANNOT PRE-EMPT LAND IN THIS STATE UNDER THE ACT OF CONGRESS OF MAY 26TH, 1824.—The Act of Congress of May 26th, 1824, "granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same," was never in force in this State. Neither was the Town-site Act of May 23d, 1844, in force in this State prior to July 14th, 1854.

APPEAL from Yamhill County.

The facts are stated in the opinion of the Court.

Boise & Willis, Curry & Hurley and J. N. Dolph, for Appellant.

P. C. Sullivan and James McCain, for Respondents.

By the Court, MOSHER, J.:

The plaintiff in this suit seeks to quiet the title to a tract of forty acres of land, of which he is in possession, and which he claims is a portion of the east half of the donation

land claim of Joel Perkins and wife. He derives his title from Laura A. Patterson, widow of said Perkins. The defendants, George H. Reese and wife, claim that the tract in dispute is a part of the west half of said claim, to which they deraign title from the heirs of said Perkins. The east half has been patented to Laura A. Patterson, the widow, and the controversy arises from the fact that one hundred and sixty acres of said claim, including the site of the town of Lafayette, has been patented to the Board of Commissioners of Yamhill County, thus changing the division line. If Perkins and wife were entitled to a patent for the whole claim of six hundred and forty acres, the title to the tract in dispute is in the plaintiff, but if the County Commissioners can hold the town site, it is in the defendants.

The facts appearing in evidence are, that in 1845, Joel Perkins purchased the claim, on which there was then a log-cabin, from one John Copenhagen, and lived on it, at intervals, until September, 1848, when he went to California. He returned in June, 1849, and resumed his residence. In July, 1850, he was married to Laura A. Hawn, now Laura A. Patterson. On the 8th of October, 1852, he filed in the office of the Surveyor-General of Oregon a notification on six hundred and forty acres, under the fourth section of the Act of 27th September, 1850, known as the Donation Act, and made proof of residence and cultivation from the 30th of June, 1849. On the 8th of April, 1854, he made his final proof of continued residence and cultivation up to that date. Having proved to the satisfaction of the Register and Receiver of the Land Office, a compliance with the conditions of the law, on the 30th of October, 1869, a certificate was issued by them to the widow and heirs at law, for the said tract, with the exception of the town site, in which the east half was designated for the widow. It is admitted that a patent was subsequently issued in accordance therewith.

The defendants have attempted to prove an abandonment by Perkins of that part of the claim included in the town site, and for this purpose introduced a copy of a quit-claim deed, dated 11th May, 1850, signed by Joel Perkins and

one Johnson, to the Board of Commissioners of Yamhill County, for the town plat of Lafayette, but it has only one witness, and is not acknowledged, nor has its execution been proved. What effect this paper might have had on the question, if properly proved, is, however, destroyed by the subsequent notification of Perkins in 1852, and by the positive proof of residence on, or cultivation of, this part of the tract during the whole term of four years.

On the 19th April, 1858, the Board of Commissioners of Yamhill County, having previously obtained the permission of the Commissioner of the General Land Office therefor, entered at the Land Office at Oregon City one hundred and sixty-three and sixty-four one-hundredth acres and received a certificate, upon which, it is admitted, a patent subsequently issued. The patent not having been produced in evidence, there is some doubt as to the Act under which this entry was permitted. In a letter dated 28th December, 1859, the Commissioner writes: "In the case of the town the Board of Commissioners for Yamhill County were permitted to make an entry under the town-site law of 23d May, 1844." He also refers the claim to the town-site law under the date of 24th October, 1868. If this is the fact the question is no longer an open one. The Supreme Court of the United States have decided that the Act of 23d May, 1844, was not in force in Oregon prior to the 14th July, 1854. (*Stark v. Starr*, 6 Wall. 402.)

"Although the town-site law was in force in Oregon in the year 1858, when this entry was made, no land could be appropriated under it for the benefit of occupants of town sites, which had already been granted to others by the terms and conditions of the Donation Law. The Donation Law is a grant in the present, and gives the fee-simple to every settler who avails himself of its provisions from the date of his settlement. True, until the completion of the subsequent conditions of residence and cultivation and proof thereof, it is an estate upon condition, what is known at common law as a base or conditional fee, subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee nevertheless,

and upon the completion of the residence and cultivation, or other conditions, it becomes absolute and unqualified." (*Chapman v. School Dist. No.* 1, 1 Deady, 113.)

Perkins had completed his four years' residence and cultivation on the 30th June, 1853, before the town-site law was extended to Oregon; hence the entry by the County Commissioners and the patent under it was, in the language of Judge Deady, without color of law or authority, and simply void.

It is claimed in the argument, although we do not find any evidence of the fact, that this entry was made under the Act of 26th May, 1824, entitled "An Act granting to the counties or parishes of each State or Territory of the United States, in which the public lands are situated, the right of pre-emption to a quarter section of land for seats of justice in the same." This Act was never in force in this State. In organizing the Territory of Oregon by the Act of 1848, Congress declared that the laws of the United States should be in force in said Territory, "so far as the same or any provision thereof may be applicable." It has never been held that this provision had the effect of extending over the State any portion of the land system of the United States in advance of the public surveys, upon which that system rested, and without which, as the law then stood, that system was inoperative. (*Stark v. Starr, supra.*)

Congress passed no law in anywise affecting title to lands in Oregon Territory till 27th September, 1850. (*Lownsdale v. Parrish,* 21 How. 290.)

The Supreme Court of the United States, as we have before stated, have decided that this Act did not extend to Oregon either the Pre-emption Act of 1841, or the Town-site Act of 1844. The County-seat Act of 1824 is a part of the land system in force at that time, which has never, by any other Act, been extended to this State.

The patent to the County Commissioners for the town site being void, the only remaining question is as to the residence and cultivation of Perkins on this portion of the tract. His notification included the whole of the six hundred and forty acres, and his proof, which was satisfactory to the Commis-

sioner of the General Land Office, extended over the whole tract. That officer based his refusal to extend the patent not upon a failure of residence and cultivation, but upon the supposed conveyance by Perkins & Johnson, in May, 1850. This opinion is unquestionably erroneous. If the deed referred to had been legally executed and proven, which it is not, still it would not be binding upon the estate afterwards acquired by Perkins under the Donation Act. This would be a proper construction of the law in case of a conveyance with covenants of warranty, or any express stipulation or agreement from which it would reasonably appear that the parties dealt and bargained with reference to the possibility or contingency of the grantor or vendor acquiring title from the United States; but a simple quit-claim by Perkins during his occupancy and before the passage of the Act granting the land, would in nowise affect the after-acquired estate in the premises. (*Chapman v. School District No.* 1, 1 Deady, 150.)

The Court, therefore, finds that Perkins was entitled to a patent for the whole tract, as described in his notification, according to his claim survey, and that the division line, as claimed by the plaintiff, is the correct one.

Decree for plaintiff.

T. J. CARTER and O. P. MASON, Respondents, v. THE CITY OF PORTLAND, Appellant.

DEDICATION.—A dedication to public use may be by parol as well as by deed.

IDEM.—To constitute a dedication by parol, there must be some act or acts proved, evincing a clear intention to devote the premises to the public use.

IDEM—WHAT CONSTITUTES.— If one owning lands or having an equitable interest therein (subsequently acquiring the title thereto), lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked streets, alleys, public squares, parks, etc., and sells lots with clear reference to said map or plan (though unrecorded), the purchasers of lots in said town acquire, as appurtenant thereto, every easement, privilege and advantage which the map or plan represents as a part of the town. Upon the sale of lots with such reference to the map or plan, the dedication of the spaces marked streets, alleys, public squares, parks, etc., becomes irrevocable.

ACCEPTANCE AND USE.—Formal acceptance by the corporate authorities is not necessary. Where the dedication is irrevocable, it need not be followed by immediate and continued use.

NOTICE.—Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, or of the public, so as to put him on inquiry into ascertaining their nature, will operate as notice.

IDEM.—Notice should, with rare exceptions, be implied where one is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

W. W. Page, W. W. Thayer and O. P. Mason, for Respondents.

R. Williams, for Appellant.

By the Court, MCARTHUR, J.:

This suit was originally instituted in the Circuit Court of the State of Oregon for Multnomah County, to quiet the title to certain parcels of land situate in the city of Portland. The plaintiffs had a decree, enjoining the defendant from disturbing them in their enjoyment of the premises described in the complaint, and from setting up further claim thereto; and also for sixty dollars damages and for costs and disbursements. The cause is in this Court at this time to be tried *de novo*, upon the transcript and the depositions certified up therewith.

The complaint alleges in substance, that the plaintiffs are the owners in fee simple, and in possession of blocks numbered 280 and 281, in the city of Portland, county of Multnomah and State of Oregon. That the defendant claims an interest or estate in said blocks adverse to plaintiffs, viz.: That said property was dedicated by some former proprietors of the city of Portland for public use, and that the said claim is a cloud upon plaintiff's title. That on January 21, 1869, the defendant, under its said claim, wrongfully and unlawfully broke and entered upon said premises and broke and threw down plaintiffs' fence, enclosing the same, and damaged plaintiffs in the sum of one hundred dollars. That

on February 6, 1869, the defendant again wrongfully and unlawfully broke and entered the said premises and again tore down said fence, and damaged the plaintiffs in the further sum of one hundred dollars, and that the defendant threatens to repeat the said alleged wrongful acts. Wherefore, they pray that the title may be quieted in them; that the defendant be perpetually enjoined from repeating the said wrongful acts, and that they have and recover the amount of damage as alleged.

The defendant answered, denying the plaintiffs' possession, and alleging the said property to be public parks, claiming that the same had been dedicated by the former proprietors of said city, viz.: Stephen Coffin, W. W. Chapman and D. H. Lownsdale, who, in 1850, were the owners and in possession, and who caused two maps of said city to be made by one Brady. That these two maps were copies of the original plat of the city of Portland made by the proprietors, upon which the real property in controversy was marked out and designated as the public parks. That said Coffin kept and retained one of these copies, and made frequent sales of lots and blocks of land in said city by reference thereto. That the city of Portland adopted said map in 1852, and that Coffin ratified it after that date. That in 1862 Coffin obtained from the General Government a patent for the land taken by him under the Donation Act of September 27, 1850, which embraced the premises described in the complaint. That the plaintiffs fraudulently combined and confederated with said Coffin to obtain and recover from said city the said parcels of land dedicated to the public use. That on December 4, 1867, said Coffin, combining and confederating with the plaintiffs, fraudulently made and published a map, or plat, designated as "Coffin's Addition to the City of Portland." That on this map the parcels of land in controversy were numbered as blocks usually are upon town plats. That on all prior maps the said parcels of land remained unnumbered, and were designated as public parks. That said pretended map was executed by said Coffin before the plaintiff Mason, who signed his name thereto as a witness, and who, be-

ing a notary public, took the acknowledgment of Coffin and wife thereto. That the said map was recorded in the record-book of deeds of Multnomah County, Oregon. That on December 28, 1867, the plaintiffs, having a full knowledge of all the facts alleged in the answer in relation to the dedication, obtained from Coffin and wife a deed purporting to convey to them the parcels of land in controversy, together with other parcels of land in said city of Portland, for and in consideration of the expressed sum of $3000. The defendant charges that the said plaintiffs did not pay said consideration, but that all the acts of plaintiffs and of Coffin, in relation to the transfer of said property, were fraudulent, and therefore void, as against the city, and all private persons, who purchased lots or blocks of said Coffin, prior to the making of the last-mentioned map.

The reply of the plaintiffs puts in issue the material allegations of the answer, and further alleges that they had purchased the property in good faith and for a valuable consideration, and without any knowledge, information or notice of the same having been dedicated to the public; that the map called "Coffin's Addition to the City of Portland," is the only map of record of said property; that the Brady map was never of record, and that neither of the plaintiffs had any knowledge of the existence of any such map or plat until long after their said purchase; that said Coffin was the owner of said blocks, and that plaintiffs, nor either of them, had any knowledge that there ever had been a dedication of, or an attempt to dedicate, the said property to public use.

The first question to be determined in this case is, did Stephen Coffin, the original owner of the land, and one of the proprietors of the town, dedicate these parcels of land to the public use, as alleged by the defendant in the answer?

Beardsley, J., in the case of *Hunter v. The Trustees of Sandy Hill* (6 Hill, 407), has furnished the most comprehensive definition of dedication to be found in the books, and he declares it to be "the act of devoting or giving property for some proper object, and in such manner as to conclude the owner." It is a well-settled principle of the

common law that property may be dedicated to the public use, and that the dedication may be by parol as well as by deed. (*Barclay v. Howell's Lessee*, 6 Pet. 498; *Dummer v. Jersey City*, 1 Spencer (N. J.), 86; *State v. Catlin*, 3 Vt. 530; *McKee v. St. Louis*, 17 Mo. 184; *Hunter v. Sandy Hill*, 6 Hill, 407; *Post v. Pearsall*, 22 Wend. 425, 454; *Dover v. Fox*, 9 B. Mon. 200.) It is also well settled that, to constitute a dedication by parol, there must be some act or acts on the part of the owner evincing a clear intention to devote or dedicate his property to some proper public use or private object. It becomes necessary, therefore, to ascertain from the testimony whether the acts of Coffin, if any he performed, evince a clear intention to dedicate the premises in controversy to the public use. In this connection it is proper to state that we have not regarded any of the testimony tending to prove the acts of Coffin, performed before the passage of the Donation Act, except that showing his participancy in procuring a survey, and in causing a certain map of the city of Portland to be made by one Short, and two copies thereof to be made by one Brady. The acts of Coffin, performed prior to September 27, 1850, the date of the Act referred to, standing alone, could not, in this case, be admitted to establish a dedication. The evidence of the dedication must be found, if at all, in the acts performed subsequently to that time, and the above exception is made for the reason that it is clearly proved that Coffin used one of the copies of the Short map, made by Brady, in describing and referring to lots and blocks in the city of Portland, sold by him after the passage of the Donation Act, and also after he had obtained his patent from the General Government in 1862.

The following facts are clearly established by the testimony: That during the year 1850, Stephen Coffin, Daniel H. Lownsdale and Wm. W. Chapman were in possession, and claimed to be the owners of what was known as "The Portland Land Claim." That in that year, and before the passage of the Donation Act, they caused a survey to be made of blocks, lots, streets, parks and other public grounds of the city Portland, and portions thereof were

designated upon the ground by stakes and monuments. That they caused a map thereof to be made by one Short, and upon said map the parcels of land described in the complaint were designated, with others, as public parks, and were unnumbered. That prior to the said survey and mapping, there were settlements made upon the "Portland Land Claim" for the purposes of trade and commerce. That the said city was duly incorporated as a body politic for municipal purposes, by Act of the Legislature of the then Territory of Oregon, dated January 23, 1851, and has ever since remained incorporated. That in 1850, John Brady, by the order of Coffin, Lownsdale and Chapman, made two copies of the original map or plat of the city made by Short, upon both of which copies the property described in the complaint was marked and designated as public parks, and the spaces were unnumbered. That Coffin took possession of one of the copies made by Brady, and made sales of lots and blocks according to the same, up to December, 1867. That in April, 1852, the city of Portland, by its Common Council, adopted the map or plat drawn by Brady as the official map or plat of the city, and this act was known to said Coffin. That Coffin adopted, exhibited and used the Brady map from the time it was made, and after the date of the passage of the Donation Act, and after the adoption of the said map by the said City Council, and made sales of lots and blocks as designated on the same. That subsequently to the passage of the Donation Act, and prior to December 4, 1867, the date of the making of a certain map to be presently mentioned, Coffin sold certain lots of land on the blocks lying opposite to and facing the public parks, at the same time informing the purchasers that the lots purchased were situated adjacent to the public parks. That on December 4, 1867, Coffin made, published and recorded a map or plat designated as "Coffin's Addition to the City of Portland," attached to which was a written instrument explanatory thereof, by which he donated to the city all the streets as shown by said map or plat, and that on this map or plat the parcels of land lying between East and West Park streets, which

parcels of land were designated on the previous maps as public parks, were numbered respectively as blocks 276, 277, 278, 279, 280, 281 and 282.

The facts being as stated, we will proceed to an examination of the principles of law applicable thereto, in order to ascertain whether the acts of Coffin can be properly regarded as evincing a clear intention to dedicate, and whether the dedication when made became irrevocable.

In the *United States v. Chicago*, 7 How. (U. S.) 185, the principle is laid down that a mere survey of land, by the proprietor thereof, into lots, streets and squares, will not amount to a dedication without a sale, and it is well settled, by the weight of authority, that a sale of lots or blocks with reference to a given map or plat describing lots and blocks as bounded by streets, will amount to an immediate and irrevocable dedication of the streets. (*Rowan's Exrs. v. Portland*, 8 B. Mon. 232; *Augusta v. Perkins*, Id. 207; *Newport v. Taylor*, 16 B. Mon. 699; *Stone v. Brooks*, 35 Cal. 489; *Hannibal v. Draper*, 15 Mo. 634; *Schenley v. Commonwealth*, 36 Penn. St. 62; *Dubuque v. Maloney*, 9 Iowa, 450; *Winona v. Huff*, 11 Minn. 119; *Huber v. Gazley*, 18 Ohio 18; and *Logansport v. Dunn*, 8 Ind. 378.)

The same doctrine applies to public squares and parks, and the dedication may be established in the same manner as in case of streets and alleys. (*Commonwealth v. Rush*, 14 Penn. St. 186; *Dover v. Fox*, 9 B. Mon. 200; *State v. Wilkinson*, 2 Vt. 480; *Watertown v. Cowen*, 4 Paige (N. Y. Ch.), 510; *Price v. Thompson*, 48 Mo. 363; and *Abbott v. Mills*, 3 Vt. 526.)

In the last case referred to it was held that whenever a public square or common is marked out or set apart as such by the owners, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietors that it should so remain; or even if there are no marks upon the ground, but a map or plan is made, and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use.

We are of opinion that if one owning land, or having an equitable interest therein, and subsequently acquires the title thereto lays out thereon a town, and makes and exhibits a plan thereof with spare ground marked as streets, alleys, public squares or parks, and sells lots with clear reference to that plan or map, the purchasers of the lots acquire as appurtenant thereto every easement, privilege and advantage which the plan or map represents as part of the town. (*Dovaston v. Payne*, 2 Smith's Ldg. C. 224, 225; *Rowan's Exrs. v. Portland*, 8 B. Mon. 232, 237; *Barclay v. Howell's Lessees*, 6 Pet. 206, 207; *United States v. Chicago*, 7 How. U. S. 196; *Cincinnati v. White's Lessees*, 6 Pet. 431; *Dubuque v. Maloney*, 9 Iowa, 455; *Godfrey v. Alton*, 12 Ill. 35; *Asken v. Wynne*, 7 Jones N. C. 22; *Wilder v. The City of St. Paul*, 12 Minn. 203, 204, 211; *Trustees of M. E. Church of Hoboken v. Hoboken*, 33 N. J. Law, 21.)

From the facts and the law as stated, we are of opinion that Coffin made a dedication by parol of the parcels of land described in the pleadings to the public, to be used as public parks, and that the said dedication was subsequent to the date of the passage of the Donation Act, and prior to the date of the execution of the map known as "Coffin's Addition to the City of Portland," and also prior to the date of the execution of the deed of Coffin and wife to the plaintiffs, under which the plaintiffs claim.

We pass now to the consideration of the questions of acceptance and user; for it is claimed by plaintiffs' counsel that nothing less than a formal acceptance, by the corporate authorities, of these particular parcels of land, or an actual entry upon, use and improvement thereof, by said corporate authorities, will amount to an acceptance, and that an acceptance was necessary to make the dedication irrevocable.

The facts tending to show an acceptance on the part of the city are the following: That on April 29, 1852, the City Council, by proper resolution, adopted the Brady map as the city map or plat, and ordered the Mayor to appoint a special committee, with instructions to call upon the proprietors of the city of Portland, and obtained from them a bond for or deed of all the public streets in said city, and a deed

of trust for all the lands donated to benevolent societies, public schools, public squares, etc. That a copy of the said map was made for the public use, that the same was kept and used by the city, and that on March 28, 1866, an ordinance was passed by the City Council, authorizing the Committee on Streets and Public Property to contract for the improvement of the public parks west of Seventh and south of Salmon streets, which includes the land in controversy.

If the position assumed by plaintiffs' counsel be correct, there could be no dedication to an unincorporated town or village, either by deed or in parol. The law is, that a parol dedication is not a grant; it is a right created in favor of the public, and is in the nature of an *estoppel in pais*. There need be no grantee *in esse* to take the fee, nor is it essential that the legal title should pass from the owner. (*Beatty v. Kurtz*, 2 Pet. 256; *New Orleans v. United States*, 10 Pet. 662; *Dubuque v. Maloney*, 9 Iowa, 450; *Kelsey v. King*, 33 How. Pr. 39; *Town of Paulet v. Clark*, 9 Cranch, 292; *McConnell v. Lexington*, 12 Wheat. 582.)

In *New Orleans v. United States*, just cited, the Court says that it is not essential that this right of use should be vested in a corporate body; it may exist in the public and have no other limitation than the wants of the community at large. We are of opinion that the acts of the city, by its council, show an acceptance on its part of the parcels of land in controversy, if such formal acceptance were necessary. But a formal acceptance is not necessary. The acts of the inhabitants in the purchase of lots, the improvement of streets, etc., and their use, conclude the owner and the corporation may insist upon every right which any of its inhabitants may have acquired by virtue of the original dedication. (*Watertown v. Cowen*, 3 Paige (N. Y. Ch.), 514; *Dovaston v. Payne*, 2 Smith's Ldg. Cases, 237, 241; *Wyman v. Mayor of New York*, 11 Wend. 499; *Langley v. Gallipolis*, 2 Ohio St. 107; *New Orleans v. United States*, 10 Peters, 713.)

The purchase of lots and improvement of streets, with reference to the Brady map or plat, were acts of acceptance of the streets and other public places, and indeed of the

entire plan of the city as displayed upon the map. The fact that the city had not, before the alleged purchase by plaintiffs, used and improved the parcels of land in controversy cannot redound to the advantage of the plaintiffs. It was not necessary that these particular pieces or parcels of land should have been improved or used prior to said alleged purchase in order to entitle the city to hold them. They were shown by the map adopted by Coffin, and by the city, to be public parks, and numerous and valuable private and public improvements were made with reference thereto, and thereby the dedication became irrevocable. As regards the improvement and use of public parks or squares, in like situation, it is sufficient if they are put to the use to which they are dedicated when the public convenience requires. In *Rowan's Exrs. v. Portland,* above cited, a case somewhat analogous to the one under consideration, the Court says that: "The dedication having been made and proved by the map, and the sales and conveyance of lots with reference to it, did not require a subsequent user to establish or prove it, and we are not sure that it could have been defeated or lost by non-user even for twenty years, except so far as it was ousted by an adverse use for that period. To say that a dedication to the use of the future town and of the public, made when the site of the town was in a state of nature, would be lost if not followed by immediate and continued use, or should be limited to the extent to which it was thus used, would deprive the dedication of its intended value and would make it a mockery." The local authorities or the corporate guardians are the ones whose duty it is to improve, adorn and embellish the public parks, and where the dedication is irrevocable, as we hold it to have long since become in this case, they are the judges as to the time when the public health and public pleasure demand the use and enjoyment of the lands dedicated. The original owner, though he has the *naked fee,* has no right whatever to interfere with the premises except where the use becomes absolutely impossible, or where the corporate authorities seek to put the premises to some other use than that to which they were originally dedicated.

Then he, as well as any lot-holder of the city, may proceed in equity to enforce the use according to the original dedication. (*Barclay v. Howell's Lessees,* 6 Pet. 498; *Williams v. The Church,* 1 Ohio St. 478; *Webb v. Moler,* 8 Ohio, 552; *Board, etc., v. Edson,* 18 Ohio St. 221; *Harris v. Elliott,* 10 Pet. 25; *County v. Newport,* 12 B. Mon. 538.)

We pass now to the consideration of the question as to whether the plaintiffs had notice of the claim of the public upon this land prior to their alleged purchase from Coffin and wife. The testimony shows that they knew that Coffin was the original proprietor of that portion of the city wherein the land in controversy lies. They knew also that he, together with the other proprietors, had laid out and established a town upon the "Portland land claim." They knew also that a town had been built upon said claim, which extended west beyond the public parks. They knew also that it had been built upon a plan indicated upon some other map than the one made by Coffin in December, 1867, and that no improvements had been made upon the "Park Blocks," as they are commonly called, throughout the entire length of the Coffin claim, while the blocks on both sides of the parks had been extensively improved. The testimony also shows that both plaintiffs were residents of the city prior to the date of the making of the map of "Coffin's Addition to the City of Portland." That Carter was a member of the City Council in 1866, when the ordinance authorizing the "Committee on Streets and Public Property" to contract for the improvement of the public parks was passed. That deeds from Coffin, conveying nearly all the lots and blocks lying in that part of the city, had been executed to different parties prior to December, 1867, and these deeds were of record in the proper office, and many of the lots and blocks were improved and occupied. That the map, according to which the conveyances were made, was the Brady map, copies of which were upon the walls of the public offices of the city and county, to which plaintiffs frequently resorted in transacting their business. That plaintiff Carter had been engaged in buying and selling real estate in said city, and had known this property for six

or seven years; had owned property described by the Brady map; had in 1866 executed a deed to one Stinson to lot 4 in block 216 and lot 6 in block 238, according to the "maps and plats of the city of Portland," and that said lot 4 in block 216 faces the row of public parks, but is north of the line of Coffin's claim. That plaintiff Mason wrote the said deed to Stinson, and took the acknowledgment thereof in September, 1866. That Carter had heard of the park blocks and the Brady map before he purchased from Coffin in 1867. That both plaintiffs had engaged in conversations, in which the claim of the city to the property in controversy was alluded to, before they purchased. That plaintiff Mason, as notary public, took the acknowledgment of the Coffin map in December, 1867. That prior to said date he had seen the Burrage map, and had a copy of the McCormick or Directory map in his office, upon both of which the parcels of land in controversy were unnumbered and were designated as public parks, and were displayed as upon the Brady map. Finally, that the premises described were generally understood to be public property.

Passing from the facts, let us consider the law touching notice. It is a well-settled principle that to constitute notice, it is not necessary that it should be in the shape of a distinct and formal communication, and it will be implied where a party is shown to have had such means of informing himself as to justify the conclusion that he has availed himself of them. It has frequently been decided by the American as well as the English Courts, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, so as to put him on inquiry into ascertaining their nature, will operate as notice. (*Le Neve v. Le Neve,* 2 Leading Cases in Equity, 160; *Barnes v. McChristie,* 3 Penn. St. 67; and *Bohlman v. Carter,* decided at the last term of this Court.)

Indeed, we think that notice should, with rare exception, be implied where a party is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man. In *Rowan's Executors v. Portland,* hereinbefore cited, Marshall, C. J., in delivering the opinion

of the Court, uses the following language in relation to notice, which is singularly applicable to the case under consideration: "The notoriety, actual as well as legal, of the acts involved in the making of a town, the laying out of the town upon the land, the representation of it upon a map open to public inspection, * * * the advertisement and sale of lots according to that plan, the conveyance of them by recorded deeds referring to the plan, the subsequent inclosure and improvement of some of them for business or residence, and, in fine, the actual existence of a town upon the land, must be considered as giving to the world such notice of the plan, to which all these acts and facts must have reference, as to preclude the possibility of afterwards acquiring from the original proprietor, or of asserting with a good conscience any right or interest inconsistent with those which, according to the plan of the town, are appurtenant to the lots, and are, therefore, granted to or held for the lot owners or citizens, and the local or general public." Applying these principles of law to the facts stated, we feel fully warranted in concluding that the plaintiffs had sufficient knowledge of the matters referred to, to charge them with full notice of the claim of the city of Portland to the parcels of land in controversy, prior to the date of their alleged purchase.

It was urged by plaintiffs' counsel that a dedication could not be predicated of the use of the Brady map by Coffin, for that the same was not of record. It is unnecessary to discuss this proposition at length, for it must be obvious, from the views already expressed, that to support a dedication of streets, alleys, public parks, etc., it is not necessary to show that the map upon which such streets, alleys, public parks, etc., were displayed, was recorded, but simply that it was used and referred to by the proprietor in selling the lots and blocks to which the streets, alleys, public parks, etc., are appurtenant.

The remaining questions are unimportant, and as the views already expressed are decisive of the case, they need not be discussed.

It follows that subsequent to the passage of the Donation

Act, September 27, 1850, and prior to the date of the execution and recording of the map of "Coffin's Addition to the City of Portland," December 4, 1867, Coffin dedicated the land in controversy to the public use; that before the date of the deed from Coffin and wife to plaintiffs, December 28, 1867, the dedication had become irrevocable; that the plaintiffs purchased with full knowledge of the pre-existing rights of the public in and to said parcels of land, and therefore took only the naked fee and acquired no rights or equities which they can assert against the public use to which the premises were dedicated by their grantor.

The decree of the Court below must be reversed and the suit dismissd at plaintiffs' cost.

Decree reversed.

H. HOLCOMB, Respondent, v. J. H. TEAL, Appellant.

FILING AFFIDAVITS OF SURETIES ON APPEAL.—The affidavit of the sureties in an undertaking on appeal as to their qualifications must be filed contemporaneously with the filing of the undertaking.

BILL OF EXCEPTIONS.—The bill of exceptions should be presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined.

APPEAL from Polk County.

This was a motion to dismiss the appeal. The other facts are stated in the opinion of the Court.

R. P. Boise and P. C. Sullivan, for the motion.

J. J. Daly, contra.

By the Court, MCARTHUR, J.:

It is contended that the undertaking herein is insufficient, for the reason that there is no proper justification of the sureties, and that the affidavit does not show that the sureties are not of that class of persons who, by § 116 of the Civil Code, are prohibited from becoming sureties. There does not appear to have been any exception taken to the sufficiency of the sureties in the undertaking, consequently

there was no justification necessary. Counsel have fallen into an error in considering the affidavit of the qualifications of the sureties as the justification of the sureties. There is a wide distinction between them. The justification need only be made after exception to the sufficiency of the sureties, who must attend before some qualified officer and be examined under oath in relation to their sufficiency. (Civ. Code, § 117.) The affidavit of the sureties to their qualification as such must be filed contemporaneously with the filing of the undertaking. (Civ. Code, § 107, sub. 4.) It must set forth that each surety is a resident within the State, and that all taken together are worth double the sum specified in the undertaking over and above all debts and liabilities and property exempt from execution. It need not contain the negation that the sureties do not belong to the class prohibited by § 116, sub. 1, of the Code. The undertaking and affidavit are sufficient.

Passing to the second point raised by the motion, we discover from the record, that the judgment attempted to be appealed from was made and entered on November 21, 1872. The certificate of the clerk, annexed to the record, bears date May 1, 1873. The bill of exceptions was allowed and signed by the Judge of the Court below July 22, 1873. Consequently the bill of exceptions could not have been filed in the Court below, and could not have been a part of the judgment-roll, as required by § 269, sub. 2, of the Code, at the time of the making of the clerk's certificate. The section referred to requires the clerk, after docketing the judgment, and before the next regular term of Court, to prepare and file in his office the judgment-roll. We are of opinion that *all* the papers constituting the judgment-roll must be so prepared and filed. This Court will take judicial notice that a regular term of the Circuit Court was held in Polk County between the date of the entry of judgment herein and the signing of the bill of exceptions. As the law stands the Judge had no authority to sign the bill of exceptions. It should have been presented, allowed and signed at some time prior to the first day of the term next succeeding the term at which the cause was determined.

We cannot regard this bill of exceptions, and as there are no errors complained of except those set forth therein, the motion to dismiss this appeal must be allowed.

Appeal dismissed.

JAMES F. BYBEE, Appellant, v. GEORGE SUMMERS and Wm. ELLIS, Respondents.

INTERLOCUTORY ORDER.—In a suit for partition of real estate, the order or decree of the Court directing the partition or the sale of the premises without further proceedings, is not a final decree, but only an interlocutory order, and is not notice to parties and their privies, etc., under the provisions of § 15, p. 154 of the Statutes of 1855.

LIS PENDENS.—To bind innocent purchasers for a valuable consideration by the proceedings in the suit for partition, under the doctrine of *lis pendens*, the cause should be prosecuted with reasonable dispatch. A suspension of proceedings for more than five years would be an unreasonable delay.

APPEAL from Clatsop County.

On the 10th day of August, 1869, plaintiff (appellant) commenced this proceeding under the provisions of § 377 of the Civil Code, for the purpose of carrying into execution a decree of the District Court for Clatsop County, alleging in his complaint that on the 10th day of September, 1859, one Cyrus Olney commenced proceedings against this plaintiff and one James Taylor for the partition of lots one (1) and two (2) in block fifty-five (55) in the town of Astoria. That on the 13th day of October, 1859, upon the hearing of said cause, it was adjudged by the Court that said Olney was the owner of the undivided three-sixths of said property, this plaintiff of two-sixths, and said Taylor of the remaining one-sixth. And it further appearing to the Court that said lots, owing to the condition of the improvements thereon, could not be divided without prejudice to the owners, the Court decreed the sale of the same. Plaintiff further avers that said Olney afterwards purchased the one-sixth interest of said Taylor by deed bearing date April 4, 1862; and that said Olney conveyed to defendants (respondents herein) his entire interest in said premises by

deed bearing date June 28, 1865. Plaintiff concludes with a prayer for a decree of the Court below, renewing the order of sale of October 13, 1859, and enforcing the same between the parties to this suit, according to their respective rights, as set out in complaint.

Defendants admit the partition proceedings and order of sale of October 13, 1859, as set out in the complaint, but deny that plaintiff is the owner of said premises or any part thereof as against them, and claim that they are the owners of the whole thereof by deed from said Olney, who, they allege, acquired the same by deed from John McClure, the donee of the Government, under Act of Congress of September 27, 1850; and that the conveyances from the Government to McClure, and from McClure to Olney, were duly recorded. Defendants further aver that they purchased said premises from Olney in good faith, for a valuable consideration and without any knowledge of plaintiff's claim to any right, title or interest in the same. No reply was made by plaintiff, and this cause was submitted to the Court below on stipulation of the parties, each party claiming judgment on the pleadings. The Court below rendered a decree for the defendants, dismissing plaintiff's cause, from which he appeals to this Court,

Hill, Thayer & Williams, for Appellant.

Johnson & McCown, for Respondents.

By the Court, BONHAM, J.:

Two questions are presented by the pleadings and the arguments of counsel in this case for the consideration of the Court:

First. Was the order of the District Court for Clatsop County, made October 13, 1859, directing the sale of the premises described in the partition suit of Olney against Bybee & Taylor, a final decree in effect, or was it only an interlocutory order?

Second. If the order above referred to was only interlocutory, would the rights of the plaintiff Bybee, to the in-

terest claimed by him in the premises, be protected by the doctrine of *lis pendens*?

It was urged by counsel for appellant, with a good deal of apparent force and reason by analogy, that the finding of the Court of October 13, 1859, determining the rights of appellant and the other parties to the partition suit, to their respective interests in the premises in question, and directing the sale of the same, was in effect a final determination of those questions, and that nothing remained to be done except to enforce that order or decree in the manner and by the means similar to those recognized and usually resorted to by Courts for that purpose. The judgment of the Court in this case, it is claimed, was equally as final and conclusive as the decree of a Court directing the foreclosure of a mortgage and the sale of the mortgaged premises.

But the character of the decision of the Court of October 13, 1859, determining the interests of the parties to the suit in the premises in controversy, and directing the sale of the same, is to be determined, not by the common law, but by the statute in force at the time on the subject of the partition of real estate.

Section 15, on page 154 of Statutes of 1855, reads: "The Court may confirm or set aside the report and, if necessary, appoint new referees. Upon the report being confirmed judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive—

"1. On all parties named therein and their legal representatives who have, at the time, any interest in the property divided, etc.

"2. On all persons interested in the property who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by § 5; and

"3. On all other persons claiming from such parties or persons or either of them."

It is claimed by counsel for appellant that "the decree of a Court of competent jurisdiction (Civ. Code, § 723) is not only binding upon the parties, but privies also, including

privies in estate, and the purchaser from one of the parties takes subject to the decree and cannot dispute its binding force."

The principle above enunciated, as applicable to this case, is true if the decree be a *final* one. And it may also be true where the decree is not final, under the doctrine of *lis pendens,* if the suit or proceeding is prosecuted with reasonable diligence and dispatch. But we are clearly of the opinion that the section of the Code above referred to (§ 723) only has reference to a final judgment or decree or a final order.

The inquiry then arises, was the judgment of the District Court for Clatsop County, rendered October 13, 1859, directing the sale of the premises in question, a final judgment? We hold that it was not. The language of the statute of 1855 (§ 15, p. 154) is as follows: "Upon the report being confirmed judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and *conclusive* between the parties and their representatives and successors in interest, by title subsequent to the commencement of the action," etc. This section of the statute declares by implication that until the report of the referees is confirmed by the Court, the proceedings theretofore had shall not, as a judgment, be binding and conclusive, but the decision of the Court is only an interlocutory order. (Freeman on Judgments, §§ 29, 30, and 31.)

Section 31, referred to, in defining an interlocutory decree, reads as follows: "A decree is interlocutory which makes no provisions for costs, and in which the right is reserved to the parties to set the cause down for further directions not inconsistent with the decree already made, and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee."

The effect of a judgment or decree in partition, is to be determined by the statute and not by the common law. (*Morenhout v. Higuera,* 32 Cal. 289; *Kester v. Stark et al.,* 19 Ill. 328.)

In the case of *Kester v. Stark et al.,* above referred to,

Spencer Stark, who was not made a party to the partition suit, came in after partition had been decreed by the Court, and commissioners to divide the land had made their report, and filed his answer to the petition, by way of interpleader setting up an interest held by him in the premises sought to be partitioned; and the Court, in speaking of his right to do so, says: "The statute says the interpleader may be filed during the pendency of such suit or proceeding." Any time before the case is finally disposed of, must be considered as during its pendency. Until that time it is before the Court, and entirely subject to its control and jurisdiction, and any previous orders or proceedings may be changed, altered or amended to meet the exigencies of new facts which may be brought before the Court by new parties, by their interpleaders. Here everything was *in fieri* when this interpleader was filed. The suit or proceeding was not yet finally determined, but was still pending, and the interpleader was filed in proper time.

Another test of the finality and conclusiveness of the proceeding of the Court of October 13, 1859, is, whether an appeal might have been taken from the same. We are clearly of the opinion that it could not, and that the order or decision of the Court, directing the sale of the premises, etc., as set out in plaintiff's complaint, does not place the subject-matter of the proceeding *res judicata* as between the parties, or innocent purchasers from them, or either of them.

And, as a further reason in support of the correctness of this proposition, it should be borne in mind that the correct and established practice of our Courts, under the Code, as it was also under the statutes of 1855 referred to, in proceedings for partitions, after the order of partition or sale (as the case may be) is made by the Court, and the referees are appointed to divide or sell the premises in question, to continue the cause for the report of such referees, and for the final determination of the proceeding. On the coming in of the report the same may be confirmed, rejected or modified; and, prior to the confirmation of the report, no question of costs can properly be determined, and no judg-

ment-roll is required to be made up by the clerk under the directions of the statute, and no entry of the cause is required to be made by him in the judgment-lien docket, all of which are tests of the finality of the proceeding.

To hold that the order of the Court below, of October 13, 1859, was in effect a final judgment, and not only binding and conclusive upon the parties to the partition proceeding, under § 15 of the statutes of 1855, but also on all other persons claiming from such parties, or either of them, would be to greatly jeopardize the rights of innocent purchasers of real estate.

It appears from the pleadings in this case that the defendants, on the 28th day of June, 1865, and more than five years after the order of sale of October 13, 1859, was made, purchased from Cyrus Olney the whole of the premises in controversy. And the defendants allege (and it is not denied) that they purchased the same in good faith and for a valuable consideration, and without any notice of appellant's interest therein; and that said Olney then had a clear record title to the premises.

It is true that, *as a rule,* a grantor can convey no higher estate in lands than he has himself. But for the protection of innocent purchasers a system of registration is provided by law, the failure to comply with which may result in the forfeiture or loss of one's estate. It is highly important to the security of titles to real estate that they should be spread out and made patent to the whole world in some kind of legal record. By the established law and practice of registration what was required of these respondents, as prudent and cautious men, when they purchased the lots in controversy in June, 1865? In the first place they ascertained that their grantor, Olney, had a clear record title by deed duly recorded from McClure, and that McClure held a patent from the Government of the United States to the lots in question. The next inquiry which would suggest itself would be to further examine the records of deeds to ascertain if the land in question had been alienated by deed of prior date to another. Then the record-books of mortgages would also be resorted to to ascertain if there were any in-

cumbrances on the land. Next, the judgment-lien docket would be referred to, to determine if there were any incumbrances by judgment, or any adjudications to which the respondent's grantors were parties, which would operate as an alienation or estoppel by record. The investigations thus far are all aided by records, which the law requires to be alphabetically indexed for ready reference. No judgment-roll having been made up, and no entry in the judgment-lien docket having been made of the order of October 13, 1859, declaring the several interests of the parties to the partition proceeding, nothing would be elicited from this quarter to indicate that appellant claimed any interest in the lots in question.

The next and last inquiry on the part of respondents then would be to see if under the doctrine of *lis pendens* their grantor's title was in way affected. To obtain the desired information, they would inquire of the Clerk of the Court concerning causes pending in the Courts of record of Clatsop County, and examine the dockets of causes pending and the pleadings on file therein.

This brings us to the consideration of the second question involved in this case. Was the sale and conveyance by Olney of June 28, 1865, to respondents, made *pendente lite;* or, in other words, was the interest of Bybee in these lots protected by the doctrine of *lis pendens?* As hereinbefore stated, this inquiry involves no difficulty in its solution. The constructive notice which the law presumes by *lis pendens* is less reliable, we think, than any of the other kinds of constructive notice arising from registration; and in order that a party may be thus protected, the suit should be prosecuted with reasonable diligence and dispatch. (Freeman on Judgments, § 202; Adam's Equity, 5th American edition, 323, note 1, and cases there cited; *Diamond v. Lawrence County,* 37 Pa. 353; *Erhman v. Kendrick,* 1 Met. Ky. 146; *Ferrier v. Buzick,* 6 Clarke's Iowa, 258; 2 Leading Cases in Equity, 171, 175.)

In this case the parties to the partition proceeding not only failed to use reasonable diligence in the prosecution of their suit, but were guilty of gross laches; it appearing,

from the pleadings, that no further step was taken after securing the interlocutory order of sale of October 13, 1859, until August 10, 1869, when the appellant was compelled, in order to consummate his remedy, to come in under § 377 of the Code, and ask for the revival of the proceeding by an original suit. To give effect to a *lis pendens* the suit should be prosecuted with such diligence as to give the proceeding some kind of notoriety. After so long a lapse of time little opportunity would be afforded a purchaser to ascertain the condition of a title which he might be looking up, so far as it might be affected by the pendency of legal proceedings; for the reason that papers are liable to be mislaid, and the cause omitted from the docket, and a new clerk might, in the meantime, come in, who would have no personal knowledge of the former proceedings, and the purchaser, under such circumstances, would be very liable to fail to get information of the pendency of the cause.

We think that a fair regard for the rights of an innocent purchaser, under such circumstances, demands that he should not suffer.

Decree affirmed.

[NOTE.—This cause was first submitted at the September term, 1871, and a majority of the Court, on the hearing at that time, were of opinion that the decree of the Court below should be reversed. An application was afterward made, under the rule, for a rehearing of the cause, for the reason that, owing to the unavoidable absence of the principal counsel for respondents, the case was not fully presented on their behalf. At the July term, 1873, of this Court, a rehearing was granted, and, after a thorough reargument and mature deliberation, the decree of the Court below was affirmed, all the Justices concurring.]

W. W. CHAPMAN, Appellant, v. JAMES H. WILBUR, Respondent.

PROPERTY IN TRUST—GRANTOR'S INTEREST IN.—A grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist on a specific execution of the trust; but a diversion of trust property by a trustee from the purpose for which it was granted, does not operate as a forfeiture of the property or cause it to revert to the donor.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

J. H. Reed, for Appellant.

Gibbs & Upton and Caples & Moreland, for Respondent.

By the Court, PRIM, J.:

This was a suit in equity to have certain deeds relating to block 224 in the city of Portland set aside and held for naught, and the title to said block decreed to be in complainant.

The material facts are as follows: On September 7, 1850, Stephen Coffin, D. H. Lownsdale and W. W. Chapman, being in possession, conveyed two adjacent blocks of land known as blocks 205 and 224 in the city of Portland "to James H. Wilbur, trustee, for the use and benefit of the Methodist Episcopal Church of Oregon * * * for the purpose of erecting an academy thereon, and therewith * * * to be by him conveyed to such person as shall be appointed to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon." This deed contained a covenant that if they, the grantors, should obtain title to said property from the United States, they would convey the same as aforesaid by deed of general warranty; and also that they would warrant and defend the said property against the claims of all persons claiming by, through or under them. Soon after receiving this deed, Wilbur went into the possession of the premises, and, in

concert with the said Church, erected a building on block 205, and instituted an academy upon it.

About the 1st of September, 1853, plaintiff obtained the legal title to the premises from the United States, and on the 10th day of that month he and his wife executed a deed of the premises to J. H. Wilbur, Trustee of the Oregon Annual Conference of the Methodist Episcopal Church in Oregon. This deed professes to recite the purport of the former deed and to be confirmatory of it, but departs from its tenor in several particulars. It is dated the "25th day of June 1851," and refers to the grantors as having, by deed of quit-claim, conveyed to the said James H. Wilbur, trustee as aforesaid, the property hereinafter described for the purpose of establishing thereon a seminary of learning to be divided into a male and female academy.

In 1854 a corporation was formed by an Act of the Territorial Legislature called "the Board of Trustees of the Portland Academy and Female Seminary." After this corporation was organized it was selected, by the said church, as its agent to hold the title of the property and manage the affairs of the academy. Wilbur, however, it appears, continued to act as such agent and trustee up to about 1853, and, in the construction of the academy, had advanced of his own funds some five thousand dollars. Afterwards Wilbur conveyed the two blocks to the said Board of Trustees of the Portland Academy and Female Seminary.

The Board having audited the accounts of Wilbur, and having found a large amount due him on account of advances made by him in constructing the academy, bargained with him to take block 224 in satisfaction of that claim, and, on June 9, 1860, executed to him a conveyance of said block, since which time he has been in the possession of it, claiming it as his own.

It is claimed by plaintiff that this was a diversion of block 224 from the purpose and use for which it was intended, and a violation of the trust, by which the property is forfeited and reverts to the donor.

One of the theories assumed by counsel for plaintiff is, that the grant was upon a condition subsequent to be per-

formed by the grantee; and, that the condition of the grant, not having been performed by establishing a seminary of learning on each block, that therefore block 224 is forfeited, and reverts to the grantor. To sustain this position, counsel for plaintiff cite the case of *Heydon et al. v. The Inhabitants of Stoughton* (5 Pick. 528). That was a devise of a certain piece of land for a certain purpose, upon a certain condition specified in the devise. The words of the devise were as follows: "I give to the town of Stoughton a certain piece of land (describing it), for the purpose of building a school-house for the use of a free grammar school (or for such other school as said town may direct); *provided,* said school-house is built by said town within one hundred rods of the place where the meeting-house now stands." That was held, by the Court, "to be a devise upon a condition subsequent; that the estate accordingly vested in the devisees, and was forfeited by a neglect for twenty years to comply with the condition."

It will be noticed that that case is not at all analogous to the one under consideration. The grant here was an absolute grant to the defendant in trust for a certain purpose specified, while there the land was devised to the town for a certain purpose, coupled with a certain condition to be performed by the town.

Warren v. The Mayor of Lyons City (22 Iowa, 351) is another case relied upon by counsel for appellant. In that case the owners in fee of the land, where the city of Lyons is laid out, dedicated a certain piece of land to the town for a public square, to be held by said town in trust for public use as such square, and for no other purpose. The lots adjoining it were valuable, and some of them had been improved with a view to its always being kept open to the public for such use. Plaintiff had lots adjoining the same, of great value, but which would be of but little value if cut off from said public square. The municipal authorities procured said "public square" to be subdivided into small lots with a view of leasing them to private individuals, for a term of years, to be built upon and used by them to the exclusion of the public, thereby

diverting it from the purpose and use for which it was originally dedicated. This, it was held by the Court, was an attempt to divert the land from the use and purpose intended by the original proprietors, and therefore void. The Court said:

"For the uses contemplated the proprietors may have parted with the fee—the proprietary right—but not for all purposes, and therefore if the city authorities, as trustee of the public, should undertake to make gain by the sale, or to authorize its use for anything else than a public square, they violate the trust, and the original owners, in virtue of the terms of the grant, *may demand* that the trust shall be *executed* in good faith, and restrain any such proposed violation of the terms upon which the grant was accepted. Nothing can be clearer than, if a grant is made for a specified, limited and defined purpose, the subject of the grant cannot be used for another purpose, and that the grantor retains still such an interest therein as entitles him in a Court of equity to insist upon the execution of the trust as originally declared and accepted."

The same doctrine is well expressed in *Barclay v. Howell's Lessee* (6 Peters, 507). The Court said: "If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a Court of Chancery to compel a *specific execution of the trust* by restraining the corporation. * * * But even in such a case, the property dedicated would *not revert to the original owner.* The use would still remain in the public, limited only by the conditions imposed in the grant." (1 Ohio St. 478; 8 Ohio, 552.)

Thus, while all the authorities appear to hold that a grantor of property in trust for a specific purpose retains such an interest therein as entitles him in equity to insist upon the execution of the trust, not one has been cited, and we can find none holding that a diversion of the property, by the trustee, operates as a forfeiture of the property, and causes it to revert to the donor.

It is claimed by defendant that the proper construction

of the deeds in question is, that one block might be sold or mortgaged for the purpose of raising money to build an academy upon the other; while it is insisted by plaintiff that they should be construed to mean that an academy should be built upon each block. In order to dispose of this case, under the view taken by the Court, it is immaterial which of these constructions is adopted as the correct one, and, therefore, we have not undertaken to pass upon that question.

If the construction contended for by defendant is the correct one, then there was no diversion of block 224 from the purpose or use for which it was granted; while, if the construction contended for by plaintiff is the correct one, then, although there was a diversion of said block by said trustees, it was immaterial, since such diversion does not operate as a forfeiture of the trust property by the *cestui que trust*, or cause a reversion of it to the grantor.

It follows, from the views herein expressed, that the decree, dismissing the bill with costs, must be affirmed.

DECEMBER TERM, 1873.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

DECEMBER TERM, 1873.

J. I. THOMPSON, Appellant, v. A. UGLOW, Respondent.

EASEMENT—RIGHT OF ENTRY FOR REPAIRS.—One who has a right to the enjoyment of an easement has a right to enter for the purpose of repairs, as against the owner of the servient estate, whenever the easement cannot be otherwise enjoyed; and he has the right to dig up and use the adjacent soil for the purpose of repairs whenever there is no other mode.

INSTRUCTIONS—ERROR DOES NOT AFFIRMATIVELY APPEAR, WHEN.—Where the record does not disclose whether or not the mode of making repairs depends on the construction of a written instrument, error does not affirmatively appear from a statement in the record that the Court instructed the jury that the defendant was not obliged to bring soil from elsewhere to repair a ditch conveying water over the plaintiff's land.

APPEAL from Polk County.

This is an action for damages alleged to have been caused by the improper use and management of a water-race, leading through the plaintiff's land to the defendant's flouring-mill.

The complaint states that the plaintiff is owner and entitled to the possession of a certain parcel of land, and that the defendant is owner of and in possession of the right of way

to a narrow strip of land through said premises to be used as a mill-race, to run the flouring-mill of the defendant, and charges that the defendant wrongfully failed and neglected to keep his race in good repair, to clean it out and to keep up the banks, and thereby caused the waters of the race to overflow and damage the plaintiff's land. The complaint also contains a count for damages, caused by the defendant's entering upon the lands of the plaintiff adjacent to the defendant's water-race and digging up and removing the turf and soil in repairing the race, the aggregate amount of damages claimed being $1700.

The answer puts in issue all that is charged respecting the acts and negligence of the defendant. The cause was tried by a jury, and a verdict having been rendered in favor of the defendant, the plaintiff appeals to this Court and states the following as the grounds of his appeal:

1. The record does not show that the jury was present in Court during the trial on the 24th day of May, 1873.

2. The Court refused to charge "that the defendant had no right to dig the turf, soil and meadows of the plaintiff to the distance of ten or fifteen feet from the race and convey away and use the same in repairing the said race."

3. The Court, after refusing the instruction aforesaid, charged the jury on the same point as follows: "It is not the province of the Court to decide that question as a question of law, but it is for the jury to determine it from the circumstances of the case. The defendant would not be obliged to take soil from his race or bring material from elsewhere to repair a breach in his race, but might take the necessary material for making such repairs from the premises of the plaintiff near the race, doing no unnecessary damage thereby, and going no further from the line of the ditch than is absolutely necessary, and the jury may determine from the circumstances to what distance he may go from the race for such material."

4. The Court refused to charge "that the defendant had no right to use said right of way or race for floating wood or logs, but only for the purpose of carrying water to his flouring mill."

J. L. Collins and N. B. Humphrey, for Appellant.

Boise & Willis, for Respondent.

By the Court, UPTON, C. J.:

The question principally controverted on the argument is, whether one who is entitled to construct a ditch or water-race and convey water over the lands of another, has the incidental right to use the soil adjacent to the race in making repairs. The brief of the appellant refers to numerous cases touching the obligation to repair and the right to enter for that purpose as between the owners of the dominant and servient estates, but the authorities cited do not directly decide the question here presented. No one of them furnishes a general rule by which to determine the right to use the soil adjacent to the artificial watercourse for the purpose of repairs in cases where the same repairs can be made by other but more expensive means.

It is very clear from the authorities cited, and it is an elementary doctrine, that one who has the right to use has incidentally the right to repair; and it follows that if repairs cannot be made without doing acts that would otherwise be an unlawful encroachment on the lands of the owner of the servient estate, the necessity of making repairs and the right to make them includes the right to occupy and use whatever is indispensable for that purpose; but none of the authorities cited give us a rule for determining, in the absence of express agreement of the parties, whether one who has an easement in the land of another to convey a stream of water over it in a race may dig up the soil near the race for the purpose of repairing the banks, in case the repairs can be made by bringing soil from elsewhere. The appellant lays much stress on the statement made in Washburn on Easements, §§ 196, 254, and in many cases cited in his brief, to the effect that the rocks and the earth extracted in constructing a canal belong to the owner of the soil. He fails to recognize the fact that the soil of which the canal itself is constructed belongs to the owner of the servient estate, and that he who has the dominant estate and the right to repair

and to use a water-race to convey water is entitled only *pro hoc*. One who has such easement in the lands of another has not the ultimate property that will authorize him to carry away the soil or use it for any purpose not connected with the use of the water; hence, the fact that the rocks and the earth excavated are the property of the owner of the soil does not settle the question whether the owner of the dominant estate may take them for the purpose of making repairs.

The right to convey water through or over the lands of another, unless it is a mere license revokable at the will of the owner of the soil, rests in grant; and the terms of the grant, when they can be definitely ascertained, control its extent. The grant may be evidenced by deed, or it may be presumed from long enjoyment. In the one case the terms of the deed, and in the other the mode of enjoyment, must be known to enable a Court to determine who is bound to repair, or to what extent a party is privileged or restricted in the mode of making repairs.

The general rule, that a party who has a right of enjoyment, has also a right to enter and make necessary repairs, is essential to the enjoyment of the thing granted. This right necessarily passes by the grant, otherwise it would be in the power of the grantor to virtually nullify and defeat his own deed, by depriving the grantee of the power to repair and use the thing granted. If the mode of enjoyment and of making repairs, is specified in the grant, the Court was only to construe the contract; or, if the right has been acquired by prescription, the Court will ascertain, under the ordinary rules of evidence, how the right has been exercised and enjoyed; but cases arise where an easement has been acquired by deed, and the instrument is silent both as to the party bound to make repairs and as to the privileges and duties of the party in making them.

It has been stated, in general terms, that where the deed thus leaves the matter of repairs to be implied, each case must be determined according to its own peculiar circumstances. The authorities cited establish the following general principles: The owner of the servient estate is not obliged to make repairs unless by virtue of a covenant so to

do, express or implied. The owner of the easement is privileged to repair in all cases where the easement cannot be enjoyed without repairs; and in making them, he may dig up the soil and otherwise use and encumber it, doing no more injury than is necessary when such course is indispensable to the enjoyment of the easement.

When a particular mode of repair is convenient, but not indispensably necessary, no general rule is laid down in the authorities cited.

In the case before us the terms of the deed are not set out, and it does not appear by the pleadings whether or not the rights of the parties in making repairs, are defined by the deed or contract under which the easement is claimed. On this point the complaint alleges that the plaintiff is owner, and in possession of, certain premises, and the defendant "is owner, and in possession of, a right of way to a narrow strip of land through said premises, to be used as a mill-race to run the flouring-mill of the defendant." No objection was taken to the form of the pleading, and the Court construes this to be a statement that the defendant had an easement in the plaintiff's land, to convey a stream of water over it in a race to the plaintiff's mill.

The contract by which the easement was created not being before us, and this Court having no information as to its terms, touching the subject of repairs, cannot decide as a matter of law whether the defendant had a right to dig up the soil; neither can it be ascertained from the facts alleged or the evidence disclosed by the transcript, whether these repairs could have been made without digging up the soil.

The Court instructed the jury that the defendant would not be obliged to take soil from his race or bring material from elsewhere to repair a breach in the race. Under certain conditions of the pleadings and evidence, the point involved in this instruction would include a question of fact which should be submitted to the jury, but if the right depended on the construction of a deed or other writing, it was a matter to be passed upon by the Court. As it does not appear by the record whether the contract under which the easement was acquired was in evidence, we cannot say

that the instruction was improper. The Court properly refused to instruct that the defendant had no right to dig the turf to the distance of ten or fifteen feet from the race. If there was a material question as to whether ten or fifteen feet was a reasonable distance, it was a question for the jury.

The plaintiff requested the Court to instruct "that the defendant had no right to use the ditch for floating wood and logs." This the Court refused to give, and charged that "if by reason of floating wood or logs the race became stopped up and thereby was caused to overflow and damage the plaintiff the defendant would be responsible for damages."

It is not shown, by the transcript, whether or not the defendant had the right to float wood and logs in the ditch, and no issue is made by the plaintiff on this point. Evidence that the ditch was used for that purpose appears to have been admissible, as tending to show that the overflow was caused by a negligent or improper mode of using the ditch, but unless the overflow resulted from that use the question whether the defendant was entitled to so use the ditch was an abstract proposition, not material to the decision of the cause, and upon which it was not the duty of the Court to instruct. Using the ditch for that purpose was not made a ground for general or special damages and it would have tended to mislead the jury to give an instruction from which it might be inferred that the defendant was entitled to even nominal damages for that cause alone.

There is nothing in the point first stated "that the record does not show that the jury was present during the trial on the 24th of May." The record shows that the jury was regularly impaneled and sworn on the 23d of May; that the trial continued to the 24th, and that on the latter day the verdict was returned in Court. Every presumption is in favor of regularity after jurisdiction is acquired.

The judgment should be affirmed.

JAMES H. EVANS, Respondent, v. S. H. CHRISTIAN, Appellant.

WRIT OF REVIEW.—Writ of review will not lie where the right of appeal exists.

DECISION OVERRULED.—*Schirott & Groner v. Phillippi & Coleman* (3 Ogn. 484), overruled so far as it is there held that appeal and review are concurrent remedies. Same case approved so far as it holds that review will lie in a cause (otherwise proper) where the *time* for appealing has elapsed.

JURISDICTION.—When want of jurisdiction appears, it is the duty of the Court at any stage of the proceeding, on its own motion, to refuse to proceed further.

APPEAL from Lane County.

Christian, the appellant, sued Evans, the respondent, before a Justice of the Peace in and for Lane County, to recover the value of a horse; and after issue joined and trial had, obtained judgment against Evans for one hundred and sixteen dollars and costs, which judgment was docketed on the 6th day of September, 1873.

On the 20th day of September, 1873, Evans sued out a writ of review in the Circuit Court for Lane County, assigning error upon the record occurring at the trial of said cause before said Justice of the Peace. Upon the trial in the Circuit Court on said writ of review, it was adjudged that there was error in the proceedings of the Justice of the Peace at the trial, as alleged in plaintiff's petition, and the judgment rendered by said Justice was reversed. From this judgment of the Circuit Court the defendant Christian appeals to this Court, assigning as error the following points: Error in holding the order of the Justice, for a jury, illegal and void; error in holding that the defendant had not waived the defect, if there was defect, by going to trial with the jury selected; error in annulling and declaring void the judgment of the Justice and in taxing the costs against the defendant.

By the Court, BONHAM, J.:

For the purposes of this case we only deem it necessary to consider the third ground of error assigned; and we only consider that so far as it involves the question of the

jurisdiction of the Court below to grant a writ of review in a case like this, where the right of appeal existed *at the time* the writ was granted.

An appeal from the Justice's judgment in this case might have been taken to the Circuit Court within thirty days from the date of its rendition. The judgment was rendered on the 6th day of September, 1873, and the writ of review was sued out on the 20th day of the same month. This state of facts presents for our consideration the question whether the remedies by appeal and by writ of review are concurrent, and if not, whether the Court below had any jurisdiction or authority to grant the writ of review at a time when the right of appeal existed. This question was not argued here, and we understand that it was not in the Court below; but inasmuch as it is a question touching the jurisdiction of the Court, it is proper to consider it here, for if the Court below had no jurisdiction to proceed, this Court, which possesses only appellate jurisdiction, could acquire none by the appeal. And when a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the Court has no jurisdiction, either over the parties or the subject-matter of the cause, it is the duty of the Court on its own motion to refuse to proceed further. Any attempt to exercise judicial functions otherwise than as authorized by law would be a nullity and an idle waste of time.

There is, however, a *dictum* in *Schirott & Groner v. Phillippi & Coleman* (3 Ogn. 484), which is well calculated to mislead the profession on the question of jurisdiction involved in this case. In fact, it is directly announced in that case by Mr. Justice Wilson, who prepared the opinion of the Court, that the remedies by appeal and writ of review are concurrent.

But this conclusion, as thus unqualifiedly announced, I think, may properly be regarded as mere *dictum*, inasmuch as the direct question presented by the facts in that case was, whether the writ of review would lie after the right of appeal, which once existed in the case, had been lost by lapse of time.

In the case at bar, the record shows that the time for appealing had not elapsed, and that respondent, when he sued out his writ of review, might have appealed.

The language of the statute is (Civ. Code, § 575): "The writ shall be allowed in all cases where there is no appeal or other plain, speedy and adequate remedy." What is the "*other* plain, speedy and adequate remedy" referred to in the Code, may often be a question more or less difficult of solution; but that appeal is *the* remedy, and the *only* remedy for the correction of errors of both law and fact so long as the right of appeal exists, we think is a conclusion clearly deducible from the language of the Code.

When the statute declares that the writ of review shall be allowed in all cases where there is *no* appeal, it is equivalent to saying that it shall not be allowed in any case where there *is* a right of appeal. And that an appeal is regarded as a plain, speedy and adequate remedy for the correction of errors of law, we think is clearly implied from the connection of the language—"where there is no appeal or *other* plain, speedy and adequate remedy." The use of the word *other* in the connection above quoted clearly designates and determines that appeal is the proper remedy where the right *exists*, and excludes the idea of the existence of any other remedy in such case.

We do not question the correctness of the decision of the Court in *Schirott & Groner v. Phillippi & Coleman*, so far as it determined the real question in that case. That was that a writ of review might issue in a case (otherwise proper) where the right to an appeal once existed, but which had been lost by the lapse of time. (*Milliken v. Huber*, 21 Cal. 166; *The People ex rel. Sturgis v. Shepard*, 28 Cal. 115.)

We are satisfied that the language of our statute on the subject of the writ of review does not warrant the construction that appeal and review are concurrent remedies. The Court below had no authority to grant the writ of review at the time it was ordered, and its judgment must therefore be reversed.

FENDEL SUTHERLIN, Respondent, v. JANE ROBERTS, Appellant.

STATUTE OF LIMITATIONS.—The defendant and her co-obligor executed a mortgage to secure payment of their joint note, and suit was commenced to foreclose the mortgage more than ten years after the note fell due; within the ten years part payment had been made on the note by the administrator of the defendant's co-obligor: *Held*, that the suit was not barred by the Statute of Limitations.

IDEM.—By § 25 of the Civil Code, the fact of part payment is made the test for ascertaining whether the action or suit is barred by the Statute of Limitations, and if it is not barred, the action may be found on the original promise.

IDEM—WHO MAY MAKE PAYMENT TO TAKE CASE OUT OF STATUTE.—Where part payment is made upon an existing contract of the kind specified in § 25, the creditor retains the right to sue on the original contract, without regard to the theory of a new promise, during the period prescribed, counting from the time of payment, and any person who could be compelled to pay is competent to make the payment.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

W. R. Willis, and Watson & Lane, for Appellant.

A payment by an administrator does not take the debt out of the statute as against a surviving debtor.

It is not a voluntary payment. There is no privity between the co-contractor and the administrator of a deceased joint contractor. (Civ. Code, §§ 1110, 1113, 1118, 1129, 1131, 1140 and 1141; *Partlow v. Singer,* 2 Ogn. 307; Civ. Code, § 4; 3 Bl. Com. 306, 307, and note; *Smith v. Irvin,* 37 Mo. 169, 174, 175; *Whitcomb v. Whiting,* 1 Smith's Leading Cases, 941, 942; 9 Pick. 42; 37 Mo. 104; Angell on Limitations, §§ 251, 252, 253, 240, and note 1; Id. 276, 287; *Root v. Bradley,* 1 Kansas, 437, 443-4; Md. Dig. 324, § 2 on Payments.)

The rights of a party shall not be prejudiced by the declaration act or omission of another, except by virtue of a particular relation between them. (Civ. Code, § 674.)

W. W. Thayer and John Burnett, for Respondent.

The payment made by the administrator, May 18, 1864, suspended the operation of the Statute of Limitations from the time the claim matured until that of such payment. (Civ. Code, § 25; 9 Minn. 13; 2 Ogn. 307; 13 Pick. 206; Ang. on Limitations, § 206.)

It will be seen, upon examination of the section of the statute referred to, that it is *sui generis,* a provision peculiar to the limitation laws of Minnesota alone, except that it has been adopted by this State.

By the Court, UPTON, C. J.:

This appeal involves a construction of the Statute of Limitations. The suit was brought to foreclose a mortgage executed to secure payment of a joint note for $2160.40 and interest, made by the defendant and Jesse Roberts, now deceased. It appears on the face of the complaint that the note, by its terms, became due February 1, 1862, and the suit was not commenced until 1873, more than ten years after the cause of suit accrued. But it is alleged in the complaint that on the 18th day of May, 1864, the administrator of the estate of Jesse Roberts, in due course of administration, paid the sum of $960.16 in part satisfaction of the note, leaving unpaid principal and interest to the amount of $3068.64. It also appears by the complaint that the money so paid was proceeds of the real estate of the decedent, under a sale made by order of the Probate Court. The defendant demurred to the complaint, on the ground that the facts stated do not constitute a cause of suit, and the demurrer was overruled. From that ruling the defendant appeals, and presents the question whether the payment made by the administrator of the defendant's co-obligor, brings the case within § 25 of the Code.

The appellant takes the position that a payment by an administrator is not a voluntary payment, that there is no privity between the co-contractor of the decedent and the administrator, and that such payment does not take the

case out of the statute, as against a surviving debtor. He cites many cases in which a distinction is made between the acts of an administrator, or executor and the acts of the joint contractor himself, and where it is held that there is no such relation between the former and the co-obligor of the decedent, as will authorize the former to affect the remedy as against the latter, or in other words, no such relation as will empower the administrator or executor to make a promise which will bind the co-obligor of the decedent. If these authorities are applicable in construing § 25 of the Code, it must be conceded that they go far in support of the appellant's position; but it will be observed that the statutes under which these cases arose were essentially different from ours. Section 25 of the Code is as follows:

"Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

In tracing the legislation on this subject, from the Act of 21 James I, ch. 16, down to the time of the latest authority cited by appellant, we find no enactment expressed in language similar to the section now under consideration; and a review of the adjudged cases leads to the conclusion that the leading intent and object of this enactment is to divest the subject of numerous exceptions and an intricate maze of subtle distinctions resulting in the course of time from judicial opposition to the letter of the earlier enactments, and to sweep away the complication of doubtful and disputed questions with which the subject has been encumbered. It will therefore be unnecessary to refer to the numerous authorities cited, except so far as they may bear upon the question whether such is the intent and object of our statute. The most prominent feature of what is new in our statute is, that, by § 25, part payment prevents the time of limitation from commencing to run; whereas, under previous statutes and adjudications, the time of limitation

actually ran against the debt, and part payment was held to be evidence of a new promise, which, being supported by the original consideration, became the basis of a new cause of action.

In 1st Smith's Leading Cases, 703, where the authorities on this subject are collated and so ably reviewed, it is said that the decision in the leading case—*Whitcomb v. Whiting*—was based on the idea "that if the presumption of payment arising from the lapse of time was rebutted by the acknowledgment or confession of the defendant, the end which the Legislature had in view was sufficiently attained"—an idea which the reviewer declares "inconsistent with the letter and spirit of the statute." The theory that the statute operated as a bar, by raising a presumption of payment, was prevalent at that time; but that idea is not expressed in the opinion as reported in the case of *Whitcomb v. Whiting.* According to the report the decision was placed on grounds quite independent of that doctrine. Lord Mansfield said in that case: "Payment by one is payment by all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises a promise to pay when the debt is admitted to be due." If his Lordship had added that, part payment is an admission of the residue of the debt, he would have made a concise but full statement of the theory upon which the whole discussion of the effect of part payment has proceeded in the cases cited by counsel.

In all these cases a payment which takes the case out of the statute, and the express promise which has that effect, have been placed side by side, and they have each been treated as the basis or proof of a new promise founded on the original consideration. So universally are these decisions based on the theory of a new promise, express or implied, that not a single case, meeting approval in modern times, is put on any other ground.

After judicial decisions had gone so far in admitting or creating exceptions that the rulings of the Courts were sometimes called judicial legislation, the extent of these exceptions was greatly narrowed by direct legislation from

time to time. Section 24 of our Act is but a copy of statutes that have long been in force elsewhere; its effect being that a direct promise is not sufficient to take the case out of the general rule of limitation, unless the promise is contained in a writing signed by the party to be charged; but the enactment does "not alter the effect of any payment of principal or interest." The effect of such payment was, therefore, until the enactment of § 25, still left a subject of judicial decision, and the Courts continued to hold that payment of part of the debt, unaccompanied by circumstances qualifying its effect, was an admission that the debt is owing, and that the law raises the promise to pay when the debt is admitted to be due. Much of the vast research and learning exhibited in the cases cited by counsel, has been devoted to determining under what circumstances part payment should not be considered a sufficient admission of the indebtedness to raise a presumption of a new promise.

It needs but a cursory examination of the cases relating to the effect of part payment under former statutes, to perceive that most embarrassing complications encumbered the subject when our statute was being enacted; a condition of the law which would naturally create a desire to substitute more simple rules for determining the liabilities of parties. By referring to the review of *Whitcomb v. Whiting,* above cited, it will be seen that the subject had not only become extremely complicated, but that there were numerous points still involved in doubt.

Among the controverted points upon which eminent counsel have differed, and upon many of which even the adjudged cases are in conflict, the following may be mentioned:—Whether there is such privity between co-obligors that payment, or a new promise, express or implied, made by one should affect the remedy as against the other: *Exeter Bank v. Sullivan,* 6 N. H. 124; *Fry v. Barker,* 4 Pick. 252; *Coleman v. Forbs,* 10 Har. 156. Whether one of the co-obligors being surety is material: *Perham v. Reynolds,* 2 Bing. 306. Whether payment by an indorser will bind other parties: *Beb v. Peyton,* 11 Sme. and M. 275; *Dean v.*

Monroe, 32 Geo. 28. Whether it is material that the statute had already run when the payment was made: *Channell v. Ditchburn,* 5 Mason and Welsby; *Yong v. Monpoey,* 2 Bailey, 278; *Ayers v. Richards,* 12 Ill. 126; *Emmet v. Overton,* 2 B. Mon. 643. Whether the executor or administrator holds such relation that the co-obligor of the decedent should be bound by a new promise of the executor or administrator, or that a new promise should be implied from a payment made by such agency; *Hathoway v. Haskell,* 9 Pick. 32; *Whitaker v. Mitchell,* 15 Me. 360; *Bloodgood v. Bruin,* 1 Seld. 362. Whether payment by a co-contractor will be construed to be a new promise as against the estate of the deceased co-contractor: *Atkins v. Tredgold,* 2 Barn. and Cres. 22. Whether payment by an executor would bind his co-executor; *Tulloch v. Dunn,* 1 R. and M. 416; *Cayuga Bank v. Bennett,* 5 Hill, 236; *Johnson v. Beardslee,* 15 John. 3. Whether such is the effect of payment by a co-contractor who is on the verge of bankruptcy: *Goddard v. Ingram,* 3 Q. B. 839. Or of payment from the assets of a bankrupt's estate: *Brondrum v. Wharton,* 1 Barn. and Ald. 463. Whether the debtor has a right to appropriate a payment made generally, to an item barred by the statute: *Walker v. Butler,* 6 E. and B. 506. And if he has that right in any case, under what circumstances may he exercise it; what shall raise a presumption that he has exercised it, and what effect will such appropriation have on other items in the same account: *Nash v. Hodgson,* 1 Kay, 650. Whether a verbal admission is sufficient proof of a part payment: *Willis v. Newham,* 3 Y. and J. 518. Whether the new promise to be inferred from part payment may be given in evidence under an averment contained in the declaration of payment of interest within six years, instead of giving it in evidence under a replication: *Hollis v. Palmer,* 2 Bing. N. C. 713; *Ross v. Ross,* 20 Ala. 105. Whether payment by a wife without authority from the husband on a note made by them jointly before marriage will warrant the inference of a new promise: *Neve v. Holland,* 17 Q. B. 262.

Conflicting decisions on many of these and on other similar practical questions rendered this subject an exceptional

field of unsettled disputes, and these questions have arisen upon points so numerous and diverse that if each one was settled and reduced to a certain rule, the business man would find the rules extremely complex and difficult of application. This condition of the law at the time of the enactment is important, inasmuch as it is the duty of a Court when the construction of a statute is open to inquiry to consider "how the law stood at the making of the Act, what the mischief was, and what remedy the Legislature has provided to cure the mischief." To ascertain how the law stood at the enactment of the statute under consideration, resort must be had to adjudged cases, some of which are above referred to as exemplifying the extent of these refinements and subtle distinctions. These exceptions, originating, it is said in judicial opposition to the harshness, real or supposed, of the letter of former statutes, have in the course of time increased in number and kind, and become complicated in the modes of their application, until the features of the original enactments supposed to underlie them are scarcely discernible through the luxuriant outgrowth.

If the Legislature had desired to retain the theory of a new and implied promise with its intricacies as well as its advantages it would have been only necessary to copy the language of the statutes on which these exceptions are supposed to be founded; but we see that that course has been carefully avoided in drafting this section; the words of the statute plainly indicate a design to institute a new rule simplifying the law as to the effect of part payment.

The express words of the statute make the fact of the payment the test for ascertaining the period within which an action may be commenced on the original promise or cause.

The fact of payment being made the test for determining when the period commences to run, the theory of requiring a new promise, or of founding an action on a presumed new promise, is abandoned, and the new promise is no longer the foundation of the plaintiff's right of action. By the letter of the section no new promise appears necessary; no new promise need be resorted to, even if the promise should

be often renewed, because the statutory limitation does not run against the original cause of action. By the words of the Act, "The limitation shall commence from the time the last payment was made."

If the difficulty of applying the complications involving this subject was the mischief, actual or imaginary, which the Legislature sought to avoid, and if that intention is expressed in the Act, we are in duty bound to carry out the intent, notwithstanding our veneration for the ancient theory, and our respect for the wisdom and learning displayed in unfolding and elucidating its subtle distinctions. If the Legislature has substituted a new and different period of limitation, not depending in any manner on the presumption of a new promise, those cases which treat only of the question whether the particular circumstances of the payment established the fact of a new promise are no longer authoritative.

The case of *Pitman v. Foster* (1 Barn. and Cres. 248), illustrates how absolutely the exceptions above mentioned rested on the theory of a new promise. In that case, suit was brought against a husband and wife and one Foster, on a promise made by Foster and the wife before the marriage. The question being whether payment made by the husband took the case out of the statute, it was said, "As the *feme covert* is incapacitated from promising in her own person, so no one could promise for her;" and, "If the husband's acknowledgment is regarded as a promise by the husband, it was a variance from the cause of action set forth in the declaration." So, also, in *Jones v. Moore* (5 Binney), and in *Betton v. Cutts* (11 N. H. 170), it was held that "an issue joined under a plea of the statute, to a declaration averring a promise to the testator, cannot be supported by an acknowledgment or payment to his personal representative;" and in *Benjamin v. De Groot* (1 Denio, 151), it was held that an acknowledgment made by an executor cannot be replied or given in evidence under an answer of *non assumpsit infra sex annos*, to a declaration setting forth a promise made to the testator.

It was doubted in *Carshore v. Huyck* (6 Barb. 483),

whether proof of the new promise that is to be implied from payment can be given in evidence where the declaration is on an express contract. It is not necessary to cite additional cases to show that payment under circumstances which negatived the idea of a new promise would not, prior to the enactment of our statute, take a cause out of the statute; nor for the purpose of showing that in all cases where part payment became a material fact, it became so because the time of limitation had, at the commencement of the action, run against the original cause of action. The confidence with which counsel have relied on adjudications based on the theory of a new promise resting on the original consideration has induced a more extensive reference to this branch of the subject than would otherwise have been deemed necessary. As to the applicability of those adjudications it may be observed that if § 25 of our statute had been omitted, the preceding section would have left the effect of part payment precisely what counsel now claim it to be; that is, if the payment was made under circumstances from which a new promise could be inferred, it would be effectual in reviving or extending the right of action, and otherwise of no effect. But the Court is satisfied that the explicit language of § 25 was employed for the purpose of avoiding that condition of things, and for the purpose of making a definite and certain rule as to the effect of a part payment.

The circumstance that the language of this section is not copied from any of the older statutes, and that it lays down a rule differing in form and substance from any and all of those enactments which form the bases of the precedents above referred to, strongly indicates an intention to make a new rule resting on a literal construction of the language employed.

We are not aware of a similar enactment elsewhere, except in the State of Minnesota. The statute of that State contains a provision in the same words of our own, and the language of § 25 was considered by the Supreme Court of that State in *Whittaker v. Rice* (9 Minn. 13), the point there involved being the same as that decided by this Court in

Partlow v. Singer, (2 Ogn. 307; that is, whether part payment, made by one of several joint makers of a promissory note, is payment within the meaning of the statute, as against the other joint makers; and the ruling was the same in the two cases. In the case in this State, Chief Justice Boise said: "Ordinarily the statute begins to run when the note is due; in this case the statute fixes the time at the date of the last payment, and such plain language can have no other meaning."

His remark, that "it was the intention of the Legislature to revive the old rule, reviving liabilities as to all on a payment made by one of several joint debtors," it is claimed, indicates the reverse of the position here taken. In support of this, it is said there would be no occasion to revive a liability if it never had been barred; but an examination of the whole case does not indicate an opinion that the original cause of action had become barred, or that the plaintiff should recover because of a new or implied promise. The plaintiff's right in that case is placed on the ground that "the statute fixes the time when the limitation shall commence;" and, by the words "old rule," is undoubtedly meant the rule that "payment by one joint contractor is payment by all," which it is there said was held in England, in Maryland and Massachusetts, but has not prevailed in New York since the case of *Van Keuren v. Parmelee* (2 Coms. 523). It is evident, from the whole tenor of the opinion, that what is said of reviving liabilities does not refer to reviving a cause of action that has been barred.

The reasonable construction of this statute is, that whatever amounts to part payment of principal or interest on an existing contract of the kind specified, made before the limitation has expired, places the creditor in a position that he may sue on the original contract at any time during the period prescribed, counting from the time of payment.

We have then only to consider what is a payment within the meaning of the statute. The appellant claims that the payment should be voluntary, and should be made by one who holds such relations as will enable him to bind his co-contractor; and he cites *Smith v. Irwin,* 37 Mo. 169; *Hath-*

away v. Hastings, 9 Pick. 42; *Root v. Bradley*, 1 Kansas, 437.

In each of these cases it is held that payment, by an administrator, does not take the case out of the Statute of Limitations, but it is thought the reasoning upon which these decisions is based is not applicable under our statute. The decisions were rendered under provisions similar to that of § 24 of our Code, and they each lay stress upon the position that the administrator had no authority to "create a new debt" or to make a new promise, binding upon the co-obligor of the decedent. In *Smith v. Irwin* payment by the administrator is spoken of as not being voluntary, but it is mentioned in connection with the subject of an implied promise; it was held there that the administrator's acts did not establish a promise, and that there was not such relation between him and the other joint makers that an agency to make a new promise could be implied; but there is nothing in either of those causes from which it can be inferred that the Court would not have held the act of the administrator a payment within the meaning of our statute. We think any person who could be compelled by law to pay the note is competent to make the payment contemplated.

The decree of the Circuit Court should be affirmed.

J. D. BURNETT et al., Appellants, v. DOUGLAS COUNTY, Respondent.

WRIT OF REVIEW.—The office of the writ of review is to review the record and proceedings of inferior Courts, offices or tribunals acting in a judicial capacity, and in no other.

IDEM—WHAT PROCEEDINGS MAY BE REVIEWED.—It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers.

IDEM—WHEN GRANTING WRIT, A MATTER OF DISCRETION.—When the proceeding sought to be reviewed involves a matter of public interest the allowance of the writ is discretionary.

APPEAL from Douglas County.

This is an appeal from a judgment and order of the Cir-

cuit Court for Douglas County, refusing a writ of review and for costs and disbursements.

The appellants presented to the Court, at the October term, 1873, an application for a writ to review certain proceedings had in the County Court of said county, sitting for the transaction of county business.

The petition sets forth that the petitioners are resident freeholders and taxpayers of said county, and that they signed a remonstrance against making the order sought to be reviewed. That at the March term, 1873, the County Court made an order appropriating fifteen thousand dollars for the construction of a certain road in said county. That at the May term, 1873, said Court made an order providing that the warrants issued pursuant to said first order should be marked "special appropriation." That at the September term, 1873, an order was made rescinding the order made at the May term, and providing that the warrants should be redeemed in the usual way, and taken and received in payment of taxes.

This order is fully set out in the opinion of the Court.

W. W. Thayer, John Burnett and J. D. Fay, for Appellants.

F. A. Chenoweth, District Attorney, W. R. Willis, and Watson & Lane, for Respondent.

By the Court, MCARTHUR, J.:

Under the Constitution of this State, the Circuit Courts may exercise supervisory control over all inferior tribunals, and, in exerting this power, may resort to the writ of review, which, under the Code, is a special proceeding and sustains the same relation to our system of civil procedure that the writ of *certiorari* sustains to the common law practice. The object of the writ is to enable the superior Courts to review the judicial proceedings of the inferior, with a view to keep even and uniform the administration of justice. The petition, to accord with the statute, must show that the inferior Court, officer or tribunal, in the exercise of judicial functions, made some erroneous decisions in

relation to some process issued, or some proceeding entertained. It is not the office of the writ to bring up the proceedings of any other bodies, or classes of public officers. Courts are instituted to decide judicial questions, and superior Courts review the record and proceedings of inferior Courts, or of officers or tribunals acting in a judicial capacity, and in no other. (*People v. Supervisors,* 43 Barb. 234.)

In the earlier reports of New York we find numerous cases wherein the writ was allowed and retained in cases not strictly judicial, as, for instance, *Lawton v. Commissioners,* 2 Caines, 182; *Le Roy v. Mayor of New York,* 20 Johns. 436. And, upon the authority of these cases, the writ was granted with great looseness to review most kinds of official acts, without regard to whether they were judicial or ministerial. But this looseness was checked and the law correctly stated and applied in *People v. Mayor of New York* (2 Hill, 10), wherein Bronson, J., said that a writ of *certiorari* lies only to inferior Courts, and officers who exercise judicial powers. And, *In the Matter of Mount Morris Square* (2 Hill, 14), Cowan, J., said the writ lies to inferior Courts only; basing his opinion on Bacon's Abridg., title *Certiorari,* 13, and *Rex v. Lloyd* (Cald. Cases, 309), in which case the writ was quashed, for the reason that the order sought to be reviewed was not judicial. Cowan, J., in the case cited from 2 Hill, alludes to the cases in which the Courts clearly, and without authority, departed from the principles of law applicable to *certiorari,* and after denying their authority, lays down the law to be, "that the proper office of the writ is to review simply judicial decisions or determinations." The modern decisions, with rare exceptions, proceed upon the same theory. (*People v. Board of Health,* 33 Barb. 346; *People v. Supervisors,* 43 Barb. 232.) In Ohio the same rule prevails. (*Dixon v. Cincinnati,* 14 Ohio, 240.) Also in Georgia, where it was held—in *Justices v. Hunt* (29 Geo. 155)—that when the inferior Court acted in a prudential capacity for the county, the writ would not lie.

The inquiry necessary in the case now before us is into

the character of the order made at the September term, 1873, of the County Court of Douglas County, sitting for the transaction of county business. The order is couched in the following language: "The Court, at its May term, 1873, having made an order directing the County Clerk to indorse on all warrants issued for the construction of a certain wagon-road from the north line of Wilbur Precinct, in Douglas County, to a point five miles south of Roseburg, the words 'Special Appropriation,' for which the Court appropriated fifteen thousand dollars out of the county funds of Douglas County, for which a special tax was contemplated to be levied. It now appearing to the Court that the levy of a special tax, as contemplated by said order, is unnecessary, it is therefore ordered that there be but one levy of taxes for county purposes for the redemption of outstanding orders, and it is further considered that the county warrants indorsed 'Special Appropriation,' which have been issued, or which may be hereafter issued for the construction of said road shall be redeemed in the same manner as other county warrants issued by the Court, and shall be received for taxes due the county as other orders are received."

In the argument counsel for appellants expressly disclaim any desire to attack the general orders relating to the assessment and levy of taxes, but simply desire to test the legality of the order just set out, which was subsequent to and distinct from the orders made in the matter of fixing the rate and levy of taxes for the year 1873.

The order above set forth was a general one, and only pointed out the means by which and the manner in which certain county warrants should be redeemed. It was not of a judicial character or nature, but was rather in the nature of an instruction or order to the proper officers, commanding them to receive and cancel a certain class of warrants in the same manner in which the general warrants are received and cancelled. In order to determine the character of the order, it is only necessary to ascertain whether, when it was made, there were any proper parties before the Court, for in all judicial proceedings there must be proper parties

who must be, in some way, particularly affected by the judgment, order or determination. An examination of the record shows that there were no parties, in the legal acceptation of the word, before the County Court at the time the order was made. Besides, it was a general order, affecting the citizens of the county generally, and was not a particular order. That is to say, in its operation it did not and cannot affect any particular person or class of persons, but operated and will continue to operate in a very general manner upon the entire body of the taxpayers of the county. In all cases where the proceeding sought to be reviewed involves a matter of public interest affecting a great number of persons, the allowance of the writ is in the sound discretion of the Court, and if refused, the refusal is not subject to review or appeal. (*People v. Supervisors*, 15 Wend. 197; *Matter of Mount Morris Square*, 2 Hill, 16; *People v. Stillwell*, 19 N. Y. 531; *Truesdale's Appeal*, 58 Penn. 150.)

It follows that the decision of the Court below should be affirmed.

SAMUEL LEVY et al., Appellants, v. JAMES RILEY, Administrator, et al., Respondents.

ADMINISTRATOR—AUTHORITY REVOKED, WHEN.—When an administrator is ordered to file a new undertaking, and fails to comply with said order, thenceforward his authority shall cease, and he shall be deemed removed and his letters revoked.

PURCHASER AT SALE OF DISQUALIFIED ADMINISTRATOR.—One who purchases land at a sale by an administrator who has been thus disqualified, without knowledge of his disqualification, will be entitled to relief in equity.

APPEAL—RIGHT OF BY PURCHASER AT ADMINISTRATOR'S SALE.—A purchaser under an order of the County Court to sell land of a decedent, has no right of appeal from such order, although it should be obtained by an improper party, unless such purchaser should be (an heir or devisee of such decedent) a party required by statute to be made a party to such proceeding; neither has such puchaser any right of appeal under the statute from an order of confirmation of such sale.

APPEAL from Linn County.

The facts are stated in the opinion of the Court.

Dolph, Bronaugh, Dolph & Simon, for Appellants.

S. A. Johns and R. S. Strahan, for Respondents.

By the Court, PRIM, J.:

This was a suit in equity to enjoin respondents as administrator and administratrix of the estate of Eli B. Moore, deceased, from paying out to the creditors of said estate or otherwise disposing of certain money received by them from appellants; also from transferring a certain promissory note received by them for the purchase-price of certain real estate sold by respondents to appellants by virtue of an order of the County Court of Linn County authorizing such sale.

Respondents demurred to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of suit, and the demurrer was sustained and a decree entered against appellants for cost of suit, etc.

The complaint alleges that on July 26, 1871, respondents were appointed administrators of said estate, and gave an undertaking for the faithful performance of their said trust as such in the sum of ten thousand dollars. On filing an inventory of the property of the estate it appeared that the real estate was of the value of eight thousand eight hundred and eighty-six dollars and fifty cents, and the personal property of the value of twelve thousand nine hundred and twelve dollars and nine cents. On April 25, 1872, an order was made by said County Court declaring the undertaking of said administrators to be insufficient, and requiring them to give a new one in the sum of twenty thousand dollars, to be approved by the County Judge, and that it be filed within twenty days from the date of said order.

That said respondents wholly failed to comply with said order, whereby their official position became vacated and their letters revoked, as provided by statute in such cases. Afterwards, to wit, on December 4, 1872, respondents, still pretending to be administrators of said estate, procured of the County Court an order authorizing them as administrators of said estate to sell certain real property belonging

thereto and described in the complaint. Said property was accordingly advertised and sold by respondents to appellants; said appellants not knowing at the time of said sale that respondents had forfeited their appointment as administrators, but supposing them to have authority to act in such capacity, became the purchasers of said property at said sale. The purchase-price of said property was two thousand and fifteen dollars, gold coin; one-half to be paid down and a note to be executed for the other half. After the sale, and prior to the confirmation thereof by the County Court, appellants, having discovered the want of authority or official capacity in respondents to make said sale, appeared by attorney before said Court and remonstrated against the confirmation of said sale; but the Court, disregarding said remonstrance, ordered said sale to be confirmed.

The respondents, having demurred to the complaint, all the facts properly pleaded are to be taken as true, as therein stated.

Adopting this rule, it is admitted as true that respondents were not in fact administrators of said estate at any time during the pendency of the proceeding in the County Court to sell the land in question.

Section 1065 of the Code provides that "when a new undertaking is ordered, if the executor or administrator fail to comply therewith within five days from the entry thereof, or within such further time as the order may prescribe, thenceforward the authority of such executor or administrator shall cease, and he shall be deemed removed and his letters revoked."

Under our statute no one can sell or dispose of the property belonging to an estate of a decedent, except an executor or administrator duly appointed to perform the duties of such trust. And no sale, made by an executor or administrator, is valid unless such sale is authorized by an order of the County Court, or Judge thereof, except when a will is made by the decedent, in which provision is made authorizing the sale of certain property without such order. (Civ. Code. § 1109.)

The real property of an estate can only be sold by an administrator when it appears that the personal assets have been exhausted, and that the charges, expenses and claims, specified in § 1110, have not been satisfied. (Civ. Code, § 1113.) Under the statute no one is authorized to make the application for such sale, or make the sale when ordered, except the administrator or executor of the estate. In this proceeding it appears that the heirs of decedent were cited, and everything appears to have been regular except that the respondents, who commenced and conducted the proceeding, were not at the time administrators of the estate.

And we are here called upon to determine what was the effect of the sale made by respondents; or rather, whether appellants acquired any title to the land in question under such sale.

It is claimed by respondents, that the Court, having obtained jurisdiction of the subject-matter, by the filing of the petition of respondents, as administrators, and by the citation of the heirs, interested in the estate, that the sale is not void, but merely voidable. It is claimed, however, by appellants, that it is an absolute nullity, because made by parties who, under the law, had no right whatever to move in the matter.

In *Griffith v. Frazier* (8 Cranch, 9), it was held that "a judgment rendered against one *as administrator* who is *not such* is *void*, and the levy of an execution, issuing on such judgment, passes *no title* to the property levied on." The difference between that case and the one here is, that judgment was rendered in that case against a party as an administrator who was not such, while here a judgment, or an order of sale, was obtained by certain parties, as administrators, who, in fact, were not such at the time. In that case Joseph Salvadore was seized of lands in which trespass was alleged to have been committed and departed this life, having first made his last will, in writing, in which he appointed Joseph Decosta one of his executors, who made probate of the will and duly entered upon his trust. A few years afterwards he left the State of South Carolina and

resided in the State of Georgia. Letters of administration *de bonis non* were then granted to James Lamotte. Prior to the death of the decedent a judgment had been rendered against him which was revived against Lamotte as the administrator of Salvadore. Execution was issued on the judgment, and the lands of Salvadore were sold under it and conveyed by the Sheriff to a party under whom the plaintiff claimed title. The Circuit Court instructed the jury that "the letters of administration granted to Lamotte were totally void; that therefore the judgment of Bourdoux was not revived against the estate of Salvadore; that the sale and conveyance, by the Sheriff, passed no title to the purchaser." Mr. Chief Justice Marshall, in delivering the opinion of the Court said: "The sole defect alleged in the title of the plaintiff being in that part of it which depends on the sale and conveyance of the Sheriff to Peter Freneau, the validity of the sale is the principal if not the only question in the cause.

"By the plaintiff it is contended that the letters of administration constituted Lamotte an administrator *de facto*, and rendered his acts valid, so far as third persons are interested, and exempted them from question where they can be examined only incidentally.

"By the defendant it is contended that they were granted by a persons having no jurisdiction in the case, and are therefore an absolute nullity; that Lamotte was not *de facto* the administrator of Salvadore, and that his acts as such administrator stand on no better or higher ground than the acts of any other person who should assume that character. * * To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person, * * * and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. * * * But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet

the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law." Again he says: "Suppose administration to be granted on the estate of a deceased person whose executor is present in the constant performance of his executional duties. Is such an appointment void, or is it only voidable? In the opinion of the Court it would be an absolute nullity."

To apply the doctrine laid down by Mr. Chief Justice Marshall to this case, we will suppose a person as administrator, who in fact is not such, should apply to the Court and obtain an order to sell the land of a person not really dead, would a sale made in pursuance of such order be void or only voidable? It would be admitted by every one, we presume, that such a sale would be an absolute nullity. But, again, suppose the party should be really dead, and an administrator should be duly appointed by the proper authority to administer upon the estate of such decedent, and while such administrator should be duly engaged in discharging the duties of such trust, suppose another person as administrator, who in fact is not such, should apply to the County Court and obtain an order to sell the land of such decedent, would a sale made under such an order be void or only voidable? It appears to us such a sale would also be an absolute nullity, because the law does not authorize or permit any one except the administrator or executor to apply for such orders or to make such sales. But in this case we are not driven to the necessity of holding the sale in question to be an absolute nullity in order to warrant the Court in granting the relief demanded.

Here the sale is not attacked collaterally but directly by an original bill, upon the ground that the order was ob-

tained and the sale made by respondents as administrators, who in fact were not such; consequently it is immaterial whether the sale was void or only voidable; the validity of such sale is at least doubtful and to such an extent as to operate as a cloud upon the title of appellants to the land. And there can be no doubt but that a Court of equity should exercise its equitable powers in removing the cloud from the title, or in compelling the respondents to refund the purchase-money.

But it is insisted that "appellants' remedy, if any they had, was by appeal from the order of the County Court confirming the sale." This position, we think, is not tenable. The first part of § 1134 provides that "the order of confirmation of sale in this title mentioned is conclusive as to the regularity of the sale and no further." Section 1119 provides that "at the term of Court next following the sale of real property, the executor or administrator shall make a return of his proceedings concerning such sale." And it further provides that "any of the persons cited to appear on the application for the order of sale may file objections to the confirmation."

Thus it will be seen that the purchasers at such sales are not included among those who may appear and oppose the order of confirmation, as the heirs and devisees are the only persons required by statute to be cited to appear on an application for an order to sell. (Civ. Code, § 1115.) In this case, however, it appears that appellants did appear by attorney in the County Court and object to the confirmation of the sale; but the statute failing to recognize any such right on the part of purchasers, they were there merely by the courtesy of the County Court, and not as a matter of right, consequently could take no appeal from the order of the Court confirming the sale, and they could not appeal from the order of the Court authorizing respondents to make the sale, because they were not parties to the proceeding at that time.

It is therefore ordered that the demurrer interposed to the complaint be overruled, and that this cause be removed to the Court below for further proceedings.

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It is therefore ordered that the demurrer interposed to the complaint be overruled, and that this cause be removed to the Court below for further proceedings.

EXTRA ANNOTATION

TO

PRECEDING VOLUME

NOTES

ON THE

OREGON REPORTS.

CASES IN 4 OREGON.

4 Or. 1-21, HEATHERLY v. HADLEY.

Courts.—No Intendment Favors Jurisdiction of Inferior Court, p. 13.

Cited in White v. Espey, 21 Or. 331, 28 Pac. 72, holding that jurisdiction of inferior court must affirmatively appear; Willits v. Walter, 32 Or. 414, 52 Pac. 24, holding that complaint in action on judgment of justice must show jurisdictional facts.

Judgment.—Recital of Facts Requisite to Jurisdiction are conclusive on collateral attack, p. 13.

Cited in Walker v. Goldsmith, 14 Or. 142, 12 Pac. 555, and McCullough v. Estes, 20 Or. 350, 25 Pac. 725, applying rule in favor of guardian's sale collaterally attacked.

Court.—When Court Seeks to Acquire Jurisdiction by a course specially pointed out by statute, strict compliance is necessary, p. 14.

Cited in Northcut v. Lemery, 8 Or. 323, reaffirming the rule; Kelley v. Kelley, 161 Mass. 118, 42 Am. St. Rep. 389, 36 N. E. 840, 25 L. R. A. 806, applying rule to proceeding in equity to annul marriage.

Judgment.—When the Decree Recites Due Service and the return purports to set out the mode of service, and the mode set out is insufficient, the recital will not aid the return, p. 21.

Cited in Northcut v. Lemery, 8 Or. 322, Knapp v. Wallace, 50 Or. 354, 126 Am. St. Rep. 742, 92 Pac. 1057, and Fishburn v. Leadershausen, 50 Or. 373, 92 Pac. 1064, 14 L. R. A., N. S., 1234, all approving and following the rule; Murray v. Murray, 6 Or. 24, holding that a foreign judgment may be collaterally attacked.

4 Or. 25-29, SEELY v. SEBASTIAN.

Eminent Domain.—Drainage of Marsh Lands is a public use, p. 29.

Cited in Zigler v. Menges, 121 Ind. 102, 16 Am. St. Rep. 357, 22 N. E. 783, and Donnelly v. Decker, 58 Wis. 473, 46 Am. Rep. 637, 17 N. W. 394, applying the rule in similar cases. Cited in notes to 16 Am. St. Rep. 367, 368, on purposes justifying tax or assessment; 60 L. R. A. 179, on procedure for establishment of drains and sewers.

4 Or. 30–39, BAMFORD v. BAMFORD.

Divorce.—Where Neither the Pleadings nor the Judgment mentions property, the party obtaining the divorce acquires no title to the property of the adversary by virtue of the divorce, p. 31.

Cited in Wetmore v. Wetmore, 5 Or. 472, Weiss v. Bethel, 8 Or. 528, Hall v. Hall, 9 Or. 456, Houston v. Timmerman, 17 Or. 509, 11 Am. St. Rep. 848, 21 Pac. 1040, 4 L. R. A. 716, Ross v. Ross, 21 Or. 11, 13, 26 Pac. 1007, Senkler v. Berry, 52 Or. 215, 96 Pac. 1071, and Philbrick v. Andrews, 8 Wash. 9, 35 Pac. 359, all approving and applying the rule; Barrett v. Failing, 111 U. S. 528, 4 Sup. Ct. Rep. 598, 28 L. ed. 507, holding that foreign divorce decree gives wife no title to lands in Oregon.

Qualified in Barrett v. Failing, 3 Fed. 473, 6 Saw. 473, holding that decree need not describe property awarded. Cited in notes to 61 Am. Dec. 466, on proceedings to vacate and annul divorces, and effect on parties and on marriages which they have contracted; 65 Am. Dec. 358, on effect of valid decree of divorce.

4 Or. 39–46, TORRENCE v. STRONG.

Appeal.—Jury are Presumed to have Found every material allegation in the complaint in favor of plaintiff, p. 45.

Cited in Schmit v. Day, 27 Or. 117, 39 Pac. 872, reaffirming the rule. Cited in note to 72 Am. Dec. 521, on striking out answer as sham.

4 Or. 46–52, JOHNS v. MARION COUNTY.

Courts.—Records of Court of Limited Jurisdiction must show affirmatively that jurisdiction has been acquired. County court, in establishing a highway, is a court of limited jurisdiction within the rule, p. 49.

Cited in State v. Officer, 4 Or. 183, Bewley v. Graves, 17 Or. 282, 80 Pac. 325, State v. Myer, 20 Or. 444, 26 Pac. 307, Cameron v. Wasco County, 27 Or. 321, 41 Pac. 161, Munroe v. Thomas, 35 Or. 175, 57 Pac. 420, and Mulkey v. Day, 49 Or. 315, 89 Pac. 958, all approving and applying the rules; Grady v. Dundon, 30 Or. 336, 47 Pac. 916, holding proceedings void where record does not show notice.

Modified in Tustin v. Gaunt, 4 Or. 307, holding that in probate matters the county court has general and superior jurisdiction; Monastes v. Catlin, 6 Or. 121, conceding general jurisdiction to county court over estates of insane persons.

Highways.—Petition for Road must Specify Place of Beginning, the intermediate points, and the terminal of the road, p. 49.

Cited in Woodruff v. Douglas County, 17 Or. 322, 21 Pac. 51, Sime v. Spencer, 30 Or. 342, 47 Pac. 919, and French-Glenn Livestock Co. v. Harney Co., 38 Or. 317, 58 Pac. 86, all approving and applying the rule; Canyonville etc. Road Co. v. County of Douglas, 5 Or. 283, 285, in main and dissenting opinion, both upholding the rule.

Highways.—One Filing a Claim for Damages is not Estopped to question jurisdiction of county court to establish the road, p. 51.

Cited in Woodruff v. Douglas County, 17 Or. 323, 21 Pac. 52, affirming and applying the rule.

Highways.—County Court can Only Acquire Jurisdiction in mode pointed out by statute, p. 51.

Cited in Bitting v. Douglas County, 24 Or. 409, 33 Pac. 982, holding notice without specific date insufficient; Jones v. Polk County, 36 Or. 542, 60 Pac. 205, stating mode of acquiring jurisdiction to establish road.

4 Or. 52–58, STONE v. OREGON CITY MFG. CO.

Master and Servant.—Assumption of Obvious Risks and dangers avoidable by use of thinking faculties, p. 55.

Cited in Hurst v. Burnside, 12 Or. 530, 8 Pac. 893, Viohl v. North Pac. Lumber Co., 46 Or. 300, 80 Pac. 113, and Blust v. Pacific States Telephone, 48 Or. 39, 84 Pac. 849, all following the rule; Johnston v. Oregon S. L. etc. Co., 23 Or. 105, 31 Pac. 286, defining open and visible risks. Cited in notes to 98 Am. St. Rep. 812, on liability to servant for injuries due to defective machinery and appliances; 92 Am. Dec. 217, on duty to furnish safe means and appliances to servants.

Master and Servant.—Continuing Work Around Machinery known to be dangerous as assumption of risk, p. 56.

Cited in Wells v. Coe, 9 Colo. 162, 11 Pac. 51, approving the rule. Cited in note in 49 L. R. A. 50, on contributory negligence in entering or remaining in an employment.

4 Or. 58–61, DEARBORN v. PATTON.

Justices of the Peace.—In Order to Make Judgment of Justice a lien, the transcript must be filed with district clerk; filing of abstract won't do, p. 60.

Cited in White v. Espey, 21 Or. 331, 28 Pac. 72, reaffirming the rule.

4 Or. 61–64, FULTON v. EARHART.

Appeal.—Findings of Court will not be Disturbed unless there be no evidence to support them, p. 63.

Cited in McClung v. McPherson, 47 Or. 76, 81 Pac. 569, reaffirming the rule.

Appeal.—Assignments must State Particulars wherein action below was erroneous, p. 64.

Cited in Carver v. Jackson County, 22 Or. 63, 29 Pac. 78, reaffirming the rule.

Appeal.—Evidence will not be Reviewed unless it is all brought up, p. 64.

Cited in Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, applying the rule.

4 Or. 64–70, STATE v. DODSON.

Indictment.—Code Form Upheld, p. 65.

Cited in State v. Brown, 7 Or. 198, State v. Wintzingerode, 9 Or. 157, State v. Ah Lee, 18 Or. 542, 23 Pac. 425, State v. Woolridge, 45 Or. 394, 78 Pac. 335, State v. Guglielmo, 46 Or. 253, 79 Pac. 579, 69

L. R. A. 466, State v. Eddy, 46 Or. 623, 81 Pac. 942, and United States v. Clark, 46 Fed. 640, all to same effect.

Homicide.—Uncommunicated Threats as Evidence, p. 67.

Cited in State v. Williams, 40 La. Ann. 170, 3 South. 630, stating when uncommunicated threats may be proved; State v. Bartmess, 33 Or. 127, 54 Pac. 172, admitting evidence of threats as tending to show that deceased was the aggressor. Cited in notes in 17 L. R. A. 655, on evidence of threats of accused, or of person injured or killed; 3 L. R. A., N. S., 525, 526, on evidence of antecedent threats on trial for homicide.

Criminal Law.—Error not Raised Below will not be considered, p. 67.

Cited in State v. Zorn, 22 Or. 592, 30 Pac. 317, reaffirming the rule.

4 Or. 70–72, SMITH v. ELLENDALE MILL CO.

Appeal.—Default Judgment is not Appealable, p. 73.

Cited in State v. Leasia, 45 Or. 411, 78 Pac. 329, approving the rule; Askrew v. Squire, 29 Or. 232, 45 Pac. 779, holding that no appeal lies from voidable judgment.

Judgment.—When Default Judgment may be Taken, p. 71.

Cited in Trullenger v. Todd, 5 Or. 37, 39, applying the rule.

4 Or. 72–76, WARNER v. MYERS.

Mandamus is Proper Remedy to Compel Officer to deliver to his successor appurtenances belonging to the office, p. 73.

Cited in Stevens v. Carter, 27 Or. 562, 40 Pac. 1076, 31 L. R. A. 342, Territory v. Shearer, 2 Dak. 346, 8 N. W. 139, and State v. Hyland, 75 Neb. 769, 107 N. W. 114, all approving the rule.

Mandamus.—Under the Code the Office of the Writ is precisely the same as it was at common law, p. 73.

Cited in Durham v. Monumental etc. Min. Co., 9 Or. 44, Habershaw v. Sears, 11 Or. 434, 50 Am. Rep. 481, 5 Pac. 309, and Slemmons v. Thompson, 23 Or. 219, 31 Pac. 515, all reaffirming the rule.

Mandamus.—Writ cannot be Used to Try Title to Office, p. 76.

Cited in Biggs v. McBride, 17 Or. 652, 21 Pac. 882, 5 L. R. A. 115, Cameron v. Parker, 2 Okl. 308, 339, 342, 38 Pac. 25, 36, 37, and In re Torney, 7 Misc. Rep. (N. Y.) 262, 27 N. Y. Supp. 914, all following the rule.

Reconciled in Kline v. McKelvey, 57 W. Va. 30, 32, 49 S. E. 896, 892, holding mandamus proper to compel restoration to office of party having clear prima facie right thereto. Cited in notes to 98 Am. St. Rep. 886, on mandamus as proper remedy against public officers; 12 Am. Dec. 29, 30, on mandamus to restore to or determine title to office; 31 L. R. A. 343, 347, 349, 360, on mandamus to compel surrender of office.

Election.—Decision of Board of Canvassers, Though Erroneous, must stand until set aside by a competent tribunal, p. 76.

Cited in State v. Johnson, 35 Fla. 12, 16 South. 789, 31 L. R. A. 357, approving the rule.

4 Or. 76-89, M. E. PROTESTANT CHURCH v. ADAMS.

Equity.—Derivation and Extent of Jurisdiction, pp. 82, 83.

Cited in Re John's Will, 30 Or. 510, 47 Pac. 346, 36 L. R. A. 242, holding that equity has inherent jurisdiction over charitable trusts; Callsen v. Hope, 75 Fed. 760, holding that where there is no plain, speedy and adequate remedy at law, equity may be invoked.

4 Or. 89-92, BROWN v. HARPER.

Mechanic's Lien.—Assignee of Claim cannot Perfect, p. 90.

Cited in Fleming v. Greener, 41 Ind. App. 80, 83 N. E. 355, Brown v. Chicago etc. Ry. Co., 36 Mo. App. 461, and O'Connor v. Current River R. Co., 111 Mo. 193, 20 S. W. 18, all holding that assignee of claim has no right to lien. Cited in note to 49 Am. St. Rep. 530, 532, on assignment of mechanics' liens.

Mechanics' Liens.—Perfected Lien is Assignable, p. 91.

Cited in Brown v. School Dist. No. 84, 48 Kan. 712, 29 Pac. 1071, reaffirming the rule; The Victorian No. 2, Sutton v. The Victorian, 26 Or. 197, 46 Am. St. Rep. 616, 41 Pac. 1103, applying the rule to a maritime lien.

Mechanics' Liens.—Right to Lien is a Personal Privilege, p. 91.

Cited in Coffey v. Smith, 52 Or. 540, 97 Pac. 1080, and Alderson v. Lee, 52 Or. 98, 96 Pac. 237, to point that to constitute a lien the statute must be complied with in every requirement; Hughes v. Hoover, 3 Cal. App. 150, 84 Pac. 683, to point that lien is a statutory right under legislative control; Hughes v. Lansing, 34 Or. 121, 75 Am. St. Rep. 568, 55 Pac. 96, holding that waiver of claim for materials waives lien.

4 Or. 92-96, FORBN v. DEALEY.

Pleading.—To be Sham Allegations must be False in fact and pleaded in bad faith, p. 95.

Cited in Miser v. O'Shea, 37 Or. 285, 82 Am. St. Rep. 751, 62 Pac. 492, and Randall v. Simmons, 40 Or. 556, 67 Pac. 514, both applying the rule. Cited in notes to 113 Am. St. Rep. 640, 643, on sham pleadings; 72 Am. Dec. 521, on striking out answer as sham.

4 Or. 96-98, O'RILEY v. WILSON.

This case has not been cited.

4 Or. 101-105, MOORE v. FLOYD.

Fraudulent Conveyances.—Presumption of Fraud from Retention of Possession, p. 103.

Cited in McCully v. Swackhammer, 6 Or. 440, reaffirming the rule; Ehrman v. Astoria etc. Co., 26 Or. 380, 38 Pac. 306, a miscitation. Cited in notes in 3 L. R. A., N. S., 423, on burden of proof in suit for failure to execute process; 30 Am. Dec. 487, on measure of damages for not returning execution.

4 Or. 105-113, ANDERSON v. BAXTER.

Mortgages.—Only Lien is Created, title remains in mortgagor, p. 110.

Cited in Thompson v. Marshall, 21 Or. 176, 27 Pac. 959, Meier v. Kelly, 22 Or. 138, 29 Pac. 266, Marx v. La Rocque, 27 Or. 47, 39 Pac. 402, Security Savings etc. Co. v. Loewenberg, 38 Or. 161, 62 Pac. 649, Dekum v. Multnomah, 38 Or. 256, 63 Pac. 496, Kaston v. Storey, 47 Or. 152, 114 Am. St. Rep. 912, 80 Pac. 218, Noble v. Watkins, 48 Or. 520, 87 Pac. 772, Teal v. Walker, 111 U. S. 251, 4 Sup. Ct. Rep. 420, 28 L. ed. 418, Savings & Loan Society v. Multnomah Co., 169 U. S. 426, 18 Sup. Ct. Rep. 392, 42 L. ed. 804, Gest v. Packwood, 34 Fed. 373, 13 Saw. 202, McManness v. Paxson, 37 Fed. 299, Lewis v. Wells, 85 Fed. 902, Witherell v. Wiberg, Fed. Cas. No. 17,917, 4 Saw. 232, Semple v. Bank of British Columbia, Fed. Cas. No. 12,659, 5 Saw. 88, and Semple v. Bank of British Columbia, Fed. Cas. No. 12,660, 5 Saw. 394, all reaffirming and applying the rule; Renshaw v. Taylor, 7 Or. 321, holding heirs of mortgagor necessary parties to foreclosure suit. Cited in note to 116 Am. St. Rep. 657, 662, 664.

Mortgages.—Foreclosure Suit is a Proceeding in Rem and absence of mortgagor from state does not extend time limit, p. 111.

Cited in Eubanks v. Leveridge, Fed. Cas. No. 4544, 4 Saw. 274, reaffirming the rule; George v. Butler, 26 Wash. 463, 90 Am. St. Rep. 756, 67 Pac. 266, 57 L. R. A. 396, holding that absence of mortgagor does not stay statute in favor of his grantee; Wells v. Scanlan, 124 Wis. 233, 102 N. W. 573, holding that absence of both parties does not toll statute; Zoll v. Carnahan, 83 Mo. 43, not deciding whether rule applies to foreclosure of vendor's lien; Menzel v. Hinton, 132 N. C. 668, 95 Am. St. Rep. 647, 44 S. E. 388, dissenting opinion, majority holding that statute of limitations is not applicable to foreclosure under power of sale; Allen v. O'Donald, 28 Fed. 348, holding that action to foreclose is not barred so long as the debt is not; Colonial etc. Mtg. Co. v. Northwest Thresher Co., 14 N. D. 166, 116 Am. St. Rep. 642, 103 N. W. 925, 70 L. R. A. 814, dissenting opinion, majority holding that foreclosure suit is action in personam.

Overruled in Simonson v. Nafis, 36 App. Div. 475, 55 N. Y. Supp. 450, holding rule different in New York. Cited in notes in 12 Am. Dec. 369, 371, on limitations in equity; 26 L. R. A., N. S., 901, on effect of mortgagor's absence from state to toll limitations as against foreclosure against his grantee.

Mortgages.—Possessory Rights of Parties are not Involved in suit to foreclose, pp. 112, 113.

Distinguished in Roberts v. Sutherlin, 4 Or. 222, involving legal effect of entry by mortgagee with assent of mortgagor.

4 Or. 114–119, CROSS v. CHICHESTER.

Appeal.—Leave to File Undertaking must be Asked before motion to dismiss, p. 115.

Cited in Alberson v. Mahaffey, 6 Or. 413, and State v. McKinmore, 8 Or. 207, both following the rule.

Overruled in Elwert v. Norton, 34 Or. 571, 51 Pac. 1098, and Fleischner v. Bank of McMinnville, 36 Or. 555, 61 Pac. 884, both permitting new undertaking to be filed.

Appeal.—Cost-bill and its verification, pp. 116–118.

Cited in Young v. Hughes, 39 Or. 597, 66 Pac. 273, approving the decision.

4 Or. 119–123, **NEWSON v. GREENWOOD.**

Statutes.—Those Repealing or Affecting the Remedy should not be extended to suits brought before the repeal, p. 122.

Cited in Smith v. Kelly, 24 Or. 472, 33 Pac. 645, City of Seattle v. O'Connell, 16 Wash. 630, 48 Pac. 414, and Campbell v. Iron-Silver Min. Co., 83 Fed. 646, 27 C. C. A. 646, all following the rule.

Reformation.—Party Seeking Correction for Mistake must establish the fact by clear and satisfactory proof, p. 123.

Cited in Lewis v. Lewis, 4 Or. 179, and Ramsey v. Loomis, 6 Or. 374, both following the rule.

4 Or. 124–132, **PITZER v. RUSSEL.**

Judgment.—Action will not Lie on Judgment unless necessary to protect rights of creditor, pp. 127–131.

Cited in Hummer v. Lamphere, 32 Kan. 441, 49 Am. Rep. 491, 4 Pac. 866, 868, sustaining the logic of the rule but regarding the contrary as stare decisis in Kansas; Bettman v. Cowley, 19 Wash. 225, 53 Pac. 59, 40 L. R. A. 815, dissenting opinion, majority holding that the owner of a judgment has a common-law right to sue on it; Bowman v. Holman, 53 Or. 459, 99 Pac. 425, leaving the question undecided; Solen v. Virginia etc. R. R. Co., 15 Nev. 323, 331, dissenting and concurring opinions, majority holding that action can be maintained on a judgment when there is no necessity for it; Stevens v. Stone, 94 Tex. 417, 86 Am. St. Rep. 861, 60 S. W. 959, approving the rule but distinguishing the facts.

Disapproved in Haupt v. Burton, 21 Mont. 576, 69 Am. St. Rep. 698, 55 Pac. 112, following contrary decisions; Citizens' Nat. Bank v. Lucas, 26 Wash. 423, 90 Am. St. Rep. 748, 67 Pac. 254, 56 L. R. A. 812, holding that right of action on judgment accrues when it is rendered. Cited in note to 76 Am. Dec. 540, as to when action lies on judgment.

4 Or. 132–152, **BROWN v. FLEISCHNER.**

State.—Treasurer is not Bound to Pay Warrants when no appropriation has been made for their payment, p. 135.

Cited in Journal Pub. Co. v. Kenney, State Auditor, 9 Mont. 397, 24 Pac. 98, holding that auditor cannot be compelled to draw warrant until appropriation is made; May v. Rice, 91 Ind. 551, holding that money cannot be appropriated by joint resolution; Territory v. Scott, 3 Dak. 430, 20 N. W. 421, discussing delegation of legislative power.

Overruled in Shattuck v. Kincaid, 31 Or. 400, 49 Pac. 764, compelling secretary to draw warrant for payment of officer's salary.

4 Or. 153–156, **CHAMBERS v. CHAMBERS.**

Public Lands.—Descent of Lands Under Donation Act, p. 155.

Cited in Proebstel v. Hogue, 15 Fed. 585, 8 Saw. 592, approving the rule.

4 Or. 157–163, STATE v. PACKARD.

Officers.—Indictment for Taking Illegal Fees, p. 160.

Cited in State v. Perham, 4 Or. 189, 190, State v. Ah Sam, 14 Or. 348, 13 Pac. 304, and State v. Shaw, 22 Or. 291, 29 Pac. 1029, all upholding the doctrine. Cited in note to 94 Am. Dec. 255, on charging crime in language of statute.

4 Or. 163–171, HILLMAN v. SHANNAHAN.

Indemnity.—Bond not to Engage in Business cannot be assigned, p. 166.

Overruled in Webster v. Buss, 61 N. H. 47, holding that such bond inures to benefit of assignee of business.

4 Or. 171–176, CARNEY v. BARRETT.

Courts.—Power of Court to Make Rules is Inherent, p. 175.

Cited in Coyote etc. Min. Co. v. Ruble, 9 Or. 122, and State v. Birchard, 35 Or. 486, 59 Pac. 469, both upholding the rule.

4 Or. 177–180, LEWIS v. LEWIS.

Reformation.—Evidence of Mistake must be Clear and satisfactory, p. 179.

Cited in Ramsey v. Loomis, 6 Or. 374, to point that parol evidence is admissible.

Boundaries.—Permanent and Visible Monuments control calls for lines, angles and surfaces, p. 179.

Cited in Raymond v. Coffey, 5 Or. 135, King v. Brigham, 19 Or. 566, 25 Pac. 152, and Albert v. City of Salem, 39 Or. 474, 65 Pac. 1071, all reaffirming the rule; Weiss v. Oregon etc. Co., 13 Or. 497, 11 Pac. 256, holding the stream, and not the meander lines, the true boundary; Miller v. White, 23 Fla. 307, 2 South. 617, holding federal survey controlling. Cited in notes in 129 Am. St. Rep. 997, on location of boundaries; 30 Am. Dec. 737, on inconsistency or uncertainty in description or boundaries of land.

Equity.—Locality of Lost Boundary Stake may be fixed in either law or equity, p. 180.

Cited in Watkins v. Childs, 80 Vt. 108, 66 Atl. 808, approving the rule. Cited in note in 15 Am. Dec. 748, on equity jurisdiction over confused boundaries.

4 Or. 180–184, STATE v. OFFICER.

Courts.—County Court is a Court of Special and limited jurisdiction, p. 183.

Modified in Monastes v. Catlin, 6 Or. 121, Bewley v. Graves, 17 Or. 282, 20 Pac. 325, State v. Myer, 20 Or. 444, 26 Pac. 307, Lime v. Spencer, 30 Or. 341, 47 Pac. 919, and Tustin v. Gaunt, 4 Or. 307, all confining the rule to cases in which county court acts as board of county commissioners.

Highways.—Record Should Show Affirmatively That the Statute requiring notice of proposed highway was strictly complied with, p. 184.

Cited in Northern Pacific etc. Co. v. City of Portland, 14 Or. 26, 13 Pac. 707, and Grady v. Dundow, 30 Or. 336, 47 Pac. 916, both applying the rule; Minard v. Douglas County, 9 Or. 213, 215, indicating that proof of service should state where the notices were posted; Munroe v. Thomas, 35 Or. 175, 57 Pac. 420, holding that record of justice court must show jurisdictional facts; Parker v. Ft. Worth etc. Ry. Co., 84 Tex. 336, 19 S. W. 519, applying the rule to condemnation proceedings. Cited in note to 94 Am. Dec. 765, on loss of lien by pledgee's surrender of possession.

4 Or. 184–188, STATE v. WILEY.

Justices of the Peace.—Police Judge of City may be Made ex officio justice of the peace or given concurrent jurisdiction, p. 186.

Cited in Multnomah County v. Adams, 6 Or. 115, and Clemmensen v. Peterson, 35 Or. 51, 56 Pac. 1016, both approving the rule; City of Portland v. Denny, 5 Or. 161, 164, holding that police judge is entitled to compensation under general laws when acting as justice of the peace.

4 Or. 188–190, STATE v. PERHAM.

Indictment.—Insufficiency of Description of Offense, p. 189.

Cited in State v. Shaw, 22 Or. 291, 29 Pac. 1029, applying the rule. Cited in note to 94 Am. Dec. 254, on charging crime in language of statutes.

4 Or. 190–197, FRAREY v. WHEELER.

Husband and Wife.—Wife's Contract to Convey cannot be specifically enforced, pp. 196, 197.

Cited in Hass v. Sedlak, 9 Or. 465, holding married woman incapacitated to mortgage land.

Distinguished in Klecka v. Ziegler, 81 Md. 486, 32 Atl. 243, under different statutes. Cited in note in 24 L. R. A. 764, on specific performance of contracts for conveyance where wife refuses to join.

Husband and Wife.—Where Married Woman has Received Proceeds of Sale of land and purchaser has made improvements, such expenditures must be charged to her in setting aside the sale, p. 197.

Cited in Finlayson v. Finlayson, 17 Or. 357, 11 Am. St. Rep. 836, 21 Pac. 60, 3 L. R. A. 801, applying the rule in favor of husband making improvements on land deeded to wife; Ware v. Hamilton Brown Shoe Co., 92 Ala. 150, 9 South. 137, applying the rule in favor of creditors and against fraudulent grantee; Wood v. Rayburn, 18 Or. 8, 9, 22 Pac. 523, charging amount of purchase price against wife's land.

4 Or. 198–199, STATE v. SPORES.

Criminal Law.—Accused must be Present When Verdict is received, p. 199.

Cited in State v. Cartwright, 10 Or. 196, holding that record must show this fact. Cited in notes to 68 Am. Dec. 224, on necessity of personal presence of accused; 14 L. R. A., N. S., 605, on right of accused to waive presence at receipt of verdict upon trial for felony.

4 Or. 200–206, STATE v. DOUGHERTY.

Indictment.—Description of Offense, p. 203.

Cited in State v. Doty, 5 Or. 492, 493, following the rule; Fitzpatrick v. United States, 178 U. S. 308, 20 Sup. Ct. Rep. 944, 44 L. ed. 1080, applying the rule to indictment for murder.

Distinguished in State v. Ah Sam, 14 Or. 348, 13 Pac. 304, holding indictment, for smoking opium, in language of statute, sufficient; State v. Shaw, 22 Or. 291, 29 Pac. 1029, where defendant was charged with depositing sawdust in a river.

4 Or. 206–208, SHEPARD v. HAWLEY.

Animals.—What is an Estray and Right to Take Up and post, p. 207.

Cited in Stewart v. Hunter, 16 Or. 63, 8 Am. St. Rep. 267, 16 Pac. 877, 878, referring to the case in reviewing instructions based on it. Cited in note in 28 Am. Rep. 501, as to when animals are running at large.

4 Or. 209–210, LEWIS v. LEWIS.

Appeal.—Requisites of Notice, p. 210.

Cited in Weiss v. Board of Commrs., 8 Or. 529, Lancaster v. McDonald, 14 Or. 266, 12 Pac. 376, Carver v. Jackson Co., 22 Or. 63, 29 Pac. 78, and Mendenhall v. Elwert, 36 Or. 379, 52 Pac. 23, all approving the rule; Neppach v. Jordan, 13 Or. 247, 10 Pac. 342, stating what constitutes sufficient description of judgment; Weitzman v. Handy, 1 Alaska, 662, applying the rule to appeal from justice to district court; Christian v. Evans, 5 Or. 254, applying the rule where the notice failed to describe the judgment.

4 Or. 210–215, ROBERTSON v. GROVES.

Municipal Corporations.—Jurisdiction of Council to Determine Election Contest, p. 212.

Cited in Simon v. Portland Common Council, 9 Or. 443, holding that council is final judge of election of mayor and its members and its decision not reviewable.

4 Or. 219–225, ROBERTS v. SUTHERLIN.

Mortgages.—Mortgagee in Possession With Permission of Mortgagor may hold premises until his debt is paid, p. 223.

Cited in Fee v. Swingly, 6 Mont. 600, 13 Pac. 377, Spect v. Spect, 88 Cal. 443, 22 Am. St. Rep. 314, 26 Pac. 205, Moncrieff v. Hare, 38 Colo. 236, 87 Pac. 1087, 7 L. R. A., N. S., 1001, Lambert v. Howard, 49 Or. 345, 90 Pac. 151, Fulton v. Levy, 21 Neb. 483, 32 N. W. 309, Edwards v. Wray, 12 Fed. 44, 11 Biss. 251, The Holladay Case (Hickox

v. Holladay), 29 Fed. 230, and Witherall v. Wiberg, Fed. Cas. No. 17,917, 4 Saw. 232, all approving and applying the rule; Renshaw v. Taylor, 7 Or. 325, holding that mortgagee receiving rents and profits should apply them on the debt; Cook v. Cooper, 18 Or. 147, 17 Am. St. Rep. 709, 22 Pac. 946, 7 L. R. A. 273, approving and extending the rule; Kelso v. Norton, 65 Kan. 790, 93 Am. St. Rep. 308, 70 Pac. 900, applying the rule where a purchaser at void foreclosure sale was let into possession by the mortgagor; Coles v. Meskimen, 48 Or. 56, 85 Pac. 68, applying rule to vendee in possession; Boggs v. Douglass, 105 Iowa, 347, 75 N. W. 186, holding that a mortgagee is a purchaser within the meaning of the recording act; Teal v. Walker, 111 U. S. 251, 4 Sup. Ct. Rep. 420, 28 L. ed. 418, to point that mortgagee is not entitled to rents and profits until he gets possession by foreclosure; Semple v. Bank of British Columbia, Fed. Cas. No. 12,660, 5 Saw. 394, and Gest v. Packwood, 34 Fed. 373, 13 Saw. 202, both to point that mortgagee has no interest or estate in the premises.

Distinguished in De Lashmutt v. Sellwood, 10 Or. 322, where mortgagee did not get possession with consent of mortgagor.

Mortgages.—Where There is a Note and Mortgage the latter is a mere incident of the debt and passes by assignment of the note, p. 224.

Cited in Barringer v. Loder, 47 Or. 229, 81 Pac. 780, reaffirming the rule.

4 Or. 225-235, MATHEWS v. EDDY.

Reformation.—Correction of Error in Description, p. 229.

Cited in Ramsey v. Loomis, 6 Or. 374, holding that lands omitted by mistake may be inserted in the description.

Judicial Sale.—Order Confirming is Conclusive, p. 233.

Cited in McRae v. Daviner, 8 Or. 65, Leinenweber v. Brown, 24 Or. 553, 34 Pac. 477, Otis Bros. & Co. v. Nash, 26 Wash. 45, 66 Pac. 113, and Ebner v. Heid, 2 Alaska, 605, all following the rule; Dawson v. Helmes, 30 Minn. 112, 14 N. W. 463, stating effect of confirmation of guardian's sale; Semple v. Bank of British Columbia, Fed. Cas. No. 12,659, 5 Saw. 88, stating effect of confirmation of foreclosure sale. Cited in note in 11 Am. Dec. 196, on execution sale of equity of redemption.

4 Or. 235-249, TAGGART v. RISLEY.

Estoppel.—By Deed, and Transfer of After-acquired Title, p. 240.

Cited in Wilson v. McEwan, 7 Or. 108, Bayley v. McCoy, 8 Or. 261, 263, Raymond v. Flavel, 27 Or. 243, 40 Pac. 165, Gardner v. Wright, 49 Or. 624, 91 Pac. 292, Hardenberg v. Ray, 33 Fed. 818, 13 Saw. 158, and United States v. California etc. Land Co., 148 U. S. 47, 13 Sup. Ct. Rep. 458, 37 L. ed. 362, all approving and applying the rule; West Seattle etc. Co. v. Novelty Mill Co., 31 Wash. 443, 72 Pac. 72, applying the rule to quitclaim deed.

Distinguished in Salem Imp. Co. v. McCourt, 26 Or. 104, 41 Pac. 1107, where the grantor was the state, against whom estoppel is in-

applicable. Cited in note to 53 Am. St. Rep. 119, on covenant for quiet enjoyment.

4 Or. 249–258, HANNAH v. WELLS.

Bail.—Parties and Pleading in Action on, pp. 250–254.

Cited in Malheur County v. Carter, 52 Or. 618, 620, 624, 98 Pac. 490, 491, 492, upholding the rules. Cited in note in 26 Am. Dec. 671, on certainty in contract as requisite to specific performance.

4 Or. 258–261, DERKENY v. BELFILS.

Abatement.—Matter in Abatement not Pleaded is waived and cannot be proved, p. 259.

Cited in Bump v. Cooper, 20 Or. 529, 26 Pac. 849, Bridal Veil Lumber Co. v. Johnson, 25 Or. 108, 34 Pac. 1027, McClung v. McPherson, 47 Or. 86, 82 Pac. 13, In re Morgan's Estate, 46 Or. 242, 78 Pac. 1030, and Elliott v. Kuzek, 2 Alaska, 589, all reaffirming and applying the rule.

4 Or. 260–261, MOORE v. FLOYD.

Appeal.—By Accepting the Benefits of a Judgment a party waives the right to appeal from it, p. 261.

Cited in Inverarity v. Stowell, 10 Or. 266, Merriam v. Victory Mining Co., 37 Or. 324, 56 Pac. 76, Bechtel v. Evans, 10 Idaho, 150, 77 Pac. 213, In re Black's Estate, 32 Mont. 54, 79 Pac. 555, Roots v Boring Junction L. Co., 50 Or. 311, 92 Pac. 816, Oregon Electric Ry. Co. v. Terwilliger Land Co., 51 Or. 114, 93 Pac. 836, and Elwert v. Marley, 53 Or. 594, 99 Pac. 888, 101 Pac. 671, all approving and applying the rule; Portland Const. Co. v. O'Neil, 24 Or. 57, 32 Pac. 765, applying the rule where appellant accepted money deposited in satisfaction of judgment; Bush v. Mitchell, 28 Or. 97, 41 Pac. 156, applying rule where party accepted benefit of part of decree; In re Baby's Estate, 87 Cal. 203, 22 Am. St. Rep. 239, 25 Pac. 405, where party accepted payment in full satisfaction; Thomas v. Booth-Kelly Co., 52 Or. 536, 132 Am. St. Rep. 713, 97 Pac. 1079, allowing fact to be proved by evidence outside of record; Meaders v. Gray, 60 Miss. 407, 45 Am. Rep. 414, not deciding whether acceptance of amount adjudged due precludes appeal. Cited in notes to 45 Am. St. Rep. 271, on appeal after satisfaction of judgment; 13 Am. Dec. 548, on waiver of appeal or right of review.

4 Or. 261–269, WILLAMETTE FREIGHTING CO. v. STANNUS.

Corporations.—Subscription of Whole Amount of Stock not prerequisite to incorporation, p. 268.

Cited in Astoria etc. Co. v. Hill, 20 Or. 180, 25 Pac. 380, and Graebner v. Post, 119 Wis. 397, 100 Am. St. Rep. 890, 96 N. W. 784, both approving and applying the rule; People v. National Savings Bank, 129 Ill. 625, 22 N. E. 288, requiring entire capital paid in under statute creating a bank. Cited in note to 100 Am. St. Rep. 893.

Corporations.—Authority of Directors to Assess Stock, p. 268.

Cited in Jewett v. Valley Ry. Co., 34 Ohio St. 697, and Budd v. Multnomah etc. Co., 15 Or. 417, 3 Am. St. Rep. 169, 15 Pac. 661, both approving the rule. Cited in note to 26 Am. St. Rep. 370, 373, 379, on liability to corporations of subscribers to stock.

Corporations.—Estoppel to Question Regularity of assessment by participating in it, p. 269.

Cited in Campbell v. Santa Maria Oil etc. Co., 153 Cal. 284, 95 Pac. 41, applying the rule in a similar case.

4 Or. 269–271, FARLEY v. PARKER.

This case has not been cited.

4 Or. 271–277, ANKENY v. MULTNOMAH COUNTY.

This case has not been cited.

4 Or. 277–279, STATE v. SLY.

Courts.—Circuit and Justice Courts had Concurrent Jurisdiction of assault and battery, p. 278.

Cited in Ex parte Martin, 46 Fed. 468, reaffirming the rule.

Criminal Law.—Person may be Punished for Same Act under state and city law, pp. 278, 279.

Cited in State v. Baker, 50 Or. 384, 92 Pac. 1078, 13 L. R. A., N. S., 1040, State v. Fourcade, 45 La. Ann. 726, 40 Am. St. Rep. 249, 13 South. 190, Theisen v. McDavid, 34 Fla. 444, 16 South. 321, 323, 26 L. R. A. 234, and State v. Lee, 29 Minn. 453, 13 N. W. 915, all approving and applying the rule; State v. Bergman, 6 Or. 343, to point that a person may, by the same act, commit more than one crime; McInerney v. City of Denver, 17 Colo. 308, 29 Pac. 518, holding that one act constituting offense against separate jurisdictions may be punished in each; Hood v. Von Glahn, 88 Ga. 403, 14 S. E. 564, to point that saloons may be regulated by both city and state. Cited in notes to 92 Am. St. Rep. 100, 102, on identity of offenses on plea of former jeopardy; 17 L. R. A., N. S., 70, on power of municipality to punish act also an offense under state law.

4 Or. 279–288, BLAKESLEY v. CAYWOOD.

Public Lands.—Grant Under Donation Act was a present grant vesting the title, p. 283.

Questioned in Hershberger v. Blewett, 55 Fed. 177, holding that where settler dies before completion of residence his heirs take by purchase from the federal government, not as heirs. Cited in note in 31 L. R. A. 180, on alien's right to inherit.

4 Or. 288–292, SCOVILL v. BARNEY.

Pleading.—Denial of Allegation in Exact Words of complaint is negative pregnant and raises no issue, p. 289.

Cited in Moser v. Jenkins, 5 Or. 449, Randall v. Simmons, 40 Or. 557, 67 Pac. 515, Board of Education v. Independent School Dist., 11

S. D. 294, 77 N. W. 107, Goble v. Dillon, 86 Ind. 331, 44 Am. Rep. 308, and Miller v. Tobin, 18 Fed. 614, 9 Saw. 401, all upholding and applying the rule.

Pleading.—Denial That Property is of Exact Value alleged is an admission of any less value, p. 289.

Cited in Rock Springs Coal Co. v. Salt Lake etc. Assn., 7 Utah, 162, 25 Pac. 743, applying the rule.

Cancellation of Instruments.—Mental Weakness and Inadequacy of consideration warrants, p. 291.

Cited in Parkhurst v. Hosford, 21 Fed. 834, reaffirming the rule; Carnagie v. Diven, 31 Or. 368, 49 Pac. 892, applying the rule where grantor had such weak understanding as to be incompetent to transact business.

4 Or. 292–296, KENDALL v. McFARLAND.

Mechanics' Liens.—Priority, p. 295.

Cited in Bastien v. Barras, 10 N. D. 33, 84 N. W. 561, approvingly.

4 Or. 296–298, JETTE v. PICARD.

Public Lands.—Will of Settler cannot Operate on Wife's Half of donation grant, p. 298.

Cited in Coulson v. Holmes, Fed. Cas. No. 3274, 5 Saw. 279, applying the rule.

4 Or. 298–301, PITTMAN v. PITTMAN.

Husband and Wife.—Wife cannot Sue Husband, on implied contract, in a court of law, p. 300.

Cited in Elfelt v. Hinch, 5 Or. 257, and Collinson v. Jackson, 14 Fed. 308, 8 Saw. 357, to point that contract between husband and wife is void; Hass v. Sedlak, 9 Or. 465, to point that wife cannot be sued alone; Bean v. Bean, 135 N. C. 94, 47 S. E. 233, holding that the law will not imply a promise from wife to husband; Heacock v. Heacock, 108 Iowa, 544, 75 Am. St. Rep. 273, 79 N. W. 355, involving wife's right to sue husband. Cited in note to 73 Am. St. Rep. 268, on suit between husband and wife.

4 Or. 305–313, TUSTIN v. GAUNT.

Courts.—County Courts, in Probate Matters, have superior jurisdiction, p. 308.

Cited in Monastes v. Catlin, 6 Or. 120, 121, Bewley v. Graves, 17 Or. 282, 20 Pac. 326, Rutenic v. Hamakar, 40 Or. 450, 67 Pac. 199, Knight v. Hamakar, 40 Or. 430, 67 Pac. 109, Henkle v. Slate, 40 Or. 351, 68 Pac. 399, Lawrey v. Sterling, 41 Or. 527, 69 Pac. 463, Gager v. Henry, Fed. Cas. No. 5172, 5 Saw. 237, Holmes v. Oregon etc. Ry. Co., 5 Fed. 528, 6 Saw. 278, and Holmes v. Oregon etc. Ry. Co., 9 Fed. 232, 7 Saw. 380, all upholding the rule; Oh Chow v. Brockway, 21 Or. 448, 28 Pac. 387, holding that when one county court assumes jurisdiction over an estate, all others are without jurisdiction to handle it.

Courts.—Necessity That Record Show Jurisdiction, p. 309.

Cited in Munroe v. Thomas, 35 Or. 175, 57 Pac. 420, to point that justice courts are of limited jurisdiction and must show jurisdiction on the record.

Courts.—When Want of Jurisdiction Appears on Record, p. 309.

Cited in Murray v. Murray, 6 Or. 24, Farley v. Parker, 6 Or. 113, 25 Am. Rep. 504, Fishburn v. Loudershausen, 50 Or. 374, 92 Pac. 1064, 14 L. R. A., N. S., 1234, and Knapp v. Wallace, 50 Or. 354, 126 Am. St. Rep. 742, 92 Pac. 1057, all upholding the rule.

Courts.—When Record is Silent, Jurisdiction is Presumed, p. 310.

Cited in Mathews v. Eddy, 4 Or. 233, approving the rule. Cited in notes in 21 L. R. A. 688, on conclusiveness of probate decree as res judicata; 94 Am. Dec. 765, on loss of lien by pledgee's surrender of possession.

4 Or. 313–318, BOHLMAN v. COFFIN.

Deeds.—Certain Deed Held Valid as Between the Parties, p. 315.

Cited in Baker v. Woodward, 12 Or. 9, 10, 17, 6 Pac. 177, 182, involving the validity and effect of the same deed.

Vendor and Purchaser.—Facts Putting on Inquiry as notice to purchaser, p. 318.

Cited in Carter v. City of Portland, 4 Or. 356, Musgrove v. Bonser, 5 Or. 317, 20 Am. Rep. 737, McDougal v. Lame, 39 Or. 214, 64 Pac. 864, Hawley v. Hawley, 43 Or. 356, 73 Pac. 5, and Williams v. First Nat. Bank, 48 Or. 574, 87 Pac. 891, all following the rule; Goodenough v. Warren, Fed. Cas. No. 5534, 5 Saw. 494, holding party bound by knowledge of facts known to his agent.

Vendor and Purchaser.—Possession of Land as Notice of Rights of possessor, p. 318.

Cited in Exon v. Dancke, 24 Or. 113, 32 Pac. 1046, Cooper v. Thomason, 30 Or. 173, 45 Pac. 299, and Ambrose v. Huntington, 34 Or. 490, 56 Pac. 514, all approving and applying the rule; Randall v. Lingwall, 43 Or. 386, 73 Pac. 2, applying the rule to the possession of a tenant. Cited in notes in 13 L. R. A., N. S., 52, 55, on possession of land as notice of title; 94 Am. Dec. 765, on loss of lien by pledgee's surrender of possession.

4 Or. 318–324, 18 Am. Rep. 287, WITHAM v. OSBORN.

Eminent Domain.—Private Property cannot be Taken for private use though compensation be made, p. 322.

Cited in Grande Ronde Electrical Co. v. Drake, 46 Or. 248, 79 Pac. 1033, and Gaston v. City of Portland, 18 Or. 90, 84 Pac. 1043, both applying the rule. Cited in notes in 22 Am. Dec. 693, 695, on what uses justify exercise of power of eminent domain; 88 Am. St. Rep. 930, on existence of public use as question for courts; 102 Am. St. Rep. 827, on uses for which power of eminent domain cannot be exercised; 25 Am. Dec. 622, on eminent domain; 22 L. R. A., N. S., 27, 107, 110, on judicial power over eminent domain.

Private Roads.—Private Property cannot be Condemned for strictly private road, pp. 323, 324.

Cited in Clark v. Board of Commrs. of Mitchell Co., 69 Kan. 548, 77 Pac. 285, 66 L. R. A. 965, applying the rule in a similar case.

Explained in Latah County v. Peterson, 2 Idaho, 1120, 29 Pac. 1039, where the private road was established for the applicant and the general public. Cited in notes to 91 Am. Dec. 585, 586, 587, on right to condemn lands for private way or road; 16 L. R. A. 81, 82, on constitutionality of condemnation proceedings to establish private road.

4 Or. 324–326, STATE v. VOWELS.

Mayhem.—Offense Defined by Section 527 of the Code may be called mayhem in indictment, p. 326.

Cited in State v. Taylor, 50 Or. 452, 93 Pac. 253, and State v. Cody, 18 Or. 513, 514, 23 Pac. 894, both approving the rule. Cited in note to 65 Am. St. Rep. 775, on mayhem.

Criminal Law.—Courts have No Right to Assume Jurisdiction of common-law offenses not included in the criminal code, p. 326.

Cited in State v. Ayers, 49 Or. 66, 124 Am. St. Rep. 1036, 88 Pac. 654, 10 L. R. A., N. S., 992; State v. Nease, 46 Or. 439, 80 Pac. 897, and State v. Gaunt, 13 Or. 120, 9 Pac. 58, to point that there are no common-law indictable offenses in this state; State v. Stephanus, 53 Or. 138, 99 Pac. 430, stating that code must be looked to for definition of crime.

4 Or. 326–332, KING v. BOYD.

Executors and Administrators.—Power to Bring Suits involving title to lands of decedent, p. 330.

Cited in Kohn v. McKinnon, 90 Fed. 626, holding that executors cannot maintain ejectment for lands of decedent.

Explained in Ladd v. Mills, 44 Or. 227, 75 Pac. 142, holding that administrator may bring suit to determine adverse claim.

Executors and Administrators.—Possessory Right Over Lands of decedent, p. 331.

Cited in Clark v. Bundy, 29 Or. 194, 44 Pac. 284, holding that mere appointment of administrator does not suspend statute of limitations running against heir unless he take possession of the land; Lewon v. Heath, 53 Neb. 711, 74 N. W. 276, holding that administrator is not bound to take possession of land and until he does so heirs' possessory right is not impaired; Gossage v. Crown Point etc. Min. Co., 14 Nev. 158, to point that administrator's possession is for benefit of heirs.

4 Or. 335–339, WHITLOW v. REESE.

This case has not been cited.

4 Or. 339–352, CARTER v. PORTLAND.

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Cited in Douglas County Road Co. v. Abraham, 5 Or. 321, reaffirming the rule. Cited in note in 27 Am. Dec. 561, 563, 564, 566, 567, 568, 569, on dedication to public use.

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Cited in Town of San Leandro v. Le Briton, 72 Cal. 175, 13 Pac. 407, Meier v. Portland etc. Co., 16 Or. 505, 19 Pac. 613, 1 L. R. A. 856, Archer v. Salinas City, 93 Cal. 51, 28 Pac. 841, 16 L. R. A. 145, Steel v. City of Portland, 23 Or. 183, 31 Pac. 480, Spencer v. Peterson, 41 Or. 259, 68 Pac. 520, Oregon City v. Oregon etc. R. Co., 44 Or. 176, 74 Pac. 926, and Buschmann v. City of St. Louis, 121 Mo. 536, 26 S. W. 691, all approving and applying the rule; John Mouat Lumber Co. v. City of Denver, 21 Colo. 5, 40 Pac. 240, applying the rule where land is sold by reference to city map.

Distinguished in Nodine v. City of Union, 42 Or. 616, 72 Pac. 583, where the plat was not acknowledged as required by statute; Schermerhorn v. Todd, 51 Mich. 27, 16 N. W. 306, basing the rule on estoppel not justified under the facts. Cited in note in 14 L. R. A., N. S., 881, on effect on grantee's rights of call in deed for street or alley in which grantor owns fee.

Dedication.—Acceptance not Necessary, p. 347.

Cited in Hogue v. City of Albina, 20 Or. 186, 25 Pac. 387, 10 L. R. A. 673, Boise City v. Hon, 14 Idaho, 281, 94 Pac. 170, and Smith v. City of Beloit, 122 Wis. 409, 100 N. W. 882, all following the rule; Riley v. Buchanan, 116 Ky. 633, 76 S. W. 529, 63 L. R. A. 642, holding dedication of highway presumptively accepted.

Distinguished in People v. Reed, 81 Cal. 78, 15 Am. St. Rep. 22, 22 Pac. 476, holding rule inapplicable to California where offer may be withdrawn at any time before acceptance.

Dedication.—Use of Park by Public, p. 348.

Cited in Conkling v. Village of Mackinaw City, 120 Mich. 77, 79 N. W. 11, applying the rule where public park was used only as picnic ground.

Dedication.—Rights of Donors and Citizens to Restrain Use for purpose other than that intended by donor, pp. 348, 349.

Cited in McIntyre v. Board of Commrs., 15 Colo. App. 88, 61 Pac. 241, to point that resident taxpayers may sue to prevent diversion of dedicated property; Rowzee v. Pierce, 75 Miss. 857, 65 Am. St. Rep. 625, 23 South. 308, 40 L. R. A. 402, holding that donors may sue to restrain city from using park for school; Campbell v. City of Kansas, 102 Mo. 346, 13 S. W. 901, 10 L. R. A. 593, holding that land dedicated for public cemetery and no longer used as such reverts to the donor; Douglass v. City Council, 118 Ala. 612, 24 South. 748, 43 L. R. A. 376, holding that dedicated park inures to benefit of all citizens present and prospective.

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4 Or. 352–354, HOLCOMB v. TEAL.

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Cited in Albersea v. Mahaffey, 6 Or. 413, State v. McKimmore, 8 Or. 208, Pencinse v. Burton, 9 Or. 179, and Northern Counties Inv. Trust v. Hender, 12 Wash. 564, 41 Pac. 915, all approving and applying the rule.

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Cited in William Deering & Co. v. Creighton, 26 Or. 560, 38 Pac. 711, reaffirming the rule.

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Questioned in Ah Lep v. Gong Choy, 13 Or. 209, 210, 9 Pac. 484, 485, holding that delay in settling bill not due to fault of party should not prejudice his rights; Che Gong v. Stearns, 16 Or. 223, 17 Pac. 873, holding that trial judge may sign bill after end of term.

4 Or. 354–361, BYBEE v. SUMMERS.

Appeal.—Finality of Orders in Partition, p. 357.

Cited in Sterling v. Sterling, 43 Or. 204, 72 Pac. 743, Marquam v. Ross, 47 Or. 380, 78 Pac. 700, and Dangerfield v. Caldwell, 151 Fed. 556, 81 C. C. A. 400, all following the rule.

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4 Or. 362–366, CHAPMAN v. WILBUR.

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4 Or. 369–374, THOMPSON v. UGLOW.

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4 Or. 375–377, EVANS v. CHRISTIAN.

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Cited in Sellers v. City of Corvallis, 5 Or. 275, and Moore v. Rennick, 1 Alaska, 175, approving and applying the rule; Feller v. Feller, 40 Or. 77, 66 Pac. 470, and Garnsey v. County Court of Klamath Co., 33 Or. 208, 54 Pac. 1091, both construing statute making

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Distinguished in Prickett v. Cleek, 13 Or. 417, 11 Pac. 59, holding void judgment of justice reviewable by writ of review.

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4 Or. 378–388, SUTHERLIN v. ROBERTS.

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Cited in Allen v. O'Donald, 28 Fed. 24, reaffirming the rule; Cowhick v. Shingle, 5 Wyo. 101, 63 Am. St. Rep. 17, 37 Pac. 694, 25 L. R. A. 608, to point that payment must be made by party to be charged or his expressly authorized agent; Oleson v. Wilson, 20 Mont. 553, 63 Am. St. Rep. 639, 52 Pac. 375, dissenting opinion, majority holding that payment by joint obligor does not extend debt as to co-obligor; Stubblefield v. McAuliff, 20 Wash. 445, 446, 55 Pac. 638, holding that payment by husband does not extend debt as to wife; In re Smith's Will, 43 Or. 609, 75 Pac. 137, holding that payment by one joint maker continues liability of all; Sheak v. Wilbur, 48 Or. 378, 86 Pac. 376, holding that part payment by trustee in bankruptcy of one maker tolls statute as to all; Scott v. Christenson, 49 Or. 225, 124 Am. St. Rep. 1041, 89 Pac. 377, holding that part payment revives debt as to all persons liable; Allen v. O'Donald, 28 Fed. 350, holding that payment on debt extends time on mortgage securing it.

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4 Or. 388–392, BURNETT v. DOUGLAS COUNTY.

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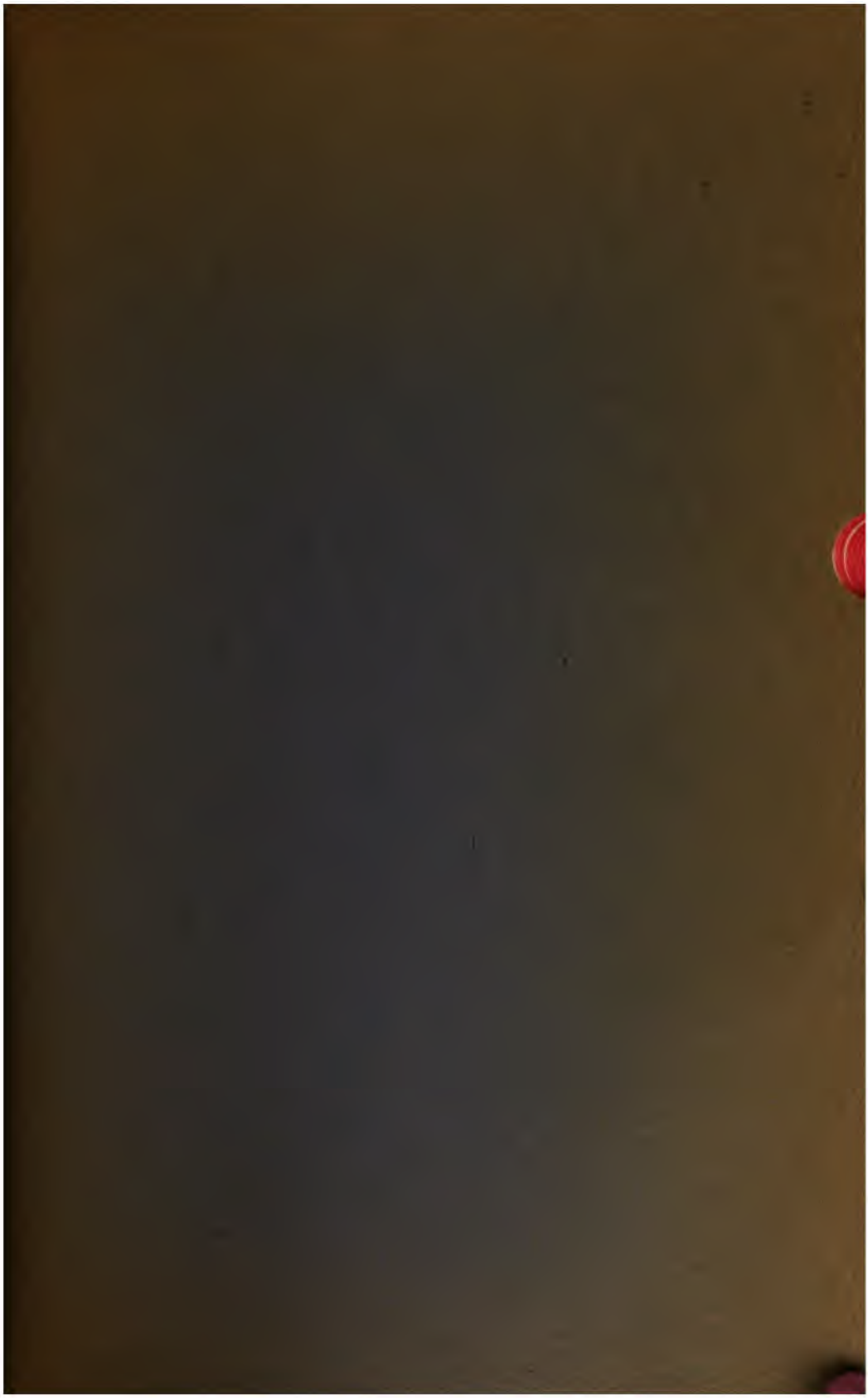
4 Or. 392–398, LEVY v. RILEY.

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Cited in Rutenic v. Hamakar, 40 Or. 455, 67 Pac. 200, applying the rule in a similar case. Cited in notes in 69 L. R. A. 39, on relief of purchaser upon annulling judicial or execution sale; 21 L. R. A. 52, on purchaser at execution or judicial sale as bona fide purchaser.

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Cited in Italian-Swiss Agricultural Colony v. Bartagnolli, 9 Wyo. 207, 61 Pac. 1020, discussing right to appeal from default judgment.




5 ORE.

XTRA ANNOTATED EDITION.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

From September Term, 1873, to December Term, 1875.

C. B. BELLINGER,
REPORTER.

VOLUME 5.

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OF

THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

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W. W. UPTON (Chief Justice from 1872, to September, 1874).

P. P. PRIM.

L. L. McARTHUR.

E. D. SHATTUCK (from September, 1874).

JOHN BURNETT (from September, 1874).

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ADMITTED AT THE DECEMBER TERM, 1875.

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DAVID R. N. BLACKBURN.
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HENRY H. GILFREY.
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TO

DECEMBER TERM, 1873.

NOTE.

The References to the Laws of Oregon in this volume are to the Revised Edition of 1874.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

DECEMBER TERM, 1873.

WM. M. PITMAN, Respondent, v. WILSON BUMP, Appellant.

LIMITATION OF TIME WITHIN WHICH ACTIONS MAY BE BROUGHT.— The Act of October 22, 1870, amending the Practice Act and limiting the period for commencing certain actions to two years, includes within that limit only causes of action that accrued after the passage of the act.

APPEAL from Benton County.

By an amendatory act of the Legislature, approved October 22, 1870, the time within which actions for criminal conversation could be brought was limited to two years. (Civ. Code, § 8.) Prior to this amendment, the limitation for such actions was six years.

This is an action begun on the 12th day of February, 1873, by respondent against appellant for enticing away respondent's wife. The alleged cause of action accrued March 27, 1870, seven months before the passage of the amendatory act referred to. The defendant demurred upon the ground that the action had not been commenced within the time limited by the Civil Code. The Court overruled

the demurrer, and rendered judgment in favor of respondent, from which judgment appellant appeals.

John Burnett, R. S. Strahan and John Kelsay, for Appellant.

The amendment applies to all causes of action existing and prospective. The law makes no exception, and the court can make none. (9 How. U. S. 526; 12 Minn. 577; 13 Minn. 153, 324; 13 Pet. 45; 42 Vt. 234.)

The Statute of Limitations forms no part of the contract; it affects the remedy only, and that statute governs which happens to be in force when suit is brought. (1 Ia. 56; 1 How. U. S. 316; 1 Kern. 281; Sedg. on Stat. & Con. Law, 658, 691.)

The only limitation on the power of the Legislature, in enacting laws of the kind in question, is that it shall pass no *ex post facto* law, or law impairing the obligation of contracts. The law in question does not conflict with this provision of the Constitution. (15 Ohio, 207; 3 Kansas, 507; 1 Duval (Ky.) 349; 1 Or. 31; 3 Paige, 415; How. N. Y. Code, § 73, p. 117; 3 Paige R. 415.)

The act may be construed to meet every objection urged against it by applying it to all cases of the class referred to, giving two years in which to bring all actions not barred by the act of 1862, cutting off no remedy, injuring no one's rights. (10 Cal. 308; 1 Cush. 508.)

Statutes of Limitations are statutes of repose. They promote peace and harmony in society; they close the doors to litigation, and should therefore, be favored by the courts. (1 Or. 31.)

F. A. Chenoweth and W. W. Thayer, for Respondent.

The amendment only applies to causes that have arisen since its passage. (Angell on Limitations, 14, § 22; *Thompson v. Alexander,* 11 Ill. 54; *Wynehasmer v. The People,* 13 N. Y. 378.)

The amendment is in violation of the Constitution. (Constitution, Art. 4, §§ 20 and 22.)

By the Court, UPTON, C. J.:

The action in this case is for criminal conversation, and the defendant demurred to the complaint on the ground that the action is barred by the Statute of Limitations. The action was commenced in February, 1873, charging the acts complained of to have been committed in March, 1870, and the appeal presents the question whether the time for commencing the action is barred by the amendatory act, passed October 22, 1870.

The appellant submits the proposition that the amendment controls the period of limitation in all actions of this class by limiting it to two years from the time the cause of action accrued, whether the two years had or had not elapsed when the act was passed, and claims that if that mode of computation is not applicable in all cases, the time cannot in any case extend beyond two years from the passage of the amendatory act.

The respondent takes the position that the language of the amendment, properly construed, does not include the case at bar; he also claims that the act is in violation of Art. 4, § 22 of the Constitution, which provides that "No act shall be amended or revised by mere reference to its title, but the act revised or section amended shall be set forth and published at full length;" and that it is in violation of § 20 of the same Article, which requires that the "subjects shall be expressed in the title." The Court does not deem it necessary to express an opinion on the constitutionality of the amendment, as we think the case at bar may be disposed of without reference to that question.

This cause of action accrued some months before the passage of the amendatory act, and is not within its provisions unless the statute is retroactive.

Section 3 of the Code provides that "Actions at law shall only be commenced within the period prescribed in this title, after the cause of action shall have accrued;" and §§ 4, 5, 6, 7, 8 and 9 prescribe the periods and specify the causes of action embraced in each period, some of which specifications the amendment purports to change. Looking at the

whole act, as amended, its provisions, so far as they relate to this class of actions, are, in substance, that actions at law for criminal conversation shall be commenced within a period of two years "after the cause of action shall have accrued." The amendment or re-enactment creates a new rule, the effect of which had its beginning at the approval of the amendatory act; and in determining the effect of the amendment on cases that are within its operation, the whole act as amended is to be read as if the entire act bore the date of the amendment; in those cases the action must be commenced within a period of two years after the cause of action shall have accrued.

The expression, a period of two years after the time the cause of action shall have accrued, if literally construed, or if taken in its ordinary acceptation, refers to a period commencing at a time subsequent to the enactment, and unless we depart from the more obvious construction of the language employed, the period of two years, as designated in the amended act, will apply only to causes that accrue at a time subsequent to the amendment. A literal construction will not necessarily include a cause of action that accrued before that time, and the inquiry is whether this is a case where a departure from the ordinary import of the words of the statute is justified by the circumstances and will promote the ends of justice. Conceding that it is within the province of the Legislature to make statutes retroactive when they affect the remedy only, it does not comport with justice that such a statute should take effect immediately on causes where the two years had already expired; in fact that would be more than changing the remedy. (*Scarborough v. Dugan*, 10 Cal. 305.)

There is no substantial difference between a retrospective law declaring a particular class of contracts void, and one which takes away all remedy to enforce them. (*Bronson v. Kinzie*, 1 How. 311.)

Many of the cases cited are based upon statutory provisions differing materially from ours. In California, and in other States, where some of these cases have arisen, it is expressly enacted that the party shall have, after the

passage of the act, the whole prescribed period in which to commence his action.

The language of the act will not extend, even by the most liberal construction, to any cause of action that had already accrued, without including those that had accrued more than two years before the amendment was enacted. The amendment makes but one rule for ascertaining when the period is to commence, and it makes no provision for a period to commence at the passage of the act; the time when the "cause of action shall have accrued" is the only point at which the period can commence, and it would be disregarding the statute, rather than construing it, to make the period of two years commence at the passage of the amendment without regard to the time when the cause of action accrued.

If any reasonable construction would exclude from the effect of the amendment all cases in which fully two years had then run, and yet include some other cases in which the cause of action had already arisen, we find no rule for determining which of the latter cases should be included, or for discriminating between causes of action that accrued nearly two years before the passage of the act, and those that accrued a month or even a day previous. The computation commencing in all cases at the time the cause of action accrued, it might include cases that would become barred in a week or a day after the passage of the act. As a general rule such construction is not favored, and courts have refused to give a retroactive effect to statutes of this kind unless that intention is so clear and positive as by no possibility to admit of any other construction. (*Wood v. Oakly*, 11 Paige, 400; *Dash v. Van Kleeck*, 7 John. 477; *Johnson v. Burrill*, 2 Hill, 258; *Van Allen v. Feltz*, 1 Keys, 332.)

The Court is of opinion that in this class of actions the limitation of two years applies only to those cases where the cause of action accrued after the passage of the amendatory act.

The judgment of the Circuit Court should be affirmed.

JOHN COGSWELL, Respondent, v. JOHN H. HAYDEN, Appellant.

PLEADINGS — DENIAL.— The allegation being that D. "made, executed and delivered" a promissory note, is not put in issue by an answer denying that he delivered it

INDORSER.—It being necessary for the payee to indorse the note in order to make it negotiable paper, he must be treated as first indorser without regard to the time of his indorsement or the locality of his name on the note.

SECOND INDORSER — ACTION BY.— An action may be maintained by second indorser against first indorser for money paid on the note.

APPEAL from Lane County.

This is an appeal from a judgment recovered at law. The complaint alleges that on May 28, 1872, one William Davidson made, executed and delivered his promissory note to Hayden; that Hayden indorsed it and for value sold and transferred it to one William Barlow; that Cogswell indorsed it subsequent to Hayden; that said Barlow sold and delivered the note to John Rines; that Rines commenced an action thereon in the Circuit Court of Multnomah County and recovered judgment therein against appellant and respondent, for seven hundred dollars and more, gold coin; that execution was issued thereon, and respondent was compelled to pay three hundred and sixty-four dollars and forty-six cents, gold coin, and twenty-seven dollars and seventy-five cents currency; that respondent had filed a notice of said payment upon said judgment, and a claim for repayment, which had been duly entered by the clerk of said court on the margin of the docket where said judgment was entered.

The appellant, for answer, denied that William Davidson *delivered* his promissory note to defendant for any sum; denied that said note was ever delivered to respondent; denied that appellant, *for value received,* sold or transferred said note to W. W. Barlow, or any other person; denied that respondent indorsed said note subsequent to appellant; denied indebtedness generally; and, for a further answer, alleged that, on the 28th day of May, 1872, appellant and respondent, for the accommodation and benefit of said

Davidson, indorsed said note as security for said Davidson; that appellant indorsed said note upon the express condition that the respondent would indorse, of which fact respondent had notice at the same time; that the note was delivered to said Barlow and not to appellant; that appellant paid his half, etc.

The respondent's counsel filed a motion to strike out the denials in appellant's answer, which was granted by the court; also demurred to the matter set up in said answer as a separate defense, which was sustained by the court, and, the appellant refusing to answer over, the court gave judgment for respondent for the relief demanded in the complaint. From these rulings this appeal is brought.

G. B. Dorris, for Appellant.

R. S. Strahan and Thayer & Williams, for Respondent.

By the Court, MCARTHUR, J.:

The allegation in the complaint being that Davidson "made, executed and delivered" the note, is not put in issue by the denial in the answer that he "delivered" the note. Such a denial operates as an admission of the making and execution, facts which in law embrace and include a delivery.

The denial that the note was delivered to Cogswell must, we think, be regarded as immaterial. It was made payable to the order of Hayden, and whenever he indorsed it, as it is admitted he did, he became the first indorser. The only presumption that can arise from Cogswell's indorsement is, that he intended to become second indorser. As in the case of *Bacon v. Burnham* (37 N. Y. 616), "it must be supposed, in the absence of any proof to the contrary, that perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear on the note, for only thus would it become negotiable." In the same case it was held that the locality of the names is immaterial; and whether the name of Cogswell should

appear above or below that of Hayden, or before or after his in point of time, would not change in any respect his position as second indorser. It follows, therefore, that the denial that Cogswell indorsed the note subsequently to Hayden is frivolous.

The denial that appellant, "for value received," sold or transferred the said note to Barlow does not raise an issue, for the reason that the note might have been sold or transferred, and full value not have been received. The denial of indebtedness must, in this action, be treated as a conclusion of law, for none of the facts out of which the indebtedness is alleged to have arisen, are denied.

As to the right of action, we regard it as a settled principle that an action may be maintained by a second indorser against a first indorser, for money paid on account of the note. (*Wright v. Butler,* 6 Wend. 283.)

The fact that the parties indorsed for the *accommodation* of Barlow does not, we think, change the rule as to their relative liability. They are governed by the rules applicable to indorsers generally.

Judgment affirmed.

ROBERT HENDERSON, Respondent, v. THOMAS MORRIS, Appellant.

SURPRISE — WHEN PROCEEDINGS RENEWED FOR.— When a party has been misled or taken by surprise by the act of the adverse party, it devolves on him to bring the fact to the knowledge of the Court, and if he seeks to review the point on appeal he should make the showing a part of the record.

REVIEWING MATTER OF DISCRETION.—Allowing or refusing an amendment is addressed to the discretion of the Court, and will be reviewed only for the purpose of determining whether there has been an abuse of discretion. Error will not be presumed.

APPEAL from Yamhill County.

The facts are stated in the opinion of the Court.

Hurley & Sullivan and Boise & Willis, for Appellant.

John Catlin and Thayer & Williams, for Respondent.

By the Court, UPTON, C. J.

The appellant was defendant in the Circuit Court, and he assigns as error a ruling permitting the plaintiff to amend his complaint, and also a ruling permitting the plaintiff to read in evidence a transcript of the plaintiff's book of accounts.

The first count of the complaint was for money loaned, in the amount of four hundred dollars. The amendment was permitted in reference to another count which, in the original complaint, was as follows: "Plaintiff for further cause of action alleges that the defendant is indebted to the plaintiff in the sum of two hundred and sixty-nine dollars and eighty-eight cents, balance upon an account for money deposited, for goods sold and delivered to the defendant, for money paid to the defendant at the defendant's request, one thousand dollars check sold, assigned and delivered to the defendant between the 17th day of June, 1871, and the 14th day of March, 1872, a statement of which account is hereto attached and made part of this complaint." The defendant answered the complaint, without objection to its form, admitting that he purchased the check of the plaintiff for one thousand dollars, but alleging that he paid for the check in money at the time of the purchase. The defendant also set up a counter-claim for goods sold and for money paid to the plaintiff. The replication admits that at the time the check was sold to the defendant the defendant handed to the plaintiff one thousand dollars therefor, but alleges that on the same day the plaintiff deposited the same money with the defendant. Upon these pleadings the parties went to trial before a jury, and it was shown in evidence that the plaintiff sold the check to the defendant, who handed to him the money (one thousand dollars) for it, and that immediately after receiving the money the plaintiff returned it to the defendant and left it in his hands. After the introduction of the evidence and before the argument, the plaintiff was permitted to amend the complaint, and to proceed for the one thousand dollars, thus received for the

check, as if he had originally declared for that amount of money deposited.

The appellant claims that it was error to permit the amendment; that he was taken by surprise; that the complaint as amended is insufficient to entitle the plaintiff to recover or receive credit for the one thousand dollars last mentioned, as a deposit, and that it was error for the court to admit testimony of the deposit of this amount.

It is obvious from what appears in the transcript that the parties proceeded with the trial and presented their evidence in the same manner they would have done if what is alleged in the replication, as to the payment and return or deposit of this money, had been set forth in the complaint; and the real question to be considered is not whether this complaint would have been good on demurrer, but whether the court erred in permitting the amendment. Sec. 94 of the Code of Civil Procedure enacts that, "No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice."

Upon the filing of the replication the defendant was informed of the true nature of the plaintiff's demand, and if he was not satisfied with that mode of setting out the facts —if he was of opinion that the deposit of the money was not a proper matter to be plead in the replication—he could have tested that question before trial, by filing a demurrer. The replication having apprised him of the nature of the plaintiff's case, after going to trial with such knowledge and without objection to the form of the pleadings, he cannot reasonably say he was taken by surprise. It was urged on the argument that the error of admitting evidence of this deposit before the complaint was amended is a good ground for a new trial, but the transcript does not show that the evidence was objected to at the time. It does not appear by the transcript that the appellant was misled or taken by surprise, or that he excepted to any ruling on this point until permission was given to amend. On the contrary, it appears that he was apprised before the trial commenced of the nature of the plaintiff's claim. When a party claims

that he was taken by surprise, he should bring that fact to the knowledge of the court where the surprise occurs; and if he wishes to review the decision of the Circuit Court in refusing to grant relief, the transcript should disclose what showing was made in the Circuit Court. (*The American River W. and M. Co. v. The Bear River W. and M. Co.*, 11 Cal. 339; *Karth v. Orth*, 10 Cal. 192; *Rabe v. Wells*, 3 Cal. 426.)

The question of allowing or refusing an amendment is addressed to the discretion of the court, and is reviewable only for the purpose of determining whether the exercise of discretion has been abused. (*Hedges v. The Tennessee Marine and Fire Insurance Co.*, 8 N. Y. (4 Seld.) 418; *Rice v. Gashirie*, 13 Cal. 53; *Smith v. Billett*, 15 Cal. 26.)

It is urged, however, that this amendment should not have been permitted, because it substantially changes the cause of action; that an action for money deposited is substantially different from a cause for the value of a check or bill of exchange sold and delivered.

The facts disclosed by the pleadings and the circumstances adduced in evidence, so far as the evidence is disclosed by the transcript, show that both the original and the amended complaint relate to the same transaction; and it is difficult to say from the evidence, even after the trial, whether the transaction should be deemed a sale of a check, or a deposit of money. The plaintiff actually sold a check to the defendant, but whether its price remained unpaid, or whether it should be deemed paid and the money deemed placed on deposit under a new contract of bailment, is not made certain by the evidence presented in the record. It would not be extraordinary if, in such a transaction, the parties themselves gave no thought to this distinction, and are now unable to inform a court or jury whether the amount due is due upon the sale or as a deposit. The case seems to be fully within § 95 of the Code, which enacts that "where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs;" and we think § 104, which requires this Court to disregard errors and defects "which shall not affect the substantial rights of the

adverse party," is designed to prevent judgments from being disturbed upon grounds like the one here referred to.

In determining whether there was error in admitting in evidence a transcript from the plaintiff's books of account, it may be first considered whether the books of account, if presented, would have been admissible. The respondent cites *Le Frank v. Hewitt* (7 Cal. 186), and some other authorities, to establish the point that a party, in case he has no clerk and has kept his own books of account, may, upon a proper showing, be permitted to introduce his books of account to charge the adverse party; and these authorities are met with the argument that, since parties may now be witnesses in their own behalf, the reason of the rule has disappeared, and the rule should no longer be recognized. The respondent also claims that the point cannot be considered in this Court, because, although it appears by the bill of exceptions that the defendant objected to the evidence, the bill of exceptions does not disclose the grounds of the objection, and he cites *Rabe v. Wells,* 3 Cal. 148; 18 Wend. 262; *Jencks v. Smith,* 1 Coms. 92.

It may be fairly deduced from the transcript that the defendant objected to the evidence on the ground that the books were not competent testimony. Without going into the question whether a party may introduce his own books of account to prove the delivery of goods, or the payment of money, we think the books become admissible upon another and entirely different ground. There was annexed to the complaint an account, or bill of items, and the defendant, in cross-examination, asked of one of the plaintiff's witnesses, whether that account was not copied from the plaintiff's books, and the witness answered that it was. The record does not disclose whether evidence was introduced to sustain or rebut the answer thus given; but the defendant, having put the question and taken the witness's answer, cannot ask the Court to assume that the evidence was inadmissible. If the object was to contradict or discredit the witness, it may have been important to the plaintiff to establish the truth of the answer; if so, the books become material and competent evidence. The record is

silent as to whether a sufficient showing was made to authorize the introduction of the transcript in place of the original books, and it does not appear that an exception was taken on the ground that the original books were not produced. It devolves on the appellant to show the error affirmatively, and as the transcript does not disclose an error affecting a substantial right, the judgment should be affirmed.

THE SALEM WATER COMPANY, Appellant, v. THE CITY OF SALEM, Respondent.

STATUTE — CONSTRUCTION OF.—The act incorporating the city of Salem prohibits the Common Council from creating "any debt or liabilities in any manner" against the city which shall exceed the sum of one thousand dollars: *Held*, that the object of this provision was to compel the Common Council to conduct the financial operations of the city upon a cash basis and thus prevent the present and future resources of the city from being incumbered or pledged for any sum in excess of such limitation.

IDEM.—An agreement to pay the Salem Water Company eighteen hundred dollars per annum, for seventeen years, in quarterly installments, for water, to be furnished the city, without any provision for raising and appropriating revenue to be applied in payment of such liabilities as they became due, necessarily created a liability against the city within the meaning of such prohibitory clause. The liability being in excess of such limitation, the contract is void.

APPEAL from Marion County.

The complaint alleges, in substance, that the city of Salem, by an ordinance, contracted and agreed to pay James M. Martin and David Allen, their associates, successors and assigns, for supplying said city of Salem with good and wholesome water, as by said ordinance provided, the sum of eighteen hundred dollars per annum, in gold coin, to be paid in quarterly installments in each and every year for seventeen years.

That said Martin & Allen duly accepted the contract and undertook to comply with its terms and conditions; that afterwards, for a valuable consideration, they assigned their interest in said ordinance and contract to the Salem Water

Company, a private corporation; that said company did erect waterworks and did supply the said city with water in accordance with the terms of said contract, from and after the 27th day of September, 1871, up to the 27th day of March, 1873, and that the city received and used said water so furnished by said company; that the city paid for all said water received and used, except for the quarter ending the 27th day of March, 1873, at which time it is alleged there was due appellant the sum of four hundred and fifty dollars, gold coin; that said city refused to pay said sum, or any part thereof, except the sum of two hundred dollars.

Respondent interposed a demurrer to the complaint upon the ground that it does not contain facts sufficient to constitute a cause of action. The demurrer was sustained by the court below and judgment rendered for respondent for costs, from which appellant appeals.

Mallory & Shaw, for Appellant.

Knight & Lord, for Respondent.

By the Court, PRIM, J.:

The respondent is a municipal corporation created by the Legislature, and clothed with the usual powers of such corporations. Its charter, among other things, provides that "the mayor and aldermen shall compose the Common Council of said city * * * and shall have the exclusive power to levy and collect taxes for city purposes, not to exceed one per cent. per annum on property in said city taxable for county purposes; to make by-laws and ordinances not inconsistent with the laws of the United States, or of this State." If further provides that "the City Council shall not in any manner create any debt or liabilities which shall singly, or in the aggregate, exceed the sum of one thousand dollars." The last provision was evidently inserted in the charter by the Legislature in pursuance of § 5 of Art. XI of the Constitution, which provides that "Acts of the Legislative Assembly incorporating towns and

cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

The Common Council of the city of Salem, in making the contract set out in the complaint, undertook to bind the city by present obligation to pay the Salem Water Company the sum of eighteen hundred dollars per annum, to be paid in quarterly installments for seventeen years, amounting in the aggregate to the sum of thirty thousand six hundred dollars. The demurrer interposed to the complaint admits that the contract was made and entered into between the parties as therein set out. And the main question in the case to be determined is whether the contract "in any manner creates any debts or liabilities which singly or in the aggregate exceed the sum of one thousand dollars." If it does, it is a contract directly prohibited by the charter, and is therefore void.

The position taken by respondent is, that no tax having been levied or specific fund set apart and appropriated for the payment of those liabilities as they accrue, that it necessarily creates a debt or liability in excess of the limitation specified in the charter; while it is insisted by appellant that the promise made by the Common Council on behalf of the city to pay money for water to be furnished in the future created no debt or liability against the city, "if the amount proposed to be paid does not exceed the amount that may be raised by the tax levy for the current year."

According to this theory the question as to whether any debt or liability was created in any manner against the city by this contract, depends wholly upon the financial condition and ability of the city to raise the amount agreed to be paid, and not upon the terms and conditions of the contract itself, or upon the further fact as to whether any provision was made for raising a fund and setting it apart to pay these liabilities as they accrue.

In other words, the theory contended for by appellant is this: If the Common Council can raise the amount proposed to be paid to this company by levying and collecting a tax of one per cent. upon all the property included within the

city limits taxable for county purposes, then no debt or liability was created against the city within the meaning of the prohibitory clause contained in the charter. This "is a proposition in legal metaphysics" we confess we are unable to comprehend.

If this theory should be adopted, then the State may make contracts involving millions of dollars, without creating any debt or liability against the State within the prohibitory clause of the Constitution, as that instrument contains no provision limiting the amount of percentage that may be levied upon the property of the State for the purpose of raising revenue to carry out the various objects of the State government. The words "any debt or liabilities," as used in the charter, are general and may include any kind of debt or liability, either absolute or contingent, express or implied. A debt exists against the city whenever it agrees to pay money in return for services performed, or, as in this case for water furnished for the use of the city. In a popular sense, debt includes all that is due to a party under any form of obligation or promise. (3 Met. 523.)

Either of the definitions are sufficient to embrace the liability created by the contract under consideration. The moment the contract was made it created a present obligation on the part of the city to pay money to the company at future periods. Now, whether this obligation can be called a debt in the technical sense or not, it is at least a liability; that is, the city is "bound or obliged in law" to pay for the water furnished by the company.

The Eighth Article of the Constitution of the State of California provides that the Legislature shall not create any debt or liabilities in any manner which shall exceed the sum of three hundred thousand dollars, except in certain contingencies specified. A question arose upon the construction of this provision in the cases of *The State of California v. McCowley* (15 Cal. 455); *McCowley v. Brooks* (16 Cal. 24); *Kloppikus v. State Capitol Commissioners* (16 Cal. 253).

In the first case the question arose upon a contract between the State and McCowley's assignor, entered into in

pursuance of certain provisions of an act of the Legislature whereby the State agreed to pay one Estell the sum of ten thousand dollars per month, during a period of five years, for taking care of the State prisoners, which amount was to be paid on the last day of each month, "out of money in the treasury not otherwise appropriated." The question presented for determination was whether this contract created any debt or liabilities against the State within the meaning of this provision of the Constitution? Mr. Chief Justice Huber, in delivering the opinion of the court, said: "The Eighth Article was intended to prevent the State from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of the moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. This appropriation accompanying the services operates, in fact, in the nature of a cash payment."

In *Kloppikus v. State Capitol Commissioners*, the same question arose upon a contract for erecting a State Capitol, made in pursuance of the act of March 29, 1860. The commissioners were authorized by the act to contract to the extent of one hundred thousand dollars; and that amount was appropriated by the act, out of any money in the treasury not otherwise appropriated, to carry this act into effect. "This act was held not to be repugnant to the Eighth Article of the Constitution upon the same grounds stated in *The State v. McCowley.*"

This question also arose and was decided in the case of *The State v. Medberry* (7 Ohio St. R. 526.) In that case the Board of Public Works contracted to pay certain parties twenty-seven thousand five hundred dollars a year, payable monthly, for five years, amounting in all to the sum of one million three hundred and seventy-five thousand dollars, for materials and repairs of the State canals. The Constitution of Ohio prohibits the General Assembly from creating any debt or liabilities against the State which shall

exceed the sum of seven hundred and fifty thousand dollars, except in certain cases mentioned. It also provides that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and no appropriation shall be made for a longer period than two years." It was held by the court that these contracts for repairs on the canals for a period of five years necessarily created a debt against the State in excess of the constitutional limit; for the reason that the General Assembly had no power to raise revenue and to authorize its appropriation in payment of these liabilities accruing after two years.

The opinion of the court was delivered by Mr. Justice Swan, which is a very able and well-considered opinion. After alluding to the general working of the financial system of the State, as to the payment of current expenses, and the creation of a debt, a very clear and forcible distinction is drawn between those contracts which do and those which do not create a debt within the meaning of this constitutional restriction. The principles stated and illustrated in the opinion are very handsomely summed up by Mr. Justice Sawyer in *The People v. Pacheco* (27 Cal. 218), as follows: "That the legislative department of the Government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; but that the power of appropriation, under the Constitution of Ohio, is limited to two years; that when an appropriation is made for an object to be accomplished, and paid for within the two years, and, at the same time, revenue is provided to meet the appropriation, a contract made in pursuance of the appropriation, and payable out of it, does not create a debt within the meaning of the prohibitory clause of the Constitution. But a contract to be performed beyond the two years, or without raising and appropriating the revenue to meet it, necessarily creates a debt, as the services cannot be paid for when rendered in the first case, because the legislative power has no authority to make the appropriation, and, in the second, because it

has failed to do it." The same doctrine was held in the case of *The People v. Pacheco* (27 Cal. 175).

The theory adopted in these cases is, that if expenses are incurred by authority of the legislative department for some specified object, without any provision being made for the payment of such expenses as they accrue, they thereby create and become a debt against the State, within the meaning of the prohibitory clause. But, on the other hand, if at the same time such expenses are authorized to be incurred, provision is made for the payment of such expenses as they accrue, and such expenses are incurred, they do not thereby become a debt against the State, because the whole is regarded as a single financial transaction. The only case referred to in which this doctrine appears to be controverted, is that of *Coulson v. The City of Portland,* reported in 1 Deady, 481. Mr. Justice Deady, in delivering his opinion in the case, said: "By means of such artificial reasoning and unlooked-for constructions of popular and plain terms and phrases, Constitutions may be purged of every prohibition upon the legislative power of taxation and creating indebtedness. The fact that the ordinance appropriates money to pay these coupons, as they fall due, makes no difference. There is no magic in the legislative formula, 'There is hereby appropriated.'"

It will be noticed that the contracts in the cases cited are very similar to the contract in the case under consideration, except that in those cases provision was made for raising and appropriating money to pay the liabilities incurred, as they became due, while in this no such provision was made.

It will be further noticed that in *Coulson v. Portland* it was held that the ordinance created a debt against the city within the meaning of the restrictive clause of the charter, notwithstanding the ordinance also contained a provision for raising and appropriating revenue in payment of the coupons as they became due, while in all the other cases it was held that the provision made for raising and appropriating revenue, in payment of the liabilities, as they became due, operated to prevent the existence of a debt against the State, within the meaning of the constitutional restrictions,

by "discharging the liabilities" as they arose, or rather by "preventing their existence."

But in the case under consideration no such provision was made; therefore, we do not undertake to decide at present what would have been the effect upon the liability created by the ordinance in question if such provision had been made for meeting such liabilities as they became due.

As to the prohibitory clause of the charter, its object was to compel the Common Council to conduct the financial operations of the city upon a cash basis, and thus prevent its present and future resources from being incumbered and pledged for a city debt in any sum greater than the amount mentioned in the limitation.

And, as in our opinion the ordinance upon which this action is based did create a liability against the city which exceeds the limitation, it must be regarded as a contract directly prohibited by the charter, and therefore void.

Judgment affirmed.

J. C. TRULLENGER, Appellant, v. THOMAS G. TODD, Respondent.

SUMMONS.—When it appears that a defendant has been duly served with a summons, and fails to answer the complaint within the time allowed by law, a judgment by default, for want of an answer, may be taken against him. From such judgment no appeal will lie; but an appeal will lie from a judgment, although taken by default, when it appears that the defendant had not been *duly served* with summons. Being duly served with summons implies that the defendant has been served in the manner directed by law. The service of a summons to appear in the Circuit Court of Multnomah County would not be *due service* of a summons to appear in the Circuit Court of Marion County.

IDEM — WHAT CERTIFICATE OF SERVICE MUST SHOW.— When an officer undertakes to serve a summons, he should use ordinary diligence at least to find the defendant in order that he may serve him *personally;* and, after using such diligence, if he should not be found, constructive service may be made. When thus made, the certificate should show that the defendant was not found, in order to render that mode of service complete.

VOID JUDGMENT.— A judgment, although void, may be appealed from.

APPEAL from Washington County.

The facts are stated in the opinion of the Court.

Shattuck & Killin, for Appellant.

Durham & Thompson, for Respondent.

By the Court, PRIM, J.:

This was an action at law to recover damages for breach of contract. The judgment was entered by default, for want of an answer, by the clerk, in vacation, under an act passed by the Legislature in the year 1868, which provides that, "when the time for answering has expired, and it appears that the defendant has been duly served with summons, * * * the clerk shall enter the default of the defendant, and immediately thereafter enter judgment," etc. From the certificate of the sheriff it appears that the summons had been served as follows: "I served the within summons, within said State and county, on the within named J. C. Trullenger, by delivering a copy thereof * * * to a white person of the family above the age of fourteen years, at the dwelling-house of the defendant." This certificate was signed by the sheriff in the usual manner of signing such papers. An appeal having been taken from this judgment, a motion has been interposed in this Court to dismiss the appeal, upon the ground that the judgment, having been entered by default for want of an answer, no appeal will lie from such judgment.

This motion, and the questions presented on the merits by the appeal, having been argued and submitted together, will be considered in the same manner by the Court. The question raised by this motion, however, needs but little consideration at this time, as it has already been considered and passed upon by this Court at a former term, upon a similar motion made in the case of *Smith v. The Ellendale Mill Company* (4 Oregon, 70). In that case a judgment had been taken in the Circuit Court of Marion by default, in which it appeared that the summons had been served upon the corporation to appear and answer a complaint in the Circuit Court of Multnomah County.

An appeal having been taken from the judgment, a motion to dismiss was interposed upon the same ground contained in the motion here. The motion having been overruled, the appeal was entertained and the judgment reversed. The court held that "a judgment, for want of an answer, can only be taken when it appears that the defendant has been duly served with summons, and has failed to answer the complaint within the time allowed by law." That from a judgment when so taken no appeal would lie, but that an appeal would lie from a judgment entered against a defendant, when the record fails to disclose that such defendant has been duly served with summons; that being duly served with summons implies that the defendant has been served with a summons in the manner directed by law, in every particular, requiring him to appear in the court of the county where the judgment is taken. That the service of a summons upon a defendant to appear in the Circuit Court of Multnomah County was not due service of a summons to appear in the Circuit Court of Marion County; that in fact it was no service at all, and that the judgment was void for the want of jurisdiction in the court over the person of the defendant. And so in the case here. Respondent was not entitled to have a judgment entered against appellant by default, for want of answer, because it does not appear from the record that he had been duly served with summons. The certificate of service appearing in the record was insufficient to warrant the clerk in entering judgment against appellant by default, for want of an answer, because it fails to show why the summons was not served upon him personally, by disclosing the fact that he could not be found.

The statute provides that the summons shall be served "by delivering a copy thereof * * * to the defendant *personally*, or if he *be not found*, to some white person of the family, above the age of fourteen years, at the dwelling-house or place of abode of the defendant."

It appears from this certificate that the summons was not served upon appellant personally, but by being delivered to some one of the family, at his dwelling, without showing

whether he could be found or not. If he could be found he was entitled to have a copy of the summons delivered to him personally.

The statute, in providing how service shall be made, evidently implies that when a summons is placed in the hands of an officer for service that he will use ordinary diligence, at least, to find the party against whom the summons is issued, in order that he may make personal service upon him; but after after using ordinary diligence, if he should fail to find such party, constructive service may be made; and when such service is made, the certificate should contain the fact that the party *could not be found.*

The certificate in this case failing to do so, the service appearing of record was insufficient to authorize the clerk in entering judgment by default against appellant. But it is further claimed that if the service was insufficient to give the court in which the judgment was rendered jurisdiction of the person of appellant, the judgment was an absolute nullity, on account of the want of such jurisdiction, and therefore no appeal would lie from such judgment.

While it appears to be generally conceded that a void judgment may be disregarded and treated as a nullity, whenever any right is claimed under such judgment, whether it has been appealed from and set aside by a competent court or not, it appears also to be the constant practice for courts of review to entertain appeals from such judgments for the purpose of reversing and purging the records of such judgments. It was so held in the case of *The People v. Ferris* (33 New York, 220). In that case the court says: "It has been the constant practice of courts of review to reverse judgments and orders granted without jurisdiction. This is often the only way in which the records of the courts can be purged of errors and dangerous precedents." (7 Cal. 280; 16 Cal. 65, to the same effect.)

We deem it unnecessary, however, to cite further authority, as this Court has already passed upon the question in the case of *Smith v. The Ellendale Mill Company* (4 Or. 70).

It is further claimed and insisted by appellant that the act of 1868, or so much thereof as authorizes the clerk to

enter judgments by default, in vacation, is unconstitutional and void; but as it has already appeared to the Court that there is sufficient error appearing of record in relation to the defect in the certificate of service to warrant a reversal of the judgment rendered by the clerk, we will not at this time undertake to pass upon the constitutionality of the law authorizing judgments to be rendered by clerks in vacation.

It is therefore ordered that this cause be and is hereby reversed and remanded to the court below for further proceedings.

Judgment reversed.

BEN HOLLADAY, Respondent, v. HENRY A. DAVIS, Appellant.

THE AGREEMENT OF AN AGENT FOR A CONSIDERATION MOVING TO HIMSELF IS VOID.— An agent of a railway corporation, charged with the duty of selecting the route or line of railway, cannot lawfully disregard the interest of his principal in making the selection; and if, for a consideration moving to himself, he should agree to select a particular route, the agreement would be void.

COMPLAINT — WHEN MUST SHOW FOR WHOSE BENEFIT THE ACTION IS BROUGHT.—When it appears on the face of the complaint that the plaintiff is not the real party in interest, and he sues as the trustee of an express trust, the complaint should show for whose benefit the action is brought.

APPEAL from Linn County.

This appeal is from a judgment of the Circuit Court for Linn County, overruling a demurrer to the complaint. The plaintiff sued to recover an amount alleged to be due on a contract in the form of a subscription list, in which the several subscribers, of whom the defendant was one, had respectively promised to pay the plaintiff specified amounts, in case the plaintiff should cause the line of the railroad of the Oregon and California Railroad Company to be located in a specified manner. It is alleged, in the complaint, that the plaintiff is the owner of a majority of the stock of the Oregon and California Railroad Company, a corporation duly incorporated under the laws of Oregon, which was engaged in building a railroad then completed to

a point twelve miles north of Harrisburg; that the plaintiff was one of the directors, and the president of the corporation, "and, as such president, director, and stockholder, had the power to cause said road to be located and constructed on such line or route as he, this plaintiff, might desire or determine," and that he "was duly authorized by said corporation to control said location;" that there were two routes for said road, both surveyed, one passing some miles east of Harrisburg and the other running through Harrisburg; that the former was the cheaper of the two; and that, "to induce the plaintiff to cause the said road to be constructed to some point" within Harrisburg, the defendant entered into a contract in which, "in consideration that the plaintiff would cause the line of the said Oregon and California Railroad to be constructed to some point" within Harrisburg, and in consideration of one dollar, the defendant agreed "to pay the plaintiff the sum or value of two thousand dollars, in United States gold coin, in real estate," as soon as the railroad should be so constructed; that afterwards the plaintiff caused the said railroad to be so constructed, and in all respects complied with the terms of the contract, and that, although requested, the defendant refused to comply on his part. The defendant demurred to the complaint, alleging defect of parties, want of capacity in the plaintiff to sue, and that the complaint does not state facts sufficient to constitute a cause of action.

E. N. Taudy, R. S. Strahan, and George R. Helm, for Appellant.

Dolph, Bronaugh, Dolph & Simon, for Respondent.

By the Court, UPTON, C. J.:

The sufficiency of the complaint in this cause is questioned on the general ground that all agreements made with railway corporations with a view to influence the corporation as to locating its route or line of road, or as to the places to and from which it shall be constructed, are contrary to public policy, and therefore void, and also on the

specific ground that from the relations existing between the plaintiff and the railway corporation the alleged contract is against public policy.

In support of the first position, the appellant claims that if such inducements can be held out to influence the location of roads, transactions of the kind may be so perverted as to operate most injuriously to the public, causing great lines of travel to deviate from the most direct route, and from points where roads are most needed. On the other hand it is urged that railways are usually originated by means of individual enterprise and upon the strength of private capital, and that in their construction the route or direction is and must be influenced and governed by the amount of business and patronage to be anticipated on the respective routes, the relative cost of construction and the inducements held out by those desiring railroad facilities; that upon the same principle that Government aid may be granted by the United States to corporations or to individuals to induce the construction of roads in particular directions, or to induce the establishment of lines of ocean steamers, similar inducements may be held out by States, communities or individuals, without violating any public or private right or any rule of morality; that if those who need railroad facilities could be prohibited from offering such inducements it would leave communities in many instances without the power of procuring roads; and that leaving parties to act as their interests shall prompt them in such cases, is the surest mode of promoting the public interest by causing roads to be located and constructed where they are most needed.

From the view taken by the Court of the relations existing between the plaintiff and the corporation it will not be necessary to express any opinion on the proposition first named.

It appears from the complaint that the plaintiff, who is a stockholder and an officer of the corporation, being empowered by the corporation, was acting as its agent in selecting the route of its road. While acting as such agent the plaintiff was, of course, bound to exercise his discretion and judg-

ment in the interest of the corporation, and he could not lawfully contract to do anything in that matter contrary to the interest of his principal. Inasmuch as it was his duty to be governed by the interests of the corporation in locating the road, if he obtained a promise of money from a third party as compensation for selecting the route which his duty to the corporation required him to select, the promise was without any equivalent; and if such promise was made to induce him to select a different route, the promise would be in fraud of his principal.

Any agreement of such an agent to select a particular route, if based upon a consideration moving to himself, would be held to be unlawful, as was said by Gilbert, J., in *Bliss v. Mattison* (52 Barb. 335): "An agreement which is designed, or which in its nature and effect tends to lead persons who are charged with the performance of a trust or duties for the benefit of others, to violate or betray them, is contrary to public policy." "It is enough if such is the tendency of it."

This doctrine is not seriously controverted by the appellant, but it is said in avoidance of this objection that the contract was made for the benefit of the corporation, that the plaintiff was the agent of the corporation, both in making the contract and in bringing this action, and that he is entitled to sue in his own name, as the trustee of an express trust. In support of this petition the respondent cites *Considerant v. Brisbane* (22 N. Y. 389).

It was held, in that case, that the plaintiff could maintain the action for money due to the corporation, it being shown on the face of the complaint that, in making the notes sued upon, the defendant treated the plaintiff as the trustee of an express trust. The action was upon promissory notes given by the defendant in consideration of stock of the corporation, to be delivered to him on the maturity of the notes. The notes were made payable to the plaintiff "as executive agent of the company." In the opinion it is stated that the plaintiff was not personally bound to deliver the stock, and that the corporation was bound; and it appeared on the face of the complaint that, in making the contract, and in bringing

the action, the plaintiff was acting as the trustee of an express trust. The Code of that State is identical with ours, in regard to the authority of a trustee to sue in his own name, and provides that "every action must be prosecuted in the name of the real party in interest," except that "a trustee of an express trust" may sue in his own name, and that "a person with whom and in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." The court held that the note was an express contract to pay the plaintiff for the use of the company. It does not appear by the complaint in this cause whether or not the payment was to be made for the benefit of the corporation. If it is true in fact that the contract declared upon was made for the benefit of the corporation, and that the corporation could compel the plaintiff to account to it for the money obtained, that fact is not stated in the complaint; there is not enough stated to show that the plaintiff was authorized by the corporation to make the contract, or that he made it for the benefit of the corporation.

As this is not shown, and the plaintiff is not entitled to recover to his own use under the facts stated, the demurrer should be sustained, and the judgment of the Circuit Court must be reversed.

HIRAM SMITH, Administrator of the Estate of WM. FOSTER, Deceased, Respondent, v. JOHN FOSTER, Appellant.

PLEADING.—A pleading should contain a concise statement of the facts constituting the cause of action or defense, instead of the evidence from which such facts may be inferred.

READINESS TO PAY.— The mere readiness and willingness of a debtor to pay a demand when due, amounts to nothing without an offer or tender of payment by him, and a refusal by the creditor.

AGREEMENT — WHEN MUST BE EXECUTED.— An agreement to substitute any other thing in lieu of the original obligation is void unless actually carried into execution and accepted as satisfaction.

APPEAL from Benton County.

This was an action to recover a balance due upon a prom-

issory note executed by appellant to William Foster on the 4th day of February, 1864, due one day after date.

It is alleged in the answer that at the time of the execution and delivery of the note, one James Foster was the agent of William Foster to collect and receive money for him, and to forward the same to him in Missouri or retain it on deposit, as he might deem best. Immediately after the execution of the note, and when the same became due (which was the next day after its execution), appellant was ready and willing to pay it, but said agent not being ready to receive it, he retained the money, at the request of said agent, under an agreement that the money for which the note was given was to remain with appellant on deposit, without interest, to be paid over whenever demanded by said agent.

The answer was demurred to upon the grounds that the facts stated do not constitute a defense to the complaint; that the answer attempts to vary and control the effect of a promissory note by matters outside thereof, and that there is no consideration alleged in the answer for the agreement set up therein. The demurrer was sustained, and judgment rendered against the defendant. Defendant appealed.

W. W. Thayer and R. S. Strahan, for Respondent.

John Burnett and John Kelsay, for Appellant.

By the Court, PRIM, J.:

Under the Code, a pleading should contain a concise statement of the facts constituting the cause of action or defense, instead of the circumstances and evidence from which such facts may be inferred.

This answer appears to be obnoxious to this rule of pleading; but waiving this objection, we think the demurrer to the answer was properly sustained, upon the ground that the matters set up in it were insufficient to constitute a defense to the cause of action contained in the complaint.

The answer undertakes to satisfy one promise by making another without alleging that the second promise was accepted by the creditor in satisfaction of the first. Such an

agreement could not operate as a payment of the note unless it was accepted as such by the party to whom the original promise was made. The answer not only fails to aver that the agreement was accepted in satisfaction of the note, but also fails to aver that it was ever executed or performed by appellant by keeping the money on deposit subject to the order of respondent.

The principle appears to be well settled that "a mere agreement to substitute another agreement, or anything in lieu of the original obligation, is void unless actually carried into execution and accepted as satisfaction." (2 Bouvier, 247.)

It was also averred that the maker of the note was ready and willing to pay the note when it became due; but a mere readiness and willingness to pay a demand when due amounts to nothing without an offer or tender of payment by one party, and a refusal by the other.

Judgment affirmed.

STATE OF OREGON, Respondent, v. A. M. CORNELIUS, Appellant.

ATTACHMENT — EFFECT OF, ON REAL PROPERTY.— A sheriff does not acquire a special ownership in real property by levying an attachment thereon. The only effect of such levy is to create a lien upon the real property in favor of the attaching creditor from the date of the levy.

LEVY UPON PERSONAL PROPERTY.—Unless the officer levying upon personal property capable of manual delivery, takes the same into his custody, he does not acquire a special property therein.

APPEAL from Lane County.

Appellant was convicted in the Circuit Court for Lane County, of larceny, alleged to have been committed by taking a large belt from his own sawmill, alleged in the indictment to be the personal property of J. N. Poindexter, sheriff of Lane County. At the trial it appeared in evidence that on September 3, 1873, a writ of attachment was levied by said Poindexter as sheriff, upon a portable sawmill belonging to appellant, by posting a certified copy of

the writ upon the mill. It did not appear who owned the land upon which the mill stood, or its condition at the time of the levy, except that it was a portable saw-mill. The belt was upon the mill two weeks after the levy of the attachment, but it failed to appear whether it was attached to the mill at the time said writ was levied. It appeared, however, that after the writ was levied, the belt was taken by appellant and sold. The jury were instructed by the Circuit Court "that the mill of defendant was real property, and that the levy upon the mill by posting up a certified copy of the writ was a sufficient levy upon the mill, and everything necessary to and for the operation of the mill; and that if the belt in question was upon the mill at the time of the levy, the belt was levied upon by the sheriff, and he thereby obtained a special property in the belt and the possession of the same."

To this instruction appellant excepted.

R. S. Strahan, J. N. Dolph and John Kelsay, for Appellant.

F. A. Chenoweth, for Respondent.

By the Court, PRIM, J.:

The instruction of the court below, as to the effect of the levy of the attachment upon the saw-mill, we think was erroneous in this: If the mill in question was real property, and the belt in question was so attached thereto as to become a fixture, the sheriff acquired no special ownership in the mill by virtue of a levy made in the manner in which this was made. The only effect of such a levy was to create a lien upon the real property in favor of the party suing out the attachment, from the time of the levy. (Civ. Code, § 149.) In fact, if the saw-mill was real property, and the belt a fixture, it was not the subject of larceny. But, on the other hand, if the belt had become personal property by reason of being detached from the mill, such was insufficient to create a special property in the sheriff, for the reason that it was not taken into his custody. Section 147, subdivision 2 of the Code, provides that "personal prop-

erty, capable of manual delivery to the sheriff, and in the possession of a third person, shall be attached by taking it into his custody." Subdivision 3 provides that "other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same."

It is ordered that the judgment of the court below be reversed.

JOSEPH GASTON, Respondent, v. FRANK L. STOTT, Appellant.

A PRESENT GRANT.—The act of Congress of September 28, 1850, was extended to Oregon by the act of March 12, 1860. The grant was *in praesenti*, and passed a fee-simple title to the State of all the swamp and overflowed lands within her borders.

PATENT.—The patent provided for in the second section of the act of 1850, operates merely as a further assurance of the title.

PERSONAL TRUST.— The trust raised by the act of 1850 is a personal, not a property trust. It does not run with the land.

SWAMP LANDS — RIGHT OF THE STATE BEFORE PATENT ISSUES.— The State has the right to make selections and dispose of the swamp and overflowed lands acquired under the grant before the issuing of the patent by the General Government.

PROVISO.—The proviso in the first section of the act of 1860 in no way operates as a limitation upon the grant.

SELECTIONS — EFFECT OF A FAILURE TO STRICTLY COMPLY WITH THE ACT IN MAKING.— The provision in the second section of the act of 1860, in relation to the time within which selections are to be made, is directory. The State lost no rights by not complying strictly therewith.

APPEAL from Yamhill County.

This is a suit to quiet the title to section twelve, township two south of range four west, of the Willamette meridian, the same being situate in Yamhill and Washington Counties. The complaint alleges that the defendant is in the possession of said lands; that they are swamp and overflowed lands, unfit for cultivation by reason of such swampy and overflowed condition; that they were granted to the State of Oregon by virtue of the provisions of the swamp land grant, made by Congress, March 12, 1860, and that the

State has sold them to this plaintiff under the provisions of the State Swamp Land Act, approved October 26, 1870. The complaint further alleges that the defendant has set up a claim to said lands under a pretended pre-emption of the same made in September, 1871, by virtue of the pre-emption laws of the United States, and alleges that said lands were not subject to pre-emption.

To this complaint the defendant filed a general demurrer. On the argument thereof in the court below, the question was raised whether or not the title to "the swamp and overflowed land" passed to the State by virtue of the act of Congress of March 12, 1860. The court below resolved this question in the affirmative, and overruled the demurrer. Upon leave granted the defendant filed answer.

The answer admits that the lands in controversy are "swamp" lands, and alleges that prior to August 28, 1871, the defendant made settlement thereon under the pre-emtion laws of the United States; that he duly made his declaratory statement at the proper land office; that on March 4, 1872, he made proof of residence and cultivation, and paid to the United States, the lawful price of said lands; that the same were at the time subject to pre-emption; that ever since said last date he has been entitled to a patent from the General Government therefor; that he is in equity the owner of the fee-simple to said land, and that he is in possession thereof. And further answering, he avers that there is now pending in the land department of the General Government a contest between the State of Oregon and the defendant, concerning the right to receive a patent for the lands described in the complaint; that it has not been determined by the proper officer of the said department who is entitled thereto; that no patent or patent certificate has been issued to the State of Oregon; that the title to said land has not been confirmed to the State of Oregon, and that said land exceeds in value the sum of two thousand dollars. The answer concludes with the prayer that the defendant's title be quieted, and that the claim set up by the plaintiff be declared to be fraudulent and void.

The plaintiff demurred to the first and second defenses

set up in the answer, for the reason that the matters therein averred constituted no answer in equity to the cause of suit set up in the complaint; at the same time filing a motion to strike out the prayer of the answer, for the reason that it asked such affirmative relief as could only be obtained by original suit. The motion was sustained, as was also the demurrer to the aforesaid defenses, and to every part thereof, except the averment setting forth the value of the land.

The defendant refused to answer or plead further, and the court granted plaintiff the relief prayed for in the complaint, and from the decree entered in accordance therewith the defendant appeals.

H. Hurley and S. F. Chadwick, for Respondent.

The act of Congress was of itself a present grant. (Opinions of Attorneys-General, vol. 9, p. 253.)

That patent is not necessary to invest a grantee with title. It is only evidence of the pre-existing title. The issuance thereof involves duties of a ministerial character only. (13 Cal. 419; 3 Washb. on Real Prop. 174; 9 Cal. 324.)

Legislative grants should be construed liberally in favor of the grantee. (13 Cal. 455; 11 Pet. 597.)

The State has the right to dispose of the swamp and overflowed lands granted to her by act of Congress prior to receiving patent. (9 Cal. 322; 27 Cal. 87; 15 How. 447; 13 Pet. 516; 31 Cal. 461; 33 Cal. 642; 34 Cal. 580.) Upon the general views stated, *vide* 24 Ark. 444; 31 Ill. 69; 9 Wall. 99; 22 Iowa, 91; Id. 450.)

Shattuck & Killin and Ball & Stott, for Appellant.

The grant to Arkansas was not a present grant of indefeasible title. (1 Black, 358, 375, 379; 2 Black Com. 326; Ohio 313; 9 Wis. 236; 22 Iowa, 91; 29 Cal. 223; 6 Wall. 151; 9 Id. 197.)

Legislative grants must be interpreted, if practicable, so as to effect the intention of the grantor; but the rule is to construe them most strongly against the grantee. (1 Black, 380, 381; 3 Iowa, 32; 11 Pet. 544; 23 How. 66.)

The lands remain part of the public domain, until confirmation of title, which can only take place after listing, platting, etc. (Sec. 2 of the Arkansas Act.)

By the Court, MCARTHUR, J.:

The only question pressed upon the attention of this Court in the argument of this cause was, whether or not the "Swamp Land Act" of Congress, in itself, passed the title to the swamp and overflowed lands in Oregon to the State. Gaston holds under the State, Stott under the United States; hence a correct solution of the question presented will be decisive of the controversy.

By act of Congress of March 12, 1860, the provisions of the act of September 28, 1850, commonly designated as the "Swamp Land Act," were extended to the States of Oregon and Minnesota. The language of the first section of the act of 1860 is as follows: "That the provisions of the act of Congress entitled 'An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September 28, 1850, be and the same are hereby extended to the States of Minnesota and Oregon; *provided*, that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act."

The second section provides that selections be made from surveyed lands within two years from the adjournment of the Legislature at the next session after the passage of the act, and from lands thereafter to be surveyed within two years from such adjournment at the next session after notice by the Secretary of the Interior to the Governor, of the completion and confirmation of the surveys.

In order to ascertain the character of the grant and the effect of the proviso in the first section of the act of 1860, an inquiry into the original act, the provisions of which are extended to Oregon, becomes necessary. The acts are *in pari materia*, and must be construed together. On September 28, 1850, Congress passed an act to enable the State of

Arkansas and other States to reclaim the "swamp lands," within their limits. The first section of the act is as follows: "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to the State." The second section provides that the Secretary of the Interior shall make out accurate lists and plats of these lands, and transmit the same to the Governor of that State, and, at his request, shall issue patent therefor, and on that patent the fee-simple to those lands shall vest in the State of Arkansas, subject to the disposal of the Legislature of that State; provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of drains and levees. The third section provides that if the greater part of all legal subdivisions of such lands shall be wet and unfit for cultivation, the whole subdivision shall be included in the list. The fourth and last section provides that the provisions of the act shall extend to, and its benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands may be situated. (9 U. S. Stats. 519.)

On March 2, 1855, Congress passed an act bearing upon this subject which authorized the President of the United States to issue patents to a certain class of purchasers prior to issuing patents to the States. It also provided that the States release their rights to individuals in certain cases, that a list of sales be returned, and that the States be indemnified for loss of lands by reason of the act. (10 U. S. Stats. 634.) And on March 3, 1857, Congress passed an act confirming to the several States the swamp and overflowed lands selected under the act of September 28, 1850 (the Arkansas Act), and the act of March 2, 1849 (the Louisiana Act). (11 U. S. Stat. 251.)

The acts of 1850 and 1855, and the confirmatory act of 1857, have been the subject of frequent investigation by

the highest judicial tribunals of a number of the States affected by their provisions. They have also received official construction by a former Commissioner of the General-Land Office, and by one of the most eminent Attorneys-General of the United States in opinions submitted for the guidance of the commissioners. As early as November 21, 1850, Mr. Commissioner Butterfield instructed the Surveyors-General that the act of 1850 clearly and unequivocally granted to the several States such lands which from being swampy or subject to overflow, were unfit for cultivation.

The second section of the act of 1850 made the Secretary of the Interior the executive officer for carrying the same into effect. In December, 1857, it became necessary for the then Secretary of the Interior, Hon. A. H. H. Stuart, to officially determine when the grant took effect; whether at the date of the passage of the act, or on the issuing of patent. He reached the conclusion that the words "are hereby granted" imported a grant *in praesenti;* conferring the right to the land, though other proceedings were necessary to perfect the title. (Lester's Land Laws, 549.)

Subsequently, on November 10, 1858, Attorney-General Black, in a very clear and able opinion addressed to Hon. Jacob Thompson, the Secretary of the Interior, held that the swamp land grant gave the State a right to the land from the day of its date. After referring to a former opinion (9 Opinions of Attorneys-General, 42), he said: "It is not necessary that patent should issue before the title vests in the State under the act of 1850. The act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect. To attain that object the Secretary of the Interior was directed to make out an accurate list of the lands and cause a patent to be issued therefor. But when a party is authorized to demand a patent for his land, his title is vested as much as if he has the patent itself, which is but the evidence of his title." And he further declared, that the general description of "all swamp and overflowed lands" within the limits of the State of Arkansas, was definite enough for purposes of notice. (9 Opinions of Attorneys-General, 255-6.)

We refer to the instructions of Mr. Commissioner Butterfield, to the conclusion reached by Mr. Secretary Stuart, and to the opinion of Attorney-General Black, to show the accepted construction of the act of 1850 by the land and law officers of the General Government. And this construction, it must be borne in mind, was given after the passage of the acts of 1855 and 1857, and has, we believe, until recently, been uniformly acted upon by the Department of the Interior.

By the fourth section of the act of 1850, commonly called the Arkansas Act, the provisions and benefits thereof were extended to and conferred upon all other States of the Union in which swamp and overflowed lands existed. Illinois, having large tracts of lands of that character lying within its borders, was affected by the provisions of the act, and became entitled to its benefits. The Supreme Court, in the case of *Supervisors of Whiteside County v. State's Attorney, etc., et al.* (31 Ill. 68), was called upon to pass upon the character of the grant. The opinion is clear, forcible and able. As it presents a complete refutation to several positions taken by counsel for the appellant in the argument of the case in hand, and, as it expresses the views of this Court, we have no hesitancy in adopting so much thereof as bears upon the question of the character of the grant. Mr. Justice Breese, in delivering the opinion of the court, after referring to the act of Congress, and to the several acts of the General Assembly of Illinois, in relation to swamp and overflowed lands, said: "By the grant of those lands to the State a fee-simple estate passed, clogged by no condition. The State became the absolute owner of the lands, with power to dispose of them in such manner, and for such purposes, as to the State might seem most expedient. The language of the act is, in the first section, 'Shall be, and the same are hereby granted to the State.' This is a full and perfect grant of an indefeasible estate. In the next section, a patent, to evidence the title, is required to be issued to the State, 'and, on that patent, the fee-simple to these lands shall vest in the State.' Language cannot be used to express more clearly, and in more comprehensive terms, the

intention of the granting power as to these lands. They are granted unconditionally to the State, to be at the uncontrolled disposal of its Legislature. The proviso (in the second section) does not limit or qualify the power of the Legislature over them and their proceeds in any manner. It is, at the utmost, but the expression of a wish or a desire, on the part of Congress, that the proceeds of their sale should be expended in levees and drains with a view to their redemption. It is not a condition of the grant that they shall be so expended, for a discretion is left with the Legislature to expend them 'as far as necessary.' From the act itself no inference can be drawn that it was the desire of Congress to resume the grant if the lands were not appropriated to their drainage. The grant was a political measure, in which the States, having vast bodies of swamp and overflowed lands within their borders unfit for cultivation, productive of disease, and yielding no revenues to the State, had a deep and important interest, while to the nation at large the interest was comparatively trifling. Congress, in view of these facts, said to these States, 'These lands are of no use to the nation; take them; we make you a perfect title to them; drain them and reclaim them if you can; we commit them, and the whole subject, to your Legislature—adopt the policy we recommend, but take the lands.' "

The learned judge then proceeds to discuss the question of the trust raised by the law in relation to the application of the proceeds of the sales of swamp and overflowed lands. He declares it to be a matter of municipal and not judicial concern, over which the State has plenary and exclusive power. In support of this principle he cites *Cooper v. Roberts* (18 How. U. S. 173). In that case certain school sections were sold,—the sales were not for school purposes, but the proceeds were placed in the general fund,—and the court said: "The grant of these lands was to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith. We think it was competent for Michigan to sell the school reservations without the consent of Congress."

In *Dunklin County v. The Dunklin District Court* (23 Mo.

449), the court, in passing upon the nature of the trust raised by the act of 1850, held that it was not fastened to the land; did not run with it; but was a mere personal trust, and was a matter exclusively within the control of the Legislature.

In *Barrett v. Brooks* (21 Iowa, 147), the court held that the fee-simple of the swamp lands passed to the State under the act, and that the Legislature had power to dispose of them; citing with approval *Allison v. Halfacre* (11 Iowa, 450).

The Supreme Court of Arkansas, in *Branch v. Mitchell* (24 Ark. 431), after reaffirming the doctrine which had before that time been repeatedly held by that tribunal, viz., that by the words of the act of 1850, all the lands in the State which were in fact swamp and overflowed, and thereby unfit for cultivation, immediately passed to and vested in the State, proceeded to judicially determine the effect of the act of 1855. In that act Congress manifestly undertook to decide that the grant under the original act was not *in praesenti*, and the court said: "Whether the lands falling within the terms of the grant had or had not vested in the State under the act, was a judicial question, which Congress had not the right to take upon itself to decide; and it is but respectful to that body to suppose that it was simply the intention of that act to give purchasers their patents, so that the claimant under the State might institute proceedings in equity to establish their titles and avoid the patents. However that may be, we continue satisfied with the decisions heretofore made, and again hold that all the lands in the State which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State on the 28th day of September, 1850."

The case is the same as if the grant had been of all the prairie land, or all the woodlands, or all the alluvial land in the State; the difficulty of ascertainment of its character not affecting the question. The words of the grant—the operative words—are direct and positive: "Shall be, and the same are hereby granted to the State;" and the provision of the second section, that the Secretary of the Inte-

rior should make out and transmit to the Governor a list and plats of the land described, and, at the request of the Governor, cause a patent to issue to the State, and that "on that patent the fee-simple to said lands shall vest in the said State," can no more be held to limit the effect of the present grant, in the first section, than if in a deed after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made "on which the fee-simple should vest." This would make the title of the State to any of the land depend on the request of the Governor for a patent. The words of the second section must be held to be simply a definition of the nature of the title which the State took under the grant, and not a postponement of the period at which the title should vest.

In *Summers v. Dickinson* (9 Cal. 554), it was held that upon the passage of the act of 1850 the State became the owner, with absolute power of disposition, of all the swamp lands within her limits which had not been disposed of, and that the title of the State in no way depended on a patent, and that the act itself operated as a conveyance. In *Owen v. Jackson* (9 Id. 322), the same court previously held that a patent issued to the State under the second section would have no operation except by way of further assurance. In *Kernan v. Griffith* (27 Id. 77), the court, after referring to the two cases last above cited, declared those decisions to be in harmony with the language of the act when properly construed, and to be fully sustained by *Foley v. Harrison* (15 Howard U. S. 447), and *Wilcox v. Jackson* (13 Peters, 516).

The principle in *Foley v. Harrison* is, we think, clearly applicable. The case arose under the act of September 4, 1841, granting certain lands to Louisiana and other States (5 U. S. Statutes, 455), and McLean, J., in delivering the opinion of the court, used the following language:

"The words of the act of 1841 are, 'that there shall be granted,' not that there is granted. The words import that a grant shall be made in future." By parity of reasoning,

we think it must follow that the words "are hereby granted," in the act of 1850, must import a grant *in praesenti*.

In *Robinson v. Forrest* (29 Cal. 322), the principle advanced in *Summers v. Dickinson*, *Owens v. Jackson*, and *Kernan v. Griffith*, is affirmed as a general proposition, but modified in its application to those swamp and overflowed lands situated adjacent to lines dividing such lands from the dry lands.

It is unnecessary for us in this case to examine into the correctness of the reasoning which led the court to adopt this modification, and as the question may be brought before us in the future, we withhold our opinion thereon.

In *Railroad Company v. Smith* (9 Wallace, 95), the company claimed under a certain "railroad grant," approved June 10, 1872, and Smith claimed under the act of 1850. From the statement of the case, we learn that there was no evidence introduced tending to show that the land in controversy was ever certified as swamp land by the Secretary of the Interior, or that the same was ever patented as such to the State of Missouri. Nor was this pretended. In fact, the correspondence of the Land Department of the United States showed that the Secretary had no sufficient evidence to enable him to make out such certificates. The court treated the act of 1850 as a "present grant," and one which no act of Congress has ever attempted to take back, or forfeit, or give to any other grantee, or modify the description by which the lands named therein were given to the States. After referring to the second section of the act of 1850, by which certain duties heretofore referred to devolve upon the Secretary of the Interior, the court used the following language:

"Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress; and though the States might be embarrassed in the assertion of this right, by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay."

Of the cases cited, the following have been decided since the passage of the act of 1857; *Supervisors v. State's Attorney; Barrett v. Brooks; Branch v. Mitchell; Kernan v. Griffith; Robinson v. Forrest;* and *Railroad Company v. Smith;* and it would be simply absurd to assume that the courts, in investigating these cases, failed to consider the effect either of the act of 1857 or the act of 1855 upon the original act of 1850. In reaching the conclusions arrived at, they must have had before them all the acts of Congress on this subject. All the decisions clearly indicate that the clause in section 2, of the act of 1850, providing that the title vest upon the issuing of patent, was not regarded as constituting a limitation upon the grant, and also that the confirmatory act of 1857 did not have the limiting effect sought to be given it by appellant's counsel.

That this question was fully considered in the case last cited, is apparent from the dissenting opinion of Clifford, J. In his opinion, the title to the swamp and overflowed land remains in the United States until all steps contemplated by the acts are taken, and patent must issue before the States acquire a fee-simple, and before the legislatures of the States can dispose of the lands. After stating the objects of the act of 1857, he says: "Such a law was certainly unnecessary, if the construction of the original act adopted in the opinion just read (by Miller, J.), is correct, as, in that view, the original act vested a fee simple title in the states without the necessity of waiting for any action on the part of the Land Department; and, if so, then it follows that the States may select for themselves, and, if their title is questioned by the United States, or by individuals, they may claim of right that the matter shall be determined by a jury."

These deductions clearly follow from the premises laid down in the opinion of the court, and instead of weakening and countervailing, they strengthen and confirm that opinion. Upon a careful review of all these cases, we can reach no other conclusion than that the act of 1850 was a grant *in praesenti* operating upon certain and unknown premises—"swamp and overflowed lands"—and investing in

those States in the Union at the time of its passage a fee-simple title thereto. Indeed, if there were no authorities touching this point, the same conclusion must be reached solely upon principle, for the grant, being a legislative grant, *proprio vigore*, passed to the grantee immediately all the estate which the grantor had in the subject-matter of the grant, except what is expressly excepted. (*United States v. Percheman*, 7 Pet. 51; *Mitchell v. United States*, 9 Pet. 711; *United States v. Brooks*, 10 How. 442; *Lessieur v. Price*, 12 How. 59; *Ladiga v. Rowland*, 2 How. 581; *Godfrey v. Beardsley*, 2 McLean, 412.)

The United States had a fee-simple title to all the unsold swamp and overflowed land at the time of the passage of the act of 1850, and hence a fee-simple passed to the States affected thereby. No subsequent act of Congress could diminish the estate or clog it with new conditions or except from the operation of the grant any swamp and overflowed lands not originally excepted. Generally, title once parted with is gone forever. A fee-simple estate passed to a grantee cannot be affected by subsequent unilateral acts of the grantor. Hence the acts of 1855 and 1857 cannot be regarded as affecting the estate or the title. And these views are abundantly fortified by the fact that there is an utter absence in all the acts of any express words or reasonable implication by which the title of the State should be divested or the land revert to the General Government in any manner or by any method known to the law. The question of the character of the grant is no longer an open one.

The second section of the act of 1850, in pointing out the duty of the Secretary of the Interior, is simply matter of direction to a ministerial officer; the patent provided for operates only by way of further assurance, and the trust raised by the proviso is a matter of legislative and not of judicial concern. Hence the diversion of the proceeds of the sales of swamp and overflowed lands, from the purposes expressed in the act of Congress to those of aiding in the construction of certain works of internal improvement, provided for by the Legislative Assembly of the State of Oregon, in no way operates to defeat the title of the State.

The act of 1855 in no way affected the title acquired in virtue of the original act; neither did the confirmatory act of 1857; and the congressional recognition by this last act of the proposition, that prior to the issuing of patent the fee-simple to the land remains in the General Government, is a solecism unworthy the serious attention of the court.

Having reach these conclusions, we revert to the consideration of the act of March, 1860, by which the provisions of the act of 1850 were extended to Oregon. Every argument hereinbefore advanced, and every conclusion following therefrom, is as applicable to the act of 1860 as to the act of 1850, unless the proviso in the first section of the act of 1860 operates as a limitation upon the grant. By the purview or body of the act, viewed in the light of the authorities heretofore cited, Oregon became invested with a fee-simple title to the swamp and overflowed lands within her borders, immediately upon its passage. The exception of any "lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act," is repugnant to the purview of the act and cannot stand. We cannot bring ourselves to believe that Congress intended to take away any part of the particular lands granted by the body of the act, by the subsequent general words quoted. The peculiar potency of the words "prior to the confirmation of title," is dispelled by the addition of the words which follow them, "to be made under the authority of said act," for it is settled by the highest judicial authorities that under said act (1850) no confirmation of title was necessary. The grant was *in praesenti*—the title a fee-simple—the patent operating only by way of further assurance. Therefore, this proviso has no greater effect upon the general purview of the act of 1860 than the confirmatory act of 1857, and the clause in the third section of the act of 1850, "vesting fee-simple upon patent," taken together, have upon the general purview of the act of 1850. Hence the conclusions reached in relation to the act of 1850 are alike applicable to the act of 1860.

The appellant claims under the Pre-emption Act of 1841.

(5 U. S. Stats. 453.) It is admitted that the lands in controversy are "swamp lands;" and such being the fact, Stott acquired no legal or equitable right therein because the officers of the United States local land office saw fit to accept or entertain his application for their pre-emption under the act of 1841, for the United States had no legal or equitable rights therein.

The appellant filed his declaratory statement August 28, 1871, and made final proof March 4, 1872. The lands in controversy were selected and sold by virtue of the act of 1870 (Session Laws, 1870, 164), and the facts do not show them to belong to any of the classes of claims the title to which was quieted by the act of 1872. (Session Laws, 1872, 139.)

It was contended by counsel that the State could not claim the lands in controversy at the time she did, because it does not appear that they were selected within the two years prescribed by the second section of the act of 1860. We cannot give our assent to this position, because we are of opinion that the designation of the time within which the lands were to be selected was not intended as a limitation of the power of the selecting officer. Any other view would be antagonistic to the character of the grant. This provision in relation to time is directory, and the State lost no rights by not complying strictly therewith.

Upon a careful review of the whole case, we are of opinion that the decree rendered by the court below should be affirmed. It is so ordered.

Decree affirmed.

JULIA A. McCRACKEN and WILLIAM, her husband, Respondents, v. ALONZO SWARTZ, Appellant.

SCIRE FACIAS.— What is necessary to be set out in the declaration or verified motion in a proceeding in the nature of *scire facias*.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Mallory & Shaw, for Appellant.

Boise & Willis, for Respondent.

By the Court, McArthur, J.:

This is a proceeding in the nature of *scire facias*. The verified motion, which, under the Code, takes the place and answers the purpose of a declaration, sets forth that on March 18, 1867, a decree was rendered by the Circuit Court for Marion County in favor of Julia A. Swartz and against Alonzo Swartz, for the sum of one hundred dollars per annum from the date of said decree, to be paid to said Julia A., as alimony for her support and that of her family; that there fell due March 18, 1868, the sum of one hundred dollars, and on March 18 of each succeeding year a like sum; the amount due at the filing of said motion being five hundred dollars and interest; that no payment has ever been made on said decree, and no execution has ever been issued to enforce the payment of any part thereof; that since the rendition of said decree, and on December 24, 1869, said Julia A. intermarried with William McCracken, and they are now husband and wife.

The answer denies the rendition of the decree; denies that there fell due on said pretended decree the sums stated in the verified motion; denies that there is now due Julia A. the sum of five hundred dollars as alleged, or otherwise; and further, the answer alleges that when the original suit was instituted, the defendant was without the State, and that he did not return until long after the rendition of the pretended decree; that he never appeared, either in person or by attorney, and was never personally served with summons; that no sufficient showing was ever made to give the court jurisdiction to order publication of summons; that no such summons as was by law required was ever made in said suit and served on the defendant, by publication or otherwise; that the said pretended decree was obtained without notice to defendant and by fraud on the part of the plaintiff, and that when said pretended decree was entered,

the court had not acquired jurisdiction of the person of defendant.

The reply puts in issue all the allegations constituting the further answer or defense, and avers that by the original decree the bonds of matrimony which had existed between Julia A. and Alonzo Swartz were dissolved, and the sum specified was the alimony granted by the court. That the defendant recognized the validity of the decree, and, since its rendition, has intermarried, and that by reason thereof he is estopped to deny the validity thereof.

The answer of the defendant is in effect the plea *nul tiel record,* which, with that of payment, release or discharge, constitute all the pleas that can be interposed to a declaration, or a writ of *scire facias.* By the defendant's demurrer, the overruling of which is assigned as error, the sufficiency of the verified motion is attacked. In this proceeding all that was necessary for the moving party to set forth in his verified motion was such a state of facts as showed that a judgment had been rendered by the same court, at a certain time, by which it was adjudged that one party should pay the other a certain sum of money. It is not essential, nor is it proper practice, to set out the record of the proceedings in the parent cause, or rather the original suit, that have passed *in rem judicatem.* Appellant charges that the decree herein is void, for the reason that the court had not jurisdiction. This was one of the questions necessarily submitted to the court below, for upon the fact of jurisdiction in the original suit turned the fact of the indebtedness of the defendant, and the order adjudging that execution issue on the decree settles the question in favor of the jurisdiction. The rule in relation to the presumption of jurisdiction, as laid down in *Grignon's Lessees v. Astor* (2 How. U. S. 340), and in *Hahn v. Kelly* (34 Cal. 408), applies with much force to the case in hand. The original decree is not before us, and we are bound to presume that an inspection thereof by the court below disclosed all the facts necessary to give the court jurisdiction at the time the original decree was entered, and also to entertain the proceeding to obtain an execution at the time when the same

was sought. As has been stated, the defense was that of *nul tiel record,* and this plea was determined by the court from an inspection of the record; and that record not being here for our inspection, and the presumption being in favor of the court below, we have no other course but to affirm the order.

In the argument it was said that an affirmance of the order would be absolutely unjust, for the reason that it would be in effect obliging Swartz to contribute toward the maintenance of another man's wife. True, this is unfortunately the case, but the fault rests with Swartz alone. Upon the marriage of his divorced wife it was his duty to go before the court which decreed the divorce, and procure a modification of that part of the decree granting her alimony. Had he made the application at the proper time, and to the proper tribunal, he doubtless would have obtained adequate relief.

Decree affirmed.

HENRIETTA GOODMAN v. JOSIAH MYRICK.

TRUE LINE OF SURVEY.— In the government surveys the line actually run by the original surveyors is the true line.

APPEAL from Multnomah County.

This is a suit for an injunction to restrain the defendant from erecting certain buildings on A street, in the city of Portland, to the irreparable damage of the adjacent premises of the plaintiff. The answer admits that there is a street called A street, thirty feet in width, dedicated and laid out by John H. Couch, the owner of the land, but denies that the buildings mentioned in the complaint are situated on any part of said street. The question submitted to the court, upon the trial, was the proper location of the southern boundary-line of A street. It was admitted by the parties that A street is thirty feet in width, and that it lies along the southern boundary-line of the land claim of John H. Couch, and that said line is the southern line of said street; that it commences at the northeastern corner of the

donation land claim of Benjamin Stark; that a stone monument, referred to in the evidence, at the east side of Front street and the south side of A street, at the northwest corner of central block, is in the line between the land claims of John H. Couch and Benjamin Stark; that the southern boundary-line of the land claim of John H. Couch, and the northern boundary-line of the land claim of Benjamin Stark, are the same line. Both of the above claims were held under the act of Congress approved September 27, 1850, commonly called the Donation Law. The patent from the United States gives the course of the division line at N. 89° 10′ W., and the plaintiff claims that the line should be established by commencing at the agreed monuments, at the corner of Front and A streets, and running westerly upon this course. The defendant claims that, at the point at which the division line crosses the government line between sections thirty-three and thirty-four, in township one north, of range one east, a government stake was established, marked "S. 33" on one side, "S. 34" on the other, and "C. 45," which indicates that the division line crossed at this point. He also claims that, having established the last mentioned stake as a point upon the government line, it follows that the true division line is a direct one from the stake on the section line to the agreed monument at the corner of Front and A streets.

The testimony introduced by the defendant upon this point is substantially as follows: C. W. Burrage, who had been county and city surveyor for six or seven years, first surveyed the north line of the Stark claim in 1862; he also surveyed it in 1864 and 1866. In 1862 the survey was commenced from the stone monument at the corner of A and Front streets, and after running west the distance to the section line as given in the field notes of the original survey, he found a stake marked S. 33 on one side, S. 34 and C. 45 on the other, which would indicate that the post was set in the line between sections thirty-three and thirty-four, and also in the line of the Stark claim, which is No. 45. This stake was verified by measuring south the distance stated in the field notes to the section corner, as well as

north to the half-mile stake. The position of the stake was found to be correct, the distance to the section-post corresponding within two or three links to that mentioned in the field notes. The course of the line as given in the field notes is N. 89° 10′ W. The course of the direct line as run by Burrage is N. 88° 36′ W., and passes nine feet north of the buildings of the defendant mentioned in the complaint. The distance from the monuments at the corner of Front and A streets to the post in the section line is forty-seven chains and forty-five links. The location of the line was endeavored to be established by the plaintiff by the testimony of several persons, one of whom, D. P. Thompson, a surveyor, was present when Mr. Trutch made the government survey of the north line of the Stark claim in 1853 or 1854. The line run was blazed. The ground at that time was covered with brush and logs. It has since been cleared, and there is nothing now to identify the original line except to run from the northeast corner on the bank of the river on the course indicated in the field notes. He had surveyed the line again in August, 1871, but recognized none of the monuments or surveyor's marks made at the time of the original survey, although his attention had been called to the stake discovered by Burrage. A. B. Hallock, a surveyor, had set the monument at the corner of A and Front streets, and knew where the original line between Stark and Couch was run and marked. A live tree stood near the west side of Fifth street, blazed on the east and west sides, ten inches in diameter. This tree was cut down in 1855, and the stump removed in 1858. The centre of the tree was about thirty feet south of the fence on the north line of A street. Joseph Tucker testified that the line of the Stark claim was blazed, and fixed it at the same place.

The court below dismissed the bill.

Thayer & Williams, for Appellant.

Shattuck & Killin, for Respondent.

By the Court, MOSHER, J.:

The question in this suit is the identification of a line in

the government surveys, all claims under the act of September 27, 1850, being recognized as legal subdivisions. We find the law to be, that in the government surveys the line actually run upon the ground by the original surveyors is the true line. Courses and distances, as contained in the field notes and plats, are but descriptions which serve to assist in ascertaining where the line was actually run. The law lays down no fixed rule as to whether courses or distances shall govern, as this depends upon the circumstances of each particular case. Marked lines and corners are the best evidence, and when they are established, courses and distances must yield to them. In determining this fact the court or jury must be governed by that evidence which carries conviction to their minds. It is claimed by the respondent that, having established the point at which the claim line crossed the section line, the true line is a direct one from that point to the agreed monument at the corner of Front and A streets. This position would be correct if the court were not satisfied from the evidence that the line, as actually run, was, as claimed in the complaint, as far west as the premises in controversy. Beyond this the court expresses no opinion.

The decision of the Circuit Court will be reversed and a decree entered in accordance with this.

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*STATE OF OREGON, Respondent, v. ROBERT BRUCE, Appellant.

INDICTMENT FOR ILLEGAL VOTING — WHEN SUFFICIENT AFTER VERDICT.—An indictment for illegal voting, based upon § 630 of the Criminal Code, is sufficient after verdict, when it charges the defendant with having willfully, knowingly and unlawfully voted at a legally authorized election for representative to the Congress of the United States, held at a specified time and place, although the indictment does not disclose the reason of the disqualification of defendant.

IDEM.—The defendant, in order to have availed himself of the defect in the indictment, in not specifying wherein the illegality of the vote complained of consisted, should have done so by demurrer.

IDEM — OBJECTION WAIVED BY FAILURE TO DEMUR.—The objection that "the indictment does not substantially conform to the requirements of chapter eight of the Criminal Code," is waived by a failure to demur.

*See 20 Am. Rep. 734.

APPEAL from Multnomah County.

The indictment is as follows:

"Robert Bruce is accused, by the grand jury of the county of Multnomah, by this indictment, of the crime of voting illegally, committed as follows;

"The said Robert Bruce, on the 13th day of October, A. D. 1873, in the county of Multnomah and State of Oregon, in the precinct of East Portland, in said county and State, did willfully, knowingly and unlawfully, vote at a legally authorized election, then and there being held for the purpose of electing a representative to the Congress of the United States, he, the said Robert Bruce, then and there having no lawful right to vote at said precinct of East Portland; and he, the said Robert Bruce, then and there well knowing himself not entitled by law to vote thereat, contrary to the statute," etc.

Appellant, without objection to the sufficiency of this indictment, pleaded not guilty thereto, and upon the trial was convicted of the crime as charged. Thereupon, by his counsel, he filed a motion in arrest of judgment, and for a new trial, which, upon the hearing thereof, was overruled by the court, and he was sentenced to pay a fine of four hundred dollars.

The errors relied upon on the motion were: error in admitting in evidence, against the objection of appellant, the poll-books of South Portland, Morrison and Northeast Portland precincts; in admitting in evidence testimony tending to show that appellant voted on the 13th day of October, 1873, at the different precincts above named; in admitting testimony to show that the defendant was a citizen of the State of Oregon, and entitled to vote at any general or special election held therein.

Ball & Stott and C. W. Parrish, for Appellant.

Durham & Thompson, for the State.

By the Court, BONHAM, J.:

It is claimed by counsel for appellant in this case:

1. That the facts charged in the indictment do not constitute a crime.

2. That there was a fatal variance between the evidence adduced by the State and the allegations of the indictment.

3. That the court erred in admitting irrelevant testimony tending to show that defendant voted at places in Multnomah County, on October 13, other than East Portland precinct.

These three propositions embrace all the questions necessary to be considered in this case, inasmuch as the other objection, that the verdict of the jury was against the evidence, could in no event be made available in the absence of a showing of all the evidence in the case, which the bill of exceptions does not pretend to give.

The statute upon which this indictment is based (Crim. Code, § 630), reads as follows: "If any person shall vote or offer to vote at any legally authorized election in this State, knowing himself not entitled by law to vote thereat, or shall vote or offer to vote at any poll or in any precinct at any such election, knowing himself not entitled by law to vote at such poll or in such precinct, such person, upon conviction thereof, shall be punished," etc.

It was conceded on the argument, and the bill of exceptions shows, that Robert Bruce, the appellant, was a lawful voter within the State of Oregon on the 13th day of October, 1873, and it would follow, under our Constitution and election laws, that he had the right on that day to cast one vote at any voting precinct within the State for representative in Congress, provided there was a legally authorized election for the same then held.

In view of these facts, is the indictment in this case sufficient to sustain the verdict and the judgment pronounced upon it? While we agree that a *demurrer* to this indictment should have been sustained, had one been interposed, on the ground that it does not substantially conform to the requirements of chapter eight, title one, of the Criminal Code, yet we do not think that the defects in the same are of such a character that they may be successfully urged on motion in arrest of judgment or upon appeal. . . .

Under the provisions of chapter eight, title one, of the Code of Criminal Procedure, the defendant had the right, if he had chosen at the proper time and in the proper manner to have demanded it, to have required that the State should specify wherein and for what reason he was charged to have been an illegal voter—whether because he was charged to be a minor, a non-resident of the State, an alien who had not declared his intention to become a citizen, as required by law, or that he was not entitled to vote at the time and place charged, because he had already voted at the same election at some other time and place.

But having slept upon his rights by failing to demand, by demurrer, a fuller specification of the facts and circumstances necessary to the complete identification of the transaction charged against him as a crime, he cannot be heard to object to the indictment after a trial upon the merits, when it substantially charges a crime in the language of the statute.

By his silence and acquiescence, the defendant virtually says: "I understand the nature and cause of the accusation against me, and am ready to meet it upon the issues of fact raised by my plea of not guilty." If the defendant had not so understood the accusation, it was his right and duty to have said so by demurrer, without putting the court and its officer, and the county, to the unnecessary labor and expense of a trial, by the result of which he had resolved, in advance, not to abide, if the issue should be found against him.

This reasoning, of course, does not apply to an indictment which is subject to the objections raised by the first and fourth grounds of demurrer, as specified by statute. (Crim. Code, §§ 123, 131.)

Counsel for appellant in this case, in support of their position that the indictment is fatally defective in not specifying the grounds of the disqualification of defendant as a voter at East Portland precinct, cite, with much reliance, the case of *Quinn v. The State* (9 American R. 754), in which the Supreme Court of the State of Indiana held that an indictment for illegal voting very similar to this was in-

sufficient, because it did not sufficiently inform the defendant of the precise nature of the offense charged, so as to enable him to prepare for his defense; but in the case referred to, it will be observed that a motion to *quash* the indictment was interposed by the defendant, which, after argument, was overruled by the court below, and exceptions to the ruling duly taken. In the case in hand, if the indictment had been demurred to, and the demurrer had been overruled, we should hold the same as was held by the Supreme Court of Indiana in *Quinn v. The State;* but the cases do not stand alike—the motion to quash under the Indiana practice being equivalent to the demurrer under ours.

To hold that every minor defect in an indictment may, for the first time, be taken advantage of after trial upon the merits, would do violence not only to the spirit, but to the letter of our Code of Criminal Practice, and would result in entailing upon the public unnecessary expense, and in many instances in thwarting the ends of justice.

We hold, then, that the indictment in this case, although defective in the respects hereinbefore mentioned, does charge a crime, and that its defects, not having been objected to by demurrer, are cured after verdict. This view of the case, as to the sufficiency of the indictment, disposes of the second and third objections against the appellant, involving the questions of irrelevancy of the testimony and the alleged variance between the proofs and the allegations of the indictment.

Judgment affirmed.

STATE OF OREGON, Respondent, v. C. G. GLASS, Appellant.

INSTRUCTIONS — DEGREE OF CERTAINTY WITH WHICH THE OFFENSE MUST BE SHOWN.—A refusal to instruct the jury that "the hypothesis contended for must be established to an absolute moral certainty, to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty," is not error. The law in criminal cases does not require such certainty as precludes the possibility of doubt. It is sufficient if the guilt of the accused be established "beyond a reasonable doubt."

IDEM — EACH NECESSARY FACT MUST BE ESTABLISHED.— Each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt.

IDEM — WHEN THERE IS NO TESTIMONY.—The court may refuse to instruct the jury when there is no testimony to which such instructions can apply.

TESTIMONY — IMMATERIAL FACT.—Where the crime charged is manslaughter, committed by attempting to produce abortion, it is immaterial whether deceased, prior to the commission of the crime, made an attempt upon herself or not, unless such attempt contributed to her death.

IDEM —REPRESENTATIONS OF A SICK PERSON.—Representations of a sick person as to the nature of the malady or bodily feelings under which he is suffering, if made to a medical attendant, are always received as original evidence.

IDEM — OPINIONS OF MEDICAL EXPERTS— FORM OF INTERROGATORIES.— Opinions of medical men as to the cause of death may be given. The form of the interrogatory is a question addressed to the discretion of the court, subject to such consideration as the nature of the particular matter under examination and the character and ability of the witnesses.

RES GESTAE.—Declarations, to become part of the *res gestae*, must have been made at the time of the act done which they are supposed to characterize.

APPEAL from Multnomah County.

The appellant, a physician, was indicted jointly with one Charles Mealey for the crime of manslaughter in producing abortion, committed on the 25th day of October, 1873, by administering drugs and medicines to, and by the use of instruments upon one Mary E. Hardman, a single woman, pregnant with child, by which means the death of the said Mary was produced. Separate trials having been granted, he was tried in the Circuit Court for Multnomah County in November, 1873, convicted and sentenced to five years' im-

prisonment; from which judgment he appeals to this Court. The errors relied upon in the appeal are as follows:

1. In admitting the testimony of physicians as to what deceased did and said to them concerning her pregnancy.

2. In admitting the testimony of a medical witness to prove that deceased died from hemorrhage caused by the removal of a foetus.

3. In refusing to admit the testimony of the wife of defendant Mealey as to statements made by her husband to her at the time he started with deceased to go to Portland, concerning the object of their journey.

4. In refusing to instruct the jury—First. That the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability, of any other hypothesis being true, or the jury must find the defendant not guilty. Second. In order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are all inconsistent with any other rational conclusion.

5. Counsel for defendant asked the court to instruct the jury that if they "believe from the evidence that the child may have died or been killed in the womb of the deceased without any act or assistance on the part of the defendant, and defendant may have injured deceased, and bruised or wounded her womb with instruments or otherwise, while in good faith endeavoring to assist nature in the delivery of such dead child, or in the delivery of the afterbirth of such dead child, then the jury must acquit, and the State must show beyond a reasonable doubt that none of these hypotheses may be true to convict." The court refused to give that part of the above instruction which follows the word "acquit." The rest was given.

6. That the court erred in instructing the jury that if defendant either used means himself to destroy the child when it was not necessary to save the life of deceased, or advised, counseled, aided or assisted deceased to do so, "and thereby caused her death, the mere fact that the de-

ceased might have done the act or used the means herself, or even that she did use the means with her own hands, would not exonerate the defendant;" that if he advised, aided or assisted the deceased in committing the crime he is to be deemed a principal.

7. That the court erred in refusing to instruct the jury that if deceased "had formed and expressed an intention to relieve herself of her pregnancy, even at the risk of her life, and that before or after coming to stop with defendant she may have endeavored to carry such design into effect without defendant's knowledge or acquaintance, they must find defendant not guilty."

8. That the court erred in refusing to instruct the jury that the declarations of standard medical books as to the effect which may or will be produced by a given medicine or drug is entitled to more weight "than opinions of medical men who admit in their evidence that they have never used such medicine in the course of their practice, and have little or no practical experience or observation as to the effect of such medicine."

9. That the court erred in refusing to instruct the jury that if they find that the womb of deceased was wounded in her lifetime, and believe that such wounds may have been inflicted in good faith in the effort to assist the delivery of a child dead in the womb, or in the effort to deliver an adhering afterbirth, after the birth of a stillborn child, then the jury must acquit.

10. That the court erred in instructing the jury that if the defendant took deceased in his charge, and continued to treat her with the intention not to destroy the child, and never intended to destroy the child, he is innocent; but that if he took her in charge intending to produce an abortion, or if, afterwards at her solicitation or otherwise, he determined to destroy the child by bringing on premature labor, in either case, if he used any means with intent to destroy the child when it was not necessary to preserve the life of the mother, the criminal intent existed; and that, if the defendant used means which resulted in the death of the mother, and used them with the intent to destroy the child

when such destruction was not necessary, the criminal motive existed, which is an essential ingredient of the crime.

Thayer & Williams, for Appellant.

If the State was entitled to inquire concerning the application of deceased to physicians, it was only entitled to what she did and said, and it was error to allow witnesses to state what they understood to be the subject-matter of the application. (9 Cush. 36-39; Taylor on Evidence, § 524.)

Acts and declarations of a third party "cannot be received as evidence unless the principal act which they accompany and to which they relate, is itself material to the issue to be submitted to the jury; nor unless the declarations were made at the time the principal act was done; nor unless they were of a character to explain that act or to unfold its true nature and quality, as they are only admissible as incident to the principal act, and because they are a part of it and are necessary to explain and define its true character. (34 Me. 312; 19 Conn. 269; 10 N. Y. 210; 3 Conn. 250; 4 Green, 556, 7; Cush. 586; 9 Gray, 245.)

The cause of deceased's death, whether by the use of drugs or medicines, was a question for the jury. The professional witness is never allowed to give his opinion upon the principal question in dispute. (10 Am. Law Reg., N. S. 594.)

The prosecution having shown that deceased was at the house of Mealey; that she was pregnant; that Mealey started with her from his house to go to Portland, October 5, 1873, and their conduct on their way to and after their arrival in Portland, it was admissible for defendant to prove Mealey's declarations made to his wife at the time he and deceased started for Portland, touching the object of the journey. "A person's contemporary declarations accord with his intentions." (1 Phillips on Ev. 190, 191; 54 Ill. 402; 1 Greenl. on Ev., § 108; 7 English R. (Ark.) 806-7; 4 Washington C. C. 729-32; *Little v. Sessions*, 9 N. H. 271.)

The degree of certainty with which the crime is shown is correctly stated in the first instruction referred to in the fourth assignment of errors. (*People v. Strong*, 30 Cal. 154.)

It is necessary not only that all the circumstances concur to show that defendant committed the crime charged, but that they are all inconsistent with any other rational conclusion. (Starkie on Ev. 743, 754; 3 Greenl. on Ev. 137; 32 Cal. 215; 39 Cal. 326, 333; Burrill on Cir. Ev. 735-36.)

To refuse the entire instruction referred to in the fifth assignment of errors is to refuse the defendant the benfit of a reasonable doubt, which the law always allows. (Burrill on Cir. Ev. 137; Starkie on Ev. 757-9; 25 Miss. 584-9; 39 Cal. 332.)

There was no evidence whatever that defendant ever advised, aided or assisted any other person in the act charged as a crime. It was error in the court to instruct the jury upon a state of facts concerning which there had been no evidence introduced or offered. (20 Howard U. S. 252-4; *Goodman v. Simon*, Id. 359; 9 Wallace, 553; 3 Bush. (Ky.) 32; 39 Cal. 332.)

It imposes upon defendant the burden of proving that the act was necessary to save the life of the mother. If a physician honestly *believes*, under circumstances calculated to produce such belief in a competent person, that the act was necessary, the law will hold him guiltless, though it should turn out that he was mistaken. The court having given this instruction in connection with that referred to in the fifth assignment of errors, with which it had no logical connection, such fact had a tendency to draw the mind of the jury away from the view desired to be presented by the former instruction. (37 Geo. 289.)

If the jury found that defendant used means to destroy the child when it was not necessary to do so in order to save the mother's life, they are not bound therefrom to believe that a criminal intent existed. The danger may not in fact exist, yet a physician honestly believing it necessary to destroy the child to preserve the life of its mother, may do so and not be guilty of any crime. The court should have left the question of intent to the jury. (Civ. Code, § 835; 34 N. J. Law R. (5 Vroom), 416, 417; 5 Barbour, 204.)

There was no law to compel the State to produce the preserved parts of the uterus. A medical witness for

the State described its condition without producing it. The counsel for defendant had the right to argue to the jury the effect of its non-production. (Civ. Code, Subd. 7, Sec. 835; Laws 1865, Sec. 198, p. 37.)

George H. Durham, Prosecuting Attorney, H. Y. Thompson and W. H. Effinger, for Respondent.

The last half of the instruction referred to in the first assignment of error states the true rule. The State is not required to establish its theory to an absolute moral certainty. The testimony must prove to a moral certainty the guilt of the accused, and must exclude a reasonable doubt.

The second instruction in the third assignment of error was properly rejected. While all the circumstances, as a whole must be inconsistent with any other rational conclusion than that of guilt, yet it is not true that each single isolated fact must tend to show guilt. (3 Greenl. 7th ed., p. 36, note 2; *State v. Webster,* 5 Cush.)

The court in another part of the charge gave the substance of these and the two following rejected instructions. The court is not required to repeat instructions already given. (1 Whart., Sec. 743.)

The fact that deceased may have designed or attempted to relieve herself of pregnancy, or may have inflicted wounds upon herself to produce abortion without defendant's knowledge, cannot exonerate the defendant, unless such attempts or wounds were the cause of her death.

Medical works cannot be used as testimony, and the court could not instruct the jury to discriminate between the declarations of such books and the testimony of medical experts. (1 Whart., Sec. 50.)

As to the value of medical testimony. (1 Whart., Sec. 47.)

Declarations of Mealey, made to his wife before starting for Portland, are not part of the *res gestae.* (1 Greenl., Sec. 108.)

Declarations of deceased, made to her medical advisers, are competent to prove her pregnancy.

By the Court, MOSHER, J.:

The questions upon which the Court is called to pass, arise upon the admission of testimony and the instructions given and refused by the court below. I will consider these in the order in which they appear in the bill of exceptions.

Mrs. Dr. Thompson and Dr. Hanchett, being called on the part of the State, testified that the deceased had applied to each of them on the subject of her pregnancy. To this evidence the defendant excepted.

In order to sustain the indictment, it became necessary for the State to establish the fact of the pregnancy of the deceased at the time she went to Glass's house. The representations of a sick person, of the nature of the malady or the bodily feelings under which he is laboring at the time, especially if made to a medical attendant, are always received as original evidence.

As stated in the case in 9 Cushing, cited by defendant, the *res gestae* are different in different cases; and it is not perhaps possible to frame any definition which would embrace all the various cases which may arise in practice. The statements of Mary Hardman, made to her physician concerning her condition, are free from those objections which usually apply to the admission of hearsay. They were in the nature of a confession. They were made against every possible inducement to suppress, conceal or distort the truth; when modesty and shame protested against their utterance, and when the perils of her situation persuaded her to speak. It would be impossible not to distinguish a case of this class from those referred to in the cases cited by defendant, where persons have sought to avail themselves of their own declarations to influence verdicts in which they had a pecuniary interest.

Dr. Watkinds, having testified that his examination of the uterus was sufficient to enable him to tell whether the deceased died from hemorrhage or other causes, was asked the question, "What, in your opinion, caused the death of the person from whom the uterus was taken?" The witness answered, "She died from hemorrhage caused by the re-

moval of a foetus." This question was objected to, for the reason that the answer would involve the point which the jury had to determine. We think the objection not well taken. In order to ascertain the guilt or innocence of the defendant, it was necessary to ascertain the cause of the death.

It is true that general opinion of scientific men is regarded by some writers as a very unsatisfactory kind of evidence, and judges in many cases have received it with the utmost caution, but no inflexible rule has ever been laid down upon the subject. It has been truly said that scientific evidence is generally a matter of opinion, and a form of questions calculated to exclude opinions will often have the effect to destroy this class of evidence altogether. The objection urged to scientific testimony is not so much to the form of the examination as to the uncertainty of scientific tests. In a large number of cases cited in Wills on Circumstantial Evidence, the opinions of medical witnesses were received. The better opinion seems to be that the form of the interrogatory is a question addressed to the discretion of the court, subject to such consideration as the nature of the particular matter under examination, and the character and ability of the witnesses. It appears that the testimony in question was but a small part of the expert testimony going to show the causes of the death. A number of medical men, whose character and ability are unquestioned, testified without objection to particular facts from which the jury, could infer the cause of death. Some of these witnesses had assisted at the post-mortem examination of deceased, others had subjected the uterus to careful microscopic examinations, and their means for becoming acquainted with all the facts accessible in a case of this kind were ample.

On the trial the defense called Mrs. Mealey, wife of Charles Mealey, who was jointly indicted with defendant, and offered to prove statements made by Mealey at the time of leaving Albany with deceased, as to his purpose in going to Portland. This testimony was objected to, and the objection, we think, properly sustained. The appellant had obtained a separate trial, and we are unable to see how his

case could be in anywise affected by proving Mealey's declarations of his intentions at some time previous to any meeting between them. "Declarations to become part of the *res gestae* must have been made at the time of the act done which they are supposed to characterize." (1 Greenleaf, note 1, § 108.)

Mealey's declarations made to his wife prior to his meeting with the defendant and to the performance of the act complained of, have no connection with that fact, which is the principal fact under investigation. These declarations are removed to a remote distance from the principal fact, and are separated from it by a number of circumstances and hypotheses having a doubtful bearing upon the main question. They were not part of the *res gestae*, and were therefore properly excluded. The condition of deceased as to pregnancy was a proper subject of inquiry. If she left Albany to go to Portland, intending to employ a physician to procure an abortion, it was proper that that fact should go to the jury for the purpose of showing her pregnancy. This evidence was not objected to on the trial, and if liable to objection, it is too late to raise the objection now.

The court refused to instruct the jury that "the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty." The instruction was properly refused. Absolute moral certainty is not attainable by the human mind. It is a well-understood and long-established rule, that in criminal cases the guilt of the accused must be established "beyond a reasonable doubt." Absolute moral certainty excludes not only reasonable doubt, but all doubt. It describes a fixed and uncompromising attitude of the mind, of which men are not capable in any of the situations of life. It means such a degree of certainty as precludes the possibility of error or mistake and as presupposes the infallibility of witnesses and jurors. It imposes such conditions upon the administration of justice as would make the punishment of crime impossible, and the existence

of criminal courts useless. The law upon this subject, as laid down by the court, is contained in the three following instructions:

"It is not sufficient that the circumstances proved, coincided with, account for, and therefore render probable, the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

"When a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion."

"Circumstantial evidence, to be sufficient for a conviction in this case, ought to be of a conclusive tendency; that is, its tendency ought to be, not only to convince the minds of the jury of the guilt of the defendant, but to exclude the supposition that the deceased destroyed her own life, either directly or indirectly, as the result of an abortion produced by herself."

We are satisfied that the rule is here stated as strongly in defendant's favor as the law will permit.

The court was asked to instruct the jury that all the circumstances, in the chain of the State's evidence, must concur in showing defendant's guilt. The true rule was undoubtedly laid down in the case of *Commonwealth v. Webster* (5 Cush 296, 313, 317 and 319). Each fact necessary to the conclusion sought to be established, must be proved by competent evidence, beyond a reasonable doubt. It is only required that "the circumstances *taken together,* must be of a conclusive nature, and leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused committed the offense charged."

In *Summer v. The State* (5 Black, 579), it was said that if the jurors have a reasonable doubt as to any one of the circumstances in the chain of evidence, that one circumstance ought not to have any influence in making up their verdict. The jury may exclude any fact from their consid-

eration, and it is sufficient, if from the facts which are considered, their minds are drawn to conclude, to a reasonable and moral certainty, that the defendant is guilty. Nor does there appear to be any material difference between the instructions asked for and those given. The jury were instructed that to establish a charge, by circumstantial evidence, it was necessary that the proof should not only be consistent with the prisoner's guilt, but inconsistent with his innocence. This language would not have been strengthened had the court said that *all* the circumstances necessary to the conclusions sought to be established must be consistent with the hypothesis of guilt and inconsistent with that of innocence. If a single material fact, "or necessary circumstance," remained unproven, or having been proven, was inconsistent with the theory of guilt, the crime was certainly not proven with that certainty which the law requires and which the instructions given required.

The court instructed the jury that if they believed, from the evidence "that the child may have died, or been killed, in the womb of deceased, without any act or assistance on the part of the defendant, and defendant may have injured deceased and wounded or bruised her womb with instruments or otherwise, while in good faith endeavoring to assist nature in the delivery of such dead child, or in the delivery of the afterbirth of such dead child, then the jury must acquit." It is insisted, by defendant, that it should not have refused to add to this instruction the words, "And the State must show, beyond a reasonable doubt, that none of these hypotheses may be true, to convict," as it was requested to do by defendant's counsel. To say that the hypothesis consistent with innocence *may be true,* contemplates the merest possibility of its truth, however remote, and it is equivalent to saying, "If you find there is a possibility of the innocence of the defendant, he is entitled to an acquittal." The question was not, *may* either of these hypotheses be true, or in other words, is it possible for any of them to be true. The real question was, are you satisfied, beyond a reasonable doubt, that the hypothesis of the prosecution is the true one?

The instruction as given by the court is open to the objection which I have just considered, and it substantially gave to the defendant the benefit of a possibility of innocence by instructing the jury to acquit if they found that the child *may* have died without defendant's act, or that he *may* have injured deceased while in good faith endeavoring to assist nature in the delivery of the child. The law does not decide upon possibilities, but upon such probabilities as appear from the facts, judging by human experience, to be reasonable, and as leave the mind free from reasonable doubt.

It is urged by the defendant that there was no evidence whatever to the effect that defendant advised, aided or assisted any other person in the commission of the crime, and that the court had no right to instruct the jury upon a state of facts which did not exist. The evidence, as disclosed by the record, was circumstantial, and the jury might infer from it either that defendant performed the act charged as constituting the crime, with his own hand, or that he aided or encouraged deceased in doing it. The instruction was, therefore, proper. It is further urged that it justified the conviction of the defendant upon proof that the act charged was not necessary to preserve the life of the mother, whereas he ought not to be convicted if he performed the act believing, under appearances that would ordinarily produce such a belief in a competent person, that it was necessary to preserve the life of the mother. This instruction describes the offense precisely as the statute describes it. The real point to which the minds of the jury were directed by it is that just examined, to wit, that he who aids or encourages the commission of a crime is as responsible as though he committed it with his own hands. The objection, however, having been made to other instructions of the court below, will be examined.

The guilty intent of defendant is presumed if the statutory ingredients of the crime are shown. The mind of man can only be explored by weighing his conduct. It devolved upon the State to show that the removal of the foetus was not necessary to preserve the life of deceased, and the de-

gree of certainty with which this is required to be shown is such that no competent person can be presumed to have believed the act necessary. In this case, had the jury found that the circumstances were such as to induce in a competent person a belief that the removal of the foetus was necessary, or had the testimony left that fact in doubt, this would have been sufficient to create a reasonable doubt in their own minds as to the necessity of the act, and the prisoner must have been acquitted.

A case might arise where there were circumstances at the time of treatment calculated to lead to a conclusion which subsequent developments would show was erroneous; but this is not such a case; and the court may refuse to instruct the jury where there is no testimony to which such instruction can apply. There was no attempt made to show, nor was there anything tending to show, that the act charged as a crime was, or appeared to be, necessary to perserve the life of the deceased. The theory of the defense was, that defendant had no agency in the removal of the foetus, and not that its removal was, or was thought to be, necessary to save the life of the mother. This is shown by the testimony contained in the transcript, where it is attempted to be shown that deceased procured her own death by the use of drugs prior to her meeting with defendant. More than this, every fact relied upon by the prosecution to show the act unnecessary was within the reach of defendant, if he is a competent physician, at the time he treated deceased.

The court was asked to instruct the jury that if they found that deceased had formed and expressed a design to relieve herself of her pregnancy, at the risk of her life, and that, before or after coming to stop with defendant, she may have endeavored to carry such design into effect without defendant's knowledge or acquiescence, they must find defendant not guilty. Under such an instruction, the jury would have been precluded from finding the defendant guilty, however conclusive the proof of guilt might be, by proof of an attempt by deceased, at some prior time, to commit the crime. It is immaterial whether deceased, prior to the commission of the crime, made an attempt upon her

self or not, unless such an attempt contributed to her death.

Counsel for defendant asked the court to instruct the jury that the declarations of standard medical books in reference to the effect of certain drugs, were entitled to more respect than the opinions of medical men who admit that they never used such drugs. There is nothing to show that medical books were offered in evidence.

Other grounds of error assigned in the bill of exceptions were not insisted upon. The charge and rulings as a whole were a fair exposition of the law governing in this class of cases, and the prisoner does not appear to have suffered in any of his substantial rights. It was said by Lord Kenyon that "the natural leaning of the mind is in favor of prisoners; and in the mild manner in which the laws of this country are administered it has been a subject of complaint that the judges have given way too easily to formal objections in behalf of prisoners," and this remark applies with peculiar force to our own country and times.

In the language of Mr. Chitty, "in criminal cases, where the public security is so deeply interested in the prompt execution of justice, it seems the minor consideration should give way to the greater, and technical objections be overlooked, rather than the ends of society defeated."

We are of the opinion that there was no error which could have prejudiced the defendant, and the judgment of the court below must be affirmed.

ALLEN SIMPSON, Respondent, v. WILLIAM B. PRATHER, Appellant.

DEMURRER.— If, from inspection of a complaint, the whole or any part thereof can be resolved into a cause of action, a general demurrer will be overruled.

DISMISSAL OF APPEAL — EFFECT OF.— Dismissal of appeal is equivalent to regular affirmance of the judgment.

JUDGMENT ON THE PLEADINGS — WHEN ALLOWED.—When the answer admits all the facts alleged in the complaint, or does not deny them, but denies the legal conclusions only, judgment on the pleadings may, on motion, be allowed.

IDEM — WHERE THERE IS A JOINT LIABILITY.—Where a number of persons are jointly and severally bound, judgment may be entered against those over whom the court acquires jurisdiction.

APPEAL from Polk County.

This cause was tried in the Circuit Court of the State of Oregon for the County of Polk, at the November term, 1873. On August 24, 1872, judgment was given in Justice's Court for Luckiamute Precinct, in said county, in favor of Allen Simpson, and against one Moses W. Hart, for one hundred and eight dollars, costs and disbursements. On August 30 said Hart appealed to the Circuit Court and filed an undertaking on appeal, which was duly executed by Moses W. Hart, William Prather and E. W. Russell, by which said parties jointly and severally undertook that Hart would pay all damages, costs and disbursements which might be awarded against him on the appeal from said judgment, or if any part thereof should be affirmed, the appellant would satisfy the same so far as affirmed.

That at the time of filing the said undertaking execution had been issued, and sufficient property levied upon to satisfy the said judgment and costs, all of which proceedings were stayed, and the property levied upon was released.

That by an order of the said Circuit Court, made at the November term, 1872, the judgment appealed from was "in all respects affirmed in this, that the said appeal to said Circuit Court was dismissed, and the defendants have abandoned their appeal, and that more than six months have elapsed since the notice of appeal was filed herein in the said Justice's Court, and that defendants have wholly failed and neglected to perfect said appeal."

To this complaint the defendants interposed a general demurrer, which, after argument, was by the court overruled. Prather, the appellant, thereupon filed his answer, denying "that the judgment rendered in the Justice's Court of said Luckiamute Precinct, on the 24th day of August, 1872, against said Moses W. Hart, was affirmed by the Circuit Court." After the answer was filed plaintiff moved for

judgment on the pleadings, upon the ground that the answer presented no defense. The motion was sustained, and judgment for one hundred and eight dollars, damages and costs and interest, was rendered against W. B. Prather, appellant.

L. Vinyard, for Appellant.

B. Hayden and Myers & Daly, for Respondent.

By the Court, MCARTHUR, J.:

The first error assigned is that the court erred in overruling the demurrer. As has been stated, the demurrer is a general one, and the rule is well settled that if, from inspection of the pleading, the whole, or any part thereof, can be resolved into a cause of action, the demurrer must be overruled. (*People v. Mayer,* 21 Barb. 240.) The principal objection urged to the complaint is, that it does not show that the judgment was affirmed, but simply that it was dismissed. The respondent claims that the dismissal of the appeal operated as an affirmance of the judgment. As that fact is supplemented by the allegation of the further facts that the time for taking the appeal had fully elapsed and that the same had been abandoned, we are of opinion that the dismissal operated as an affirmance of the judgment of the court below. In this view we are supported by *McConnel v. Swailes* (2 Scam. 572), in which it was held that the dismissal of an appeal is equivalent to a regular technical affirmance of the judgment appealed from so as to entitle the party to claim a forfeiture of the bond and have his action therefor. *Southerland v. Phelps* (22 Ill. 91) cites and approves *McConnel v. Swailes. Harrison v. Bank of Kentucky* (3 J. J. M. 375) is to the same effect, as also is *Karth v. Light* (15 Cal. 325). These cases lay down a doctrine antagonistic to that laid down in *Drummond v. Husson* (14 N. Y. 60), the case relied on by appellant's counsel. We cannot give our assent to the application of the New York rule, but will follow the rule in the other cases cited as being, in our opinion, the correct one.

The second assignment of error is that the court erred in granting respondent's motion for judgment on the pleadings. The answer was fatally defective. It tendered no issue. It admits the execution of the undertaking, admits that the appeal was dismissed on motion, and that more than six months had elapsed since the appeal was taken from the Justice's Court. The only denial is of an indebtedness in the sum of one hundred and eight dollars—a negative pregnant. It admits all the facts upon which the indebtedness arose, but denies only the legal conclusion from those facts. Therefore, we think the answer tendered no issue. Hence, the motion for judgment on the pleadings was well taken and properly sustained by the court below.

It appears that Prather was the only party against whom judgment was entered. He was the only defendant served, and the only one over whom the court had acquired jurisdiction. The obligation was joint and several, and allowing and entering judgment against one jointly and severally bound with others was strictly in accordance with the terms fixed by himself in the written instrument, and was not error.

Judgment affirmed.

MARY GILMORE, Appellant, v. FRANK TAYLOR and RICHARD PHILIPS, Respondents.

EVIDENCE — JUDGMENT-ROLL.—The judgment-roll is proper preliminary evidence to warrant the introduction of proof of a sheriff's sale, and, in probate proceedings, the petition, citation, and proof of service, are essential parts of the record.

IDEM.—The defendant introduced an order of sale of the County Court, a decree of confirmation, and the administrator's deed; the plaintiff produced and offered the residue of the record in the cause, to show want of jurisdiction, and the court refused to receive the evidence. *Held*, that the ruling was an error affecting a substantial right.

APPEAL from Yamhill County.

This is a possessory action to recover an undivided eighth of the parcel of land described in the complaint. The an-

swer denies the plaintiff's allegations of title, and sets up title in the defendant Richard Philips. The plaintiff claims title as heir of John Monroe, deceased, and the defendant claims that he has acquired title through a sale made by the administrator of the estate of said John Monroe, in the regular course of administration. By consent, the cause was tried without a jury, and it was admitted, on the trial, that the plaintiff is heir, as alleged, and is entitled to the premises, unless title was acquired by virtue of the administrator's sale, and that the defendants are entitled to recover if title passed by virtue of the sale. On the trial, the defendant offered in evidence an order made in the County Court of Yamhill County, in the matter of the said estate, directing a sale of the premises by the administrator. The defendant objected, on the ground that no foundation had been laid for introducing that part of the record, claiming that the whole record would show that the Probate Court had not acquired jurisdiction to make the order. The court overruled the objection, and the ruling is assigned as error. The defendant having introduced the order first above mentioned, an order confirming the sale, and the administrator's deed, rested his case. The plaintiff offered in evidence the petition filed in the Probate Court for the order of sale, the order to show cause, the citation, the journal entries pertaining to the administration, and the other papers and files in the cause. The defendant objected to the papers as immaterial, and on the ground that the decretal order of the Probate Court, which contained recitals of due notice, could not be impeached or invalidated by the evidence offered. The court sustained the objection, and the ruling is assigned as error.

P. C. Sullivan and James McCann, for Appellants.

H. Hurley, G. R. Helm, and Boise & Willis, for Respondents.

By the Court, UPTON, C. J.:

The record in this cause contains several assignments of error, but the only point necessary to be considered relates

to the rulings of the court in permitting the order of sale and the decree of confirmation, made in the County Court, to be used as evidence, and refusing to permit the residue of the same record to be introduced.

In case of a sale under a decree of the Circuit Court, the proof, preliminary to the introduction of the execution and sheriff's deed, is the summons and proof of service, the pleadings and the judgment entry; or, in other words, the judgment-roll. The statute regulating probate proceedings does not contain a provision similar to that of § 269 of the Practice Act, directing the clerk to attach together the papers constituting the judgment-roll, unless, indeed, that section should be construed to include probate cases; but I cannot conceive that the omission materially alters the case.

If there was no such duty required of the clerk, in regard to cases in the Circuit Court, still those papers would contain proper preliminary evidence to warrant the introduction of the execution and sheriff's deed, and no reason is perceived why similar papers, constituting the files and records of the Probate Court, should not be considered the foundation and proof of the administrator's power to sell. If it be conceded that a decree reciting due service of process renders the production of the summons and proof of service unnecessary, yet it is not on that account to be assumed that such recital cannot be disputed by production of antecedent parts of the same record when such original papers contain intrinsic and convincing proof that the recitals are not true in fact. The petition, citation and proof of service are as essential parts of the record in a probate case as are the pleadings, process and return in proceedings in the Circuit Court.

These prior portions of the record may be regarded as the original evidence of the jurisdictional facts, and they are also material and pertinent for the purpose of showing what subject-matter was before the court for adjudication, and upon whom the adjudication is binding. If the decree purports to recite the same facts disclosed by these original papers, and there is a discrepancy between the recitals and

those parts of the record upon which the recitals are based, it would be illogical to permit the latter to override or falsify the antecedent statement in the record, of which the recitals purport to be a summary. For these reasons the plaintiff had a right to insist that the record should be presented as a whole, or in other words, that a foundation should be laid for exhibiting the decretal order. (1 Greenl. Ev., §. 511; *Wilson et al. v. Coniell*, 2 John. 280; *Winans v. Durham*, 5 Wend. 47.) At least, if it was proper to permit the defendant to lay such foundation by producing the recitals contained in the order of sale, the plaintiff could insist on the admission of such other parts of the same record as tended to explain the recitals.

Some doubt has existed whether the ruling ought to be treated as an error affecting a substantial right, inasmuch as the transcript in this case does not show what was contained in those parts of the record that were ruled out. In the absence of any knowledge of the contents of the documents offered, this Court cannot say that the judgment of the Circuit Court would have been different had they been admitted in evidence; but evidently the character of the papers ruled out may be such that their admission ought to have changed the result; and as the transcript shows that they were offered for the purpose of proving a want of jurisdiction, and that the objection to their introduction was on the ground that the recital of service contained in the decree is not subject to be so disposed, it is thought that the court ought not to assume that the error in ruling them out did not affect a substantial right.

If on a trial a party propounds to a witness a pertinent and proper question, and through an erroneous ruling an answer is not received, in general, the record does not disclose what the answer would have been; still it is not the practice in such cases to designate the error as one not affecting a substantial right.

I think also it ought not to be assumed, because of the presumption of regularity, that the residue of the record was inspected and found to contain nothing inconsistent with the jurisdictional facts recited in the decree. The

avowed purpose of offering the evidence, and the nature of the objections to it, do not so indicate; and in addition to this, if they had been examined by the court and found to be in harmony with the recitals, it would have been in all respects proper to receive them in evidence as part and parcel of the very record on which the defendant based his title, and as throwing light on the only controverted question in the case.

It is the opinion of the Court that refusing to waive the evidence was an error affecting a substantial right, and the judgment must be reversed.

Mr. Justice McARTHUR dissented.

A. C. LAYTON and CLARA D. LAYTON, Respondents, v. H. A. HOGUE et al., Appellants.

INTEREST — NOT ALLOWED, WHEN.—Where an executor purchases through an agent a parcel of land belonging to the estate under his care as such, and suit is brought to set aside the sale and cancel the deed, neither he nor his heirs will be allowed interest upon the price paid for the same.

APPEAL from Linn County.

This suit was brought by A. C. Layton, as plaintiff, against the heirs at law and widow of J. P. Hogue, deceased, to set aside a sale of land made by the said J. P. Hogue, in his lifetime, as the executor of the last will and testament of Davis Layton, deceased; at which sale it appears said executor himself became the real purchaser of the land, acting through his agent and attorney, at the price of ten dollars per acre, amounting in the aggregate to the sum of $3129.80 in coin. It appears that at said executor's sale, Powell bid off the land at said price on July 18, 1868. The sale was confirmed August 3, 1868, and Hogue, as executor, etc., executed a deed therefor on October 12, 1868. On November 24, 1870, Powell and wife conveyed the land back to Hogue; the consideration recited being $4000, but as found by the court below the true consideration was $3129.80. The relief sought by the plaintiff was the set-

ting aside of said sale and the cancellation of said deeds, which relief was granted by the court below, and a referee was appointed to take an account of the rents and profits accrued to Hogue and his heirs since the sale, and also of the value of the permanent improvements made by them upon said land, and the amount of taxes paid by them during the interval. On the coming in of said report, the same was modified in some respects, and a final decree entered setting aside said sale, and declaring said deeds void. Interest was allowed to Layton's heirs upon the rents and profits from the end of each year, as the same accrued, up to the date of the decree. After allowing Hogue's heirs for the value of the improvements and for taxes paid, and deducting therefrom the value of rents and profits, with interest thereon as aforesaid, there was found due Layton's heirs the sum of $2300.70.

The heirs of Hogue were allowed the original purchase-price paid by their ancestor the said executor, for said land —$3129.80, without interest—the court below refusing to allow interest thereon; and one of these sums being deducted from the other, a balance of $829.10 was decreed to be paid by Layton's heirs to Hogue's heirs. A. C. Layton and Clara D. Layton, one of the defendants, are identified in interest as against Hogue's heirs and therefore are both made respondents in this appeal, which is only from so much of said decree as allows interest to them on rents and profits, and refuses interest to appellants on the purchase-money paid by their ancestor for the land at the sale, which is thus avoided.

Powell & Flynn, and Dolph, Bronaugh, Dolph & Simon, for Appellants.

J. J. Murphy, J. M. Johns, and Thayer & Williams, for Respondents.

By the Court, McARTHUR, J.:

No statement of evidence accompanied this appeal, and we have nothing before us except the pleadings and the

decree. Nor are any further papers necessary; for the only question presented for our consideration arises upon the refusal of the court below to decree the right of Hogue's heirs to recover interest upon the purchase-price of the parcel of land in question. True, the question whether the sale was void or voidable was pressed upon our attention in the argument by respondent's counsel, but we do not think it necessary to pass upon that question; for whether void or voidable, the end desired was achieved by the respondents in the court below, and the sale was set aside. It would be impossible in this case, without the testimony to guide us, to arrive at any conclusion upon the question, and it would be very embarrassing, without having the case fully before us, to pass upon so important a question of law.

Hogue, when acting as executor, was occupying an important trust capacity, one which should be discharged with the utmost fidelity, and in which all his acts, when subjected to the closest scrutiny, should disclose nothing which conflicts with honor, shocks, conscience, or violates law. By purchasing the land in the manner in which it is shown to have been purchased, the executor, Hogue, accomplished just what the law declared he should not do, and, in every step which he took leading up to the purchase, he occupied a position in which his interest and his integrity were in conflict. His heirs are in no position to ask equity, for their ancestor did not do equity in this matter. We are of opinion that the court below took as charitable a view of his acts as could be taken, and allowed his heirs all that the most indulgent chancellor could have allowed. They certainly are in no position to demand and insist upon anything further. Upon no principle of law or equity with which we are acquainted, or which we have been able to discover, would they be entitled to recover the interest they insist upon. To allow them to do so would, in effect, be allowing them to reap an advantage from the wrongful and inequitable act of their ancestor. The decree of the court below must be affirmed.

Affirmed.

ALBERT ODELL, Appellant, v. JOSIAH MORIN et al., Respondents.

SPECIFIC PERFORMANCE.— A contract for the sale of land of which the courts will be justified in decreeing a specific performance must be certain and defined, and the testimony offered in support of it must be fully sufficient and ample.

IDEM.—The rule that a specific performance will be refused where the contract is vitiated by uncertainty, is applied with more than ordinary stringency against assignees and representatives of the contracting parties.

APPEAL from Yamhill County.

This is a suit in equity to enjoin the further prosecution of three several actions of ejectment and to enforce the specific performance of a contract for the sale of land. The complaint alleges that in February, 1855, John Odell, the father of the plaintiff, purchased of Laban Morin a portion of his donation land claim and paid him the sum of six hundred dollars, that being the full purchase-price and value thereof. That the contract of purchase was not in writing, but it was agreed between the parties that the said Morin should, as soon as convenient, execute to John Odell a deed for the land. That Laban Morin failed to execute said deed prior to his death, which occurred in March, 1855. That a patent to the said land was, in 1867, issued to the defendants as the heirs at law of said Laban Morin. That John Odell, in July, 1869, conveyed his right and title in the said premises to the plaintiff. The answer denies the contract of purchase and payment.

The testimony offered by the plaintiff on this point was as follows: McTeer, a son-in-law of John Odell, testified that in March, 1854, Morin and Odell stated the contract in his presence. Odell was to pay $500, and Morin was to deed the land as soon as he got a title. Odell paid the amount by giving two yoke of oxen and some money, perhaps $150. In the following fall Morin said that $500 was not enough for the land, and he wanted another yoke of oxen. Odell gave him another yoke, valued at $200, for which sum Morin gave his note.

W. H. Odell, a son of John Odell, testified that in February or March, 1853, a contract was made between Morin and his father for the sale of the land for the sum of $600; the title to be made when Morin obtained his certificate from the land office. That he delivered two yoke of cattle in payment, valued at $300, and that his father told him the balance of the purchase-money was paid. He was not present when the contract was made, but knew that Morin gave his father a note, which witness wrote, payable at some future time. The note was to run about the length of time required to complete the title to the land, but he did not recollect the length of time. He thought this note was delivered to the widow after the death of Morin. Mrs. Sarah Odell, widow of John Odell, knew nothing except what her late husband told her—that he had bought the land for $600, which he paid before Morin died. In the fall of 1854, or the spring of 1855, her husband took the money out of the house, saying that he was going to pay for the land, and when he returned said he had paid for it. Mrs. C. R. Alderman, a daughter of John Odell, testified that just before Morin died, in the spring of 1855, a message from Morin was brought to her father requesting him to come and settle up their business concerning the land before he died. She had no knowledge of the contract except the statements of her father, and that Morin received the cattle. This is all the testimony of the plaintiff in regard to the contract of sale, if we except certain admissions of Mrs. Darr, widow of Morin, made after his death.

On the part of the defense, Mrs. Darr states the only purchase of the land was made of herself in 1856, after Morin's death, the consideration for which was $400 and the note of Morin for $200.

The court below dismissed the bill.

Boise & Willis, for Appellant.

P. C. Sullivan and E. C. Bradshaw, for Respondents.

By the Court, MOSHER, J.:

The requisites of a contract for the sale of land, of which the courts will be justified in decreeing a specific performance, are clearly stated by Washington, J., in the case of *Colson v. Thompson* (2 Wheat. 336): "The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it."

In this case the evidence of the contract is of a very unsatisfactory character. For instance, McTeer says the purchase was made in the spring of 1854 and the whole of the purchase-money paid at that time, yet he says Morin claimed more money for the land in the fall, when Odell gave him another yoke of cattle, valued at $200, for which he took his note. W. H. Odell, speaking of the first payment, says his father took Morin's note for $600. From this evidence it is uncertain whether the delivery of the cattle was a positive or conditional payment for the land. This is rendered more uncertain by the testimony that Morin, on his deathbed, sent for Odell to come and settle up the business concerning the land. The Court could not be justified in enforcing a contract the evidence of which is so indefinite and uncertain.

It is urged by the counsel for appellant that the testimony is uncertain by reason of the lapse of time. This may be true, but one who has slept upon his rights for eighteen years is not in a position to ask a court of equity to relax the rules of law in his favor. The rule that a specific performance will be refused where the contract is vitiated by uncertainty, is applied with more than ordinary stringency against assignees and representatives of the contracting parties. (*Kendall v. Almy*, 2 Sumn. 178; *Montgomery v. Norris*, 1 How., Miss. 499.)

The judgment of the Circuit Court is affirmed.

MARY C. WHITE, Respondent, v. THE NORTHWEST STAGE COMPANY, Appellant.

WAIVER.—The voluntary appearance of a defendant in a cause is a waiver of the service of summons and complaint.

DAMAGES — PROOF OF, NOT REQUIRED, WHEN.—In an action for damages arising on contract, no proof of damages is required where judgment is rendered for want of an answer.

SOUND DISCRETION CANNOT BE REVIEWED.— The granting a motion to set aside a default is in the sound discretion of the court, and unless it clearly appear that such discretion has been abused, the appellate court will not interfere.

IDEM — PRACTICE.—In such case the correct practice is for the defendant to present his answer, properly verified, when the motion to set aside is called for hearing.

APPEAL from Baker County.

This is an action for damages, brought by the plaintiff to recover the sum of four hundred and ninety-five dollars, for the failure and refusal of the defendant, as a common carrier, to convey the plaintiff from the town of Kelton, in the Territory of Utah, to Baker City, in Oregon.

Plaintiff avers that on or about the 3d day of November, 1871, she arrived at Kelton, in Utah, *en route* from the East to Baker City, Oregon, and that she had then and there in her lawful possession, and as the lawful owner thereof, for value, an order from the defendant to its agent at Kelton, directing him to give her passage on the stage-coaches of the defendant, from said town of Kelton to Baker City, Oregon. This order is set out in the complaint in words and figures as follows:

"MR. KINNEY,

"Agent N. W. Stage Co. at Kelton.

"DEAR SIR: You will please way-bill Miss M. E. White from Kelton to Baker City. Collect, as her fare is settled to this place.

"J. A. REED,
"Agent N. W. S. Co.

"Baker City, March 28, 1871."

Plaintiff further avers that defendant refused to pass her

upon said order from Kelton to Baker City, although said order was presented to the agent of the company at Kelton, and her passage demanded thereon; and that by reason of such failure she was annoyed, harassed and delayed on her journey among strangers, and compelled to incur great expense in getting to her destination, to her damage in the sum of four hundred and ninety-five dollars.

Defendant appeared September 23, 1872, by its attorney, F. P. Dugan, Esq., and demurred to the complaint, which demurrer was by said attorney subsequently withdrawn, and by order of the court said Dugan was allowed to withdraw his appearance as attorney for defendant, for the reason that the same was entered without his authority.

Subsequently, on the 26th day of November, 1872, defendant entered an appearance by its attorneys, Dugan and La Dow, and demurred to the complaint, which demurrer, after argument, was overruled by the court.

On May 21, 1873, defendant, by Lawrence and Dugan as attorneys, was permitted by leave of court to file a motion to strike out portions of the complaint. The record fails to disclose any further action of counsel or the court on this motion to strike out; but subsequently thereto, to wit, on the 23d of May, 1873, an answer was filed, signed and indorsed by Frank P. Dugan as attorney for defendant. On the day following the filing of said answer a motion was filed by plaintiff's counsel to strike out the same, for the reasons that said Dugan had never been admitted to practice as an attorney in the courts of this State; and because said answer was not properly verified, and was sham and frivolous. The motion to strike out the answer was sustained by the court on the 26th of May, 1873, and the defendant failing to apply for further time to further plead or answer, the court, on the same day, on motion of plaintiff's counsel, rendered judgment for the amount claimed by plaintiff for want of an answer.

Subsequently, on the 28th day of May, 1873, defendant appeared by J. H. Reed, Esq., of counsel, and, on motion supported by affidavit, sought to have the judgment for plaintiff set aside; and, upon the hearing thereof, the court

overruled said motion on the 4th day of September, 1873. The defendant appeals to the Court, assigning as error:

"1. The entry of a judgment in said action against defendant, for the reason that there had been no legal service of summons on said defendant, and that the court had no authority to enter judgment in this action without some proof of plaintiff's claim; that the judgment entered in this action is informal, and erroneous in form; and that the complaint does not state facts sufficient to constitute a cause of action.

"2. The overruling the motion of defendant to open said judgment, and permit the defendant to answer on the merit."

L. O. Stearns and Knight & Lord, for Respondent.

J. H. Reed, for Appellant.

By the Court, BONHAM, J.:

The principal difficulty which this case presents is the complicated condition of the pleadings and proceedings as disclosed by the transcript. Some idea of the peculiar character of the proceedings, on the part of the defendant, is disclosed by the foregoing statement of the case, which is only a partial synopsis of what was done; the object being to prevent only those proceedings which are pertinent to the questions presented by the assignment of errors. And it is a somewhat remarkable feature of the case, that during its pendency in the court below, for about the period of one year, and the frequent appearance, disappearance and reappearance of various members of the bar of Eastern Oregon and Washington Territory, on behalf of defendant, that the cause finally culminated in a judgment for want of an answer. And it is for the purpose of obtaining leave to defend the cause, upon its merits, that the same is appealed to this Court.

The transcript presents no bill of exceptions; but the first error assigned in the notice of appeal is, that there was no legal service of process of defendant to place it in default. To this objection we answer that the record shows a volun-

tary appearance entered in the cause, on the part of defendant, by attorneys, whose right to so appear is not questioned; the result of which is the waiver of any defect or irregularity in the service of process. (*Rogue River Mining Company v. Walker,* 1 Or. 341; *Harker v. Fahie,* 2 Or. 89.)

Appellant, in the next place, objects that the court had no authority to enter judgment in this action without some proof of the plaintiff's claim. This objection is also untenable, for two reasons:

In an action for damages, arising upon contract, the plaintiff is entitled to judgment for the amount claimed, without proof thereof, if the defendant fail to answer within the time prescribed by law. And in the second place, if it were necessary to prove such claim, the law would presume that it had been done in the absence of a showing to the contrary. (Civil Code § 246; *Dimick v. Campbell,* 31 Cal. 238.)

The third objection urged by the counsel for appellant is that the complaint does not state facts sufficient to constitute a cause of action, in that it is not alleged that Kinney and Reed, or either of them, was agent of the Northwest Stage Company, and because the word "collect" occurs in the order of Reed to Kinney, on which plaintiff claimed her passage from Kelton to Baker City.

While plaintiff's complaint is subject to criticism in the respects mentioned as to matters of form, yet we think it does substantially aver that Reed and Kinney were the agents of defendant, and that it is sufficient to sustain the judgment; for the plaintiff does charge that on her arrival at the town of Kelton, on or about the 3d day of November, 1871, she was the lawful owner and holder for value of the order of defendant, as hereinbefore set out in the statement of this case. And while there is an ambiguity in the terms of the order, caused by the use of the word "collect" as it is written in the transcript, yet we think it pretty clearly appears from the context that the word as written does not convey the idea intended by Mr. Reed, the maker of the order. It would hardly be a fair reason to give for collect-

ing fare of plaintiff that it had already been paid. We think it more fair and reasonable to presume that a mistake was made, either in the original or in copying the record.

The only other error assigned, which was relied upon in the argument, is the overruling of defendant's motion to set aside the default and permit an answer to be filed upon the merits. The court below (McArthur, J.), in passing upon the motion to set aside the default of defendant, assigns the following reasons for its refusal, to wit: "That the defendants have been guilty of laches, from which this court cannot relieve them without doing palpable injustice to the plaintiff. That, although the defendant Huntley was served out of Baker County, this judgment is valid for the reason that the record shows the appearance of authorized attorneys for the defendant, other than F. P. Dugan, who was disqualified by the statute. That the appearance of said attorneys was general, and was a waiver of irregularities in the service. That a motion to open up a default and to set aside a judgment should be accompanied with a copy of the verified answer which the party desires to be permitted to file, so that the court may judge whether there be a meritorious defense, for defaults should not be opened up unless the defendant have a meritorious defense."

We think the record sustains the court below in the conclusions arrived at as above expressed. The granting or refusing of a motion to set aside a default is a matter within the sound discretion of the court, and unless it clearly appear that such discretion has been abused, the appellate court will not interfere. (*Bailey v. Taaffe*, 29 Cal. 422; *Crandall v. Piette*, 1 Or. 226.)

Judgment affirmed.

THE GOLD HILL QUARTZ MINING COMPANY, Appellant, v. JACOB ISH, Respondent.

EMINENT DOMAIN.—Mines of precious metals belong to the eminent domain of the political sovereignty.

OCCUPANCY — RIGHT OF, RECOGNIZED.—By the act of Congress of July 26, 1866, the General Government extended to all in possession of mining claims, and all subsequently locating and denouncing mines containing the precious metals, a guarantee of protection in their occupancy so long as the mines are operated.

PRE-EMPTION.—The provisions relative to pre-emption of mining lands in said act, and the amendments thereto, are not obligatory.

PATENT TO MINERAL LANDS.— A patent for agricultural lands does not pass title to known deposits of precious metals.

EFFECT OF FAILURE TO SEGREGATE MINERAL LANDS.— Failure of government surveyors to segregate mineral from agricultural lands cannot operate to defeat the right of occupant miners.

APPEAL from Jackson County.

This suit was instituted to quiet the title to and enjoin the respondent from asserting any rights in and to a certain gold-bearing quartz lode situate in Jackson County.

The complaint alleges that Henry Klippel, John McLaughlin, Charles S. Drew, N. C. Dean, Thomas Chavner and John E. Ross, on December 5, 1865, located six claims upon the said lode in accordance with the provisions of the State laws and the local laws and customs of miners. On December 11, 1865, the said parties filed articles of incorporation under the general laws of the State. The name of the incorporation was declared to be "The Gold Hill Quartz Mining Company;" the capital stock was fixed at $60,000, and the object was the working of the said lode. The company was duly organized, the stock-books opened, and the stock subscribed. Contemporaneous with the filing of the said articles of incorporation the parties aforesaid duly transferred their claims to the said company. Ever since said transfer, and up to July 8, 1871, the said company were in possession of said claims, working said lode by driving tunnels, etc., for the purpose of procuring the quartz rock and extracting the gold therefrom, and had, up to said date, expended thereon $1090. The possession

of the said company was open and notorious, and the respondent had actual notice thereof, and of the character and extent of the appellant's claims.

On June 15, 1870, respondent applied to the officers of the proper United States Land Office to purchase the west half of the northeast quarter and east half of the northwest quarter of section fourteen, township thirty-six south, of range three west, of the Willamette meridian, upon which the lode in controversy is situated, and having been allowed to purchase said lands as agricultural lands, a patent therefor was issued to respondent on August 11, 1870. The said patent was recorded July 8, 1871, and until said date the appellant had no notice of the application for and purchase of said lands by the respondent, or that respondent had any claim to or interest in the same.

The respondent demurred to the complaint. After argument the court below sustained the demurrer and dismissed the complaint with costs.

From the order dismissing the same this appeal is taken.

J. D. Fay and W. W. Thayer, for Appellant.

B. F. Dowell and H. Kelly, for Respondent.

By the Court, MCARTHUR, J.:

The claims upon the gold-bearing quartz lode in controversy, were located and taken up in the year 1865 in accordance with the provisions of the act of the Legislative Assembly of the State of Oregon, approved October 24, 1864, and the acts amendatory thereof. They were "opened up" and operated under the State laws for a number of months prior to the passage of the act of Congress of July 26, 1866, commonly called the "Mining Act." This act was the first direct and positive recognition on the part of the General Government of the right of the citizen to explore the public domain for the precious metals, and to denounce and operate mines when found. Anterior to the passage thereof, the General Government, in carrying out a policy redounding to the public good, tacitly consented to the search for and development of the mines, and the

courts, applying what has been often denominated "the common law of the mines," uniformly protected the rights of those engaged in mining for the precious metals. They recognized the binding force of the local laws, customs and usages of the miners, in all cases when those local laws, customs and usages did not conflict with written constitutions or legislative enactments. Taking into consideration the condition of the country and the importance of encouraging mining operations, and the non-action of the General Government, they held that those engaged in mining for the precious metals enjoyed a species of franchise in the mines, and that they held the same free from all molestation or interference of all parties save the General Government.

That the General Government has the exclusive right to control the mines has never been seriously questioned; the principle being conceded that mines of precious metals belong to the eminent domain of the political sovereignty, as well under the laws of Spain as by the common law of England and public law of the United States.

All the reported cases in California and Nevada lead to the conclusion that the non-action of the General Government raised such a presumption of license to those engaged in mining for the precious metals as to give them a standing in the courts to assert their rights and redress their wrongs against all persons except the General Government. The right of mining for the precious metals is a franchise, and the attending circumstances raise the presumption of a general grant from the sovereign of the privilege. (*Conger v. Weaver*, 6 Cal. 548; *Merced Mining Company v. Fremont*, 7 Id. 327; *Hill v. King*, 8 Id. 338; *McKeon v. Brisbee*, 9 Id. 142; *Partridge v. McKinney*, 10 Id. 183; *State v. Moore*, 12 Id. 70; *Curtis v. Sutter*, 15 Id. 263; *Hughes v. Devlin*, 23 Id. 506; *Horn v. Jones*, 28 Id. 202; *Pralus v. Jefferson G. and S. Mining Co.*, 34 Id. 559; *Correa v. Frietas*, 42 Id. 340.)

Accepting this as a postulate, it follows that the General Government itself could not equitably interfere with or abridge the rights of the miner. We are of opinion that "there are equitable circumstances connected with these

mining claims that are clearly binding upon the conscience of the governmental proprietor that must never be disregarded. Rights have become vested, in virtue of the license, that cannot be divested without a violation of all the principles of justice and reason." In *Sparrow v. Strong* (3 Wallace, 104), Chief Justice Chase used the following forcible language: "We know that the Territorial Legislature (of Nevada) has recognized by statute the validity and the binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but under its implied sanction, vast mining interests have sprung up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country." The decision quoted from was rendered in December, 1865, and is a clear recognition by our highest judicial tribunal of the underlying principle upon which rests the rules governing this species of property, which have had practical operation for nearly a quarter of a century. It follows, then, that the locators and operators of the claims upon the quartz lode in controversy, were invested with a franchise which the courts would protect and uphold. Thus they stood before the passage of the act of Congress of July 26, 1866. By this act the mineral lands of the public domain, both surveyed and unsurveyed, are declared to be free and open to exploration and occupation to all citizens of the United States, and those who have declared their intentions to become citizens, subject to such regulations as may be prescribed by law. Any person or association claiming a vein or lode of quartz rock in place, bearing gold, silver, cinnabar or copper, who have expended in improvements thereon not less than one thousand dollars, and have occupied and improved the same according to the local customs or rules of miners in the district, and in regard to which there is no controversy or opposing claim, may acquire title to the same by filing a diagram, in the local land office, of said claim, giving notice and performing such other acts as are prescribed by law. As has before been stated, this act

was the first direct and positive recognition on the part of the General Government of the right of the citizen, and the alien who had declared his intention to become such, to explore the public domain for the precious metals, and to denounce and operate mines when found.

Whatever difference of opinion may exist as to the tenure by which mining claims were held prior to the passage of this act of Congress, it is clear that, by the act, the General Government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guarantee of protection in their occupancy so long as the mines are operated and worked. The lode in controversy was, when "claimed," situate upon surveyed lands belonging to the General Government. Pursuant to instructions, the lands were sold as agricultural lands, and patented to Ish on August 11, 1870. The application to purchase was made subsequent to the passage of the act of 1866, and at a time when the possession of the appellant was open and notorious. Thus the adverse interest of Ish, if any interest he has, did not accrue until after the passage of the said act, and was therefore in violation of the guarantee of occupancy created by the first section thereof. But Ish obtained no interest in the mining claims on the lode by the patent. True, by the patent he obtained a given quantity of agricultural lands, and the lode is situate upon said lands, but the known deposits of precious metals did not pass by the patent, for they are expressly reserved from sale under the pre-emption and other land acts. The only law under which patent to mining claims, either lode or placer, can be obtained, is the act of 1866, and the amendments thereto. The fact that the claims of the appellant were not segregated and listed as mineral lands, cannot avail the respondent. Segregation, when required, must be made by the surveyor; and to hold that the failure of the surveyor to fully discharge his duty could operate to defeat the rights of the appellant, would be violative of the plainest principles of justice. Moreover, the returns of the surveyor are not conclusive as to the character of the lands, for the Commissioner of the

General Land Office, in carrying out the policy of the General Government in the disposal of the public lands, allows affidavits as to the character of the lands to be made in impeachment of the returns of the surveyors. The open and notorious possession of the appellant was sufficient to charge the respondent with notice of the character of the lode, and also to bring the lode within the description of "known mineral deposits." Nor are the rights of the appellant forfeited, nor in the least abridged, by failure to procure a patent for the claims upon the quartz lode. "It is understood," says the Commissioner of the General Land Office, in the instructions to the local land offices, "that there is nothing obligatory on claimants to proceed under the statute (act of 1866), and where they fail to do so, there being no adverse interest, they hold the same relation to the premises they may be working which they did before the passage of the act, with the additional guarantee that they possess the right of occupancy under the statute. (Zabriskie's Land Laws, 207.)

Before leaving this case it becomes necessary to allude to the prayer of the complaint, and to express our views in relation to the proper relief to be afforded. The prayer asks for a decree of the Circuit Court declaring the defendant a trustee for the plaintiff; that the defendant be required to execute a good and sufficient deed to the plaintiff of the land included within the boundaries of the claims, and also for a perpetual injunction inhibiting the defendant from setting up any title to said claims.

Inasmuch as Ish never obtained title to the lode, he cannot be decreed to be trustee for the plaintiff, nor can he execute a deed conveying to the plaintiff the legal title. The proper relief to be granted is an injunction order perpetually enjoining and inhibiting Ish, and all persons claiming, or to claim by or through or under him, from asserting any title to the lode, and also from in any manner interfering with the plaintiff in entering upon and working the claims thereon.

Decree reversed.

RUTH M. BONSER, Respondent, v. A. F. MILLER, Appellant.

CONVEYANCE — WHEN NOT VOLUNTARY.— A conveyance, the consideration of which is marriage, is not a voluntary conveyance.

MARRIAGE— CONVEYANCE OF, NOT PRESUMED FRAUDULENT.— Marriage being a valuable consideration, such conveyance will not be presumed to be fraudulent, either as to existing or subsequent purchasers.

FRAUD.— It may, however, be set aside and held to be void for actual fraud. Both parties must concur in the fraud before the deed can be set aside.

APPEAL from Multnomah County.

This was a suit in equity, in the Circuit Court of Multnomah County, against the defendants, to quiet the title to six hundred and forty acres of land described in the complaint. The respondent claims title in fee-simple, under a conveyance from John Bonser, executed on January 20, 1866, in consideration of an agreement of marriage with the said Bonser, and claims to have been in actual, open and notorious possession of said lands, by her tenants, since May, 1866, and that appellant claims some interest in said lands adversely to respondent and threatens to eject respondent. The appellant's title is derived through an execution sale on a judgment obtained against said John Bonser, on September 14, 1866, subsequent to the conveyance to respondent, which judgment was obtained upon a debt subsisting against John Bonser prior to January, 1866, the date of John Bonser's conveyance to Ruth M. At the time the conveyance to Ruth M. was executed, John Bonser was in failing circumstances and unable to pay his debts, the appellant being one of his creditors. John Bonser and Ruth M. intermarried on the 21st of January, 1866, the day after the conveyance to Ruth M. The cause was referred to a referee to report findings of fact and law. The referee found the facts here stated, and further, that Ruth M., prior to accepting the deed from John Bonser, used reasonable care and diligence to ascertain the true financial condition of John Bonser; that she had no notice of the insolvency of John Bonser, or of his being in debt at the time of said transfer; that the transfer of said premises to her by John

Bonser was *bona fide;* that the claim upon which appellant's judgment was obtained was not a lien on the disputed lands at the time of their being transferred by John Bonser to Ruth M. Dow; that the prayer of the complaint should be granted.

The court below rendered a decree confirming the report, from which defendant Miller has appealed to this Court.

Marquam & Beale and A. H. Townsend, for Appellant.

Shattuck & Killin, for Respondent.

By the Court, PRIM, J.:

The main question to be determined in this case is whether the conveyance of the lands in controversy from John Bonser to plaintiff was fraudulent as to defendant. At the time it was made she appears to have occupied the relation of an intended wife to the said Bonser. The consideration of the conveyance having been an agreement of marriage, it was not a voluntary conveyance, but a conveyance upon a valuable consideration, and the plaintiff must be treated as a purchaser for value. A voluntary conveyance made by a grantor at a time when largely indebted will be conclusively presumed to be fraudulent as to such debts; while a conveyance made for a valuable consideration will not be presumed fraudulent as to existing or subsequent creditors, but may be set aside and held void for actual fraud. (1 Story's Eq. J., § 359.)

Under the pleadings in this case, in order to have the conveyance in question set aside and held fraudulent and void as to plaintiff, it was incumbent upon the defendant to show that at the time of its execution her grantor was not only indebted to him and others, and that said conveyance was made to delay and defraud creditors, but that plaintiff had knowledge of these facts, and participated in the fraud. (*Magniac v. Thompson,* 7 Peters, 389.)

The case just cited involved an ante-nuptial settlement similar to the one under consideration. Mr. Justice Story, in delivering the opinion of the court, said: "Nothing can

be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it.

"Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design after such notice into execution." As to whether plaintiff had any notice of the insolvent condition of Bonser at the time the conveyance was accepted by her is a question of fact which must be determined upon evidence in the case. On this point it appears that the referee to whom this cause was referred, found that although plaintiff had used reasonable care and diligence to ascertain John Bonser's true financial condition, she had no notice of his insolvent condition; and that, so far as the plaintiff was concerned, the conveyance was a *bona fide* transaction.

On a full review of the evidence we are satisfied the finding of the referee is supported by the evidence. It appears from the evidence that at the time the deed was executed plaintiff was in Washington Territory; and that prior to accepting the deed she employed Judge McFadden to investigate the financial condition of Bonser, who was unable to find that he was at all indebted. And while he found him in the possession of a large amount of personal and real property, he could not find that there was any mortgage, judgment or other lien upon any of it. And it appears that

he did not in fact owe but about six hundred dollars on his own account.

The decree should be affirmed.

JOHN WHITEAKER, Appellant, v. G. VANSCHOIACK and Wife, and JOHN CURRIN, Respondents.

SPECIFIC PERFORMANCE.—Before the court will exercise its extraordinary jurisdiction of enforcing a specific performance, it must appear that the agreement sought to be enforced is fair and just, mutual in its character, and certain in its terms.

IDEM—WHERE THE TERMS OF THE CONTRACT HAVE BEEN VARIED BY PAROL.—Courts of equity will not, ordinarily, compel the specific performance of a contract with variations, additions, or new terms to be made and introduced into it by parol evidence.

DOWER.—In this State there is no dower in an equity.

APPEAL from Lane County.

This is a suit in equity to enforce the specific performance of an agreement in writing for the exchange of lands.

On the 4th day of May, 1872, appellant and respondent Vanschoiack entered into a written agreement for the exchange of certain lands. The agreement contained a proviso by which it was provided that the exchange should take place thirty days from the date of the agreement. The land that appellant thus agreed to convey had been purchased by him at a sheriff's sale, on the 10th of February, 1872, which sale had been confirmed April 23, 1872. Appellant had no other title to the tract than that derived through this sale. The time within which redemption of the tract so sold might be made, not having expired, the appellant had only a prospective title thereto at the time the agreement was executed. On May 27, 1872, before the time for the performance of said contract had expired, appellant and Vanschoiack, "in consideration of the agreement aforesaid, and the exchange of lands aforesaid," agreed by parol to extend the time for the performance of said contract of exchange until the period for redemption aforesaid should have expired, and the sheriff

made a good and sufficient deed to the appellant for the said land, which appellant was to convey, and which was designated as the McMurray claim; that in consideration of said agreement of extension and exchange of lands, the parties thereto agreed with each other to deposit each the deed of himself and wife of the land he had agreed to convey, with respondent John Currin, to be held by him until said sheriff's deed of the McMurray claim should be delivered to the plaintiff and recorded, at which time Currin was to deliver the deed of plaintiff and wife to Vanschoiack, and that of Vanschoiack and wife to the plaintiff; provided, however, that if said McMurray claim should be redeemed from said execution sale and not conveyed to plaintiff by the sheriff, then said deeds deposited with Currin were to be withdrawn and held for naught; that said deeds were accordingly executed by the parties and their wives, respectively and left with Currin pursuant to said mentioned agreement, who agreed and promised that as soon as said sheriff's deed to plaintiff should be executed and recorded he would deliver to plaintiff the deed of Vanschoiack, and to the latter the deed executed by plaintiff. No redemption having been made of the McMurray claim, and the time of redemption having expired, the sheriff executed and delivered to the plaintiff a deed therefor, dated July 9, 1872, which was on the same day duly recorded, and on the 27th, of said month the certificate of record was presented to Currin by plaintiff, who instructed him to deliver his deed to Vanschoiack, and demanded that he deliver to plaintiff the deed of Vanschoiack. Currin, by order of Vanschoiack, refused to deliver said deed to plaintiff, and Vanschoiack and wife refused to make a title to the lands therein mentioned to the plaintiff; that Currin still holds the deed of plaintiffs and wife to Vanschoiack, with instructions to deliver it to the latter; that by reason of the premises plaintiff is damaged in the sum of one hundred dollars. The defendants interposed a demurrer to the complaint, which was sustained by the court below.

Thompson & Fitch and R. S. Strahan, for Appellant.

In law, a contract for the sale of land is simply treated as an executory agreement, while in equity it is considered as executed, and the vendee is treated as the equitable owner of the land, and the vendor as the trustees of the legal title for the benefit of the vendee. (Leading Cases in Eq., vol. 2, part 2, p. 26; 1 Story's Eq., § 790.)

It is the duty of the court to make an agreement effective if possible, *ut res magis valeat, quam pereat.* As to the subject-matter of a contract, extrinsic evidence may and must be received and used to make it certain if necessary for that purpose; as when a party conveys all his real estate by deed, describing it as all my real estate, without any other description, the instrument is good and operative, and evidence will be admitted to locate the premises. (2 Pars. on Con. 549; 17 Barbour's S. C. R. 269; 21 Wend. 652; 2 Vesey, Jr. 589; 13 Peters, 89.)

A promise to do what the promisor has not the present power to do, it not being impossible, illegal nor immoral, is a good consideration for the promise of another. (1 Pars. on Con. 460.)

Trust and confidence are a sufficient consideration to uphold an undertaking on the part of the trustee. (Id. 447.)

Time is not generally deemed, in equity, to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and consequences of the contract. (1 Story's Eq., § 776.)

Where delay may be accounted for upon the ground of the state of the title, it will not prevent a specific performance being decreed, where time is not treated by the parties as of the essence of the contract. (2 Leading Cas. in Eq., part 2, p. 14.)

Where there is nothing special in the nature of the property, or of the purposes for which it is intended to be purchased, although a particular day may be fixed for the completion of the contract, equity considers the general object to be the sale of the premises, and the particular day named as merely formal. Courts of equity look to the

substance of the contract, and do not allow small matters of variance to defeat them. (2 Leading Cas. in Eq., part 2, p. 18; Sug. on Vendors, chap. 5, p. 313; 1 Story's Eq. § 777.)

Time fixed for the performance may be waived by the acts of the parties. (Sug. on Vendors, § 3, 306; Id. 307, 308; Id. § 2, 298, 299.)

When a party treats a contract as subsisting after the purchaser's default, *held* to be a subject for specific performance. (14 Barb. S. C. 638.)

The state of the title when the contract was entered into is not material. It is sufficient if a good title can be made at the time of the decree. (2 Leading Cas. in Eq., part 2, pp. 15, 16, 30; Sug. on Vend. 302, § 3; 1 Story's Eq., § 775; 7 Vesey, 202; 2 Comstock, 60.)

A delivery may be either absolute, that is, to the grantee himself, or to a third person to hold until some conditions be performed on the part of the grantee; in which last case it is not delivered as a deed, but as an escrow; that is, a scrowl or writing which is not to take effect as a deed until the conditions be performed, and then it is a deed to all intents and purposes. (1 Blackstone, 306; Chitty on Con. 3; 3 Hilliard, 437; § 89; Id. 440, §§ 95, 96; 3 Washb. on Real Prop. 268, 272; 14 Ohio, 307.)

As a general rule the delivery of a deed is complete when the grantor has put it beyond his power to revoke or reclaim it. (6 Abb. Dig. 186, § 4.) Equity will decree the specific delivery of a deed to the party entitled thereto. (1 Leading Cas. in Eq. 592; 1 Story's Eq. § 703; Willard's Eq. 307.)

E. C. Bronaugh and W. W. Thayer, for Respondents.

Time was the essence of the original agreement. (3 Parsons on Con. 383; 2 Story's Eq., §§ 787, 793.)

There must have been consideration for the alleged contract for extension of time. (1 Pars. on Con. 427, 468; 21 Conn. 476.)

The execution and deposit of the deed by appellant was not a consideration, for the reason that appellant had no

title or assurance of title to the land described in his deed at the time he so executed and deposited it. There is a want of mutuality in the said alleged second agreement.

A. is not bound by a promise, without consideration, that at a future day he will sell property to B., unless the latter be likewise bound on his part to purchase of A. when that time arrives. (Pars. on Con. 448, 449; 13 Ill. 140; 12 Barb. 502; 12 How. 126; 1 John. Ch. R. 281, 370; 6 Paige, Ch. R. 288; 2 Story's Eq. Jur., § 776.)

And the question of mutuality depends on the terms of the contract itself, not upon circumstances arising after it is made. (*Cooper v. Penn,* 21 Cal. 403.)

The alleged agreement for extension of time was oral, and within the Statute of Frauds, and void. (15 John. 200; 9 Wend. 68; 5 Barn. and Alolph. 36; 6 Meeson & Welsby, 116; 2 Story's Eq. Jur., §§ 757, 762, 768, 770*a*, 776; 1 John. Ch. 274; 2 Edw. Ch. 445.)

Nor can such oral agreement be so connected with the written deeds as to relieve it of this objection, since a contract cannot exist partly in parol and partly in writing. (3 Pars. on Con. 13, 14; 1 John. Ch. R. 273.)

Neither was the delivery of the deeds to Currin a part performance of such parol contract, such as to take it out of the statute. (2 Story's Eq. Jur., § 762; 2 Lead. Cases in Eq. 527.)

Not only must a contract for the sale of lands be in writing, under the statute, but the lands must be certainly described in the writing, so as to be capable of identification without reference to extrinsic proof. (*Talman et al. v. Franklin,* 3 Duer, 395, 405; *Pipkin v. James,* 1 Hump. (Tenn.) 325; Brown on Stat. Frauds, § 385.)

A contract which is required to be in writing under the Statute of Frauds, must be averred to be in writing by the pleader. (1 Van Sandtv. Pl. 266, 267; 16 Barb. 365; 17 Barb. 141; 2 Duer, 609, 626.)

By the Court, MOSHER, J.:

Before the court will exercise its extraordinary jurisdiction of enforcing a specific performance it must appear that

the agreement sought to be enforced is fair and just, mutual in its character and certain in its terms. The written agreement of May 4, 1872, contained neither the State, county, township, range nor section in which the lands were situated, and could not be enforced by reason of its uncertainty. Not only must a contract for the sale of lands be in writing, under the statute, but the lands must be certainly described in the writing, so as to be capable of identification without reference to extrinsic proof.

It is urged by the counsel for appellant that this defect is cured by the parol agreement of May 27, 1872, whereby the time for the execution of the contract was extended, and under which the deeds were delivered to Currin. This agreement introduced new terms into the contract. The first provided for the absolute exchange of lands within a time certain; the second, after adding to and perfecting the description of the lands, makes the performance of the contract depend upon the contingency that the plaintiff secured the title to himself. Courts of equity will not, ordinarily, compel the specific performance of a contract with variations or additions, or new terms to be made and introduced into it by parol evidence, for in such a case the attempt is to enforce a contract, partly in writing and partly by parol, and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises under the Statute of Frauds.

Another objection to the binding obligation of the parol agreement is in the want of mutuality. At the time of the execution of the deed by Whiteaker and wife, Whiteaker had no legal title to the land conveyed. In this State there is no dower in an equity. (*Farmer v. Loomis*, 2 Or. 29.)

The wife of the plaintiff only acquired a right of dower upon the execution of the deed to her husband by the sheriff, and this she cannot be compelled to confer. Whiteaker, therefore, could not be compelled to make "a good and sufficient deed," and a want of mutuality forbids such a decree against the defendant. The contract set up in the complaint is neither certain in its terms nor mutual in its

character, and the court below properly sustained the demurrer.

Decree of the court below affirmed.

STATE OF OREGON, Appellant, v. CHARLES BROWN Respondent.

APPEALABLE ORDER.—An order to be appealable is one which not only affects a substantial right, but one which in effect determines the action.

NOTICE OF APPEAL.—When the State appeals in a criminal action, notice of appeal must be served upon the respondent in person, if he is a resident of the county, and also upon the clerk. If respondent is not a resident of the county, notice must be served upon his attorney and also upon the clerk, and the return should show that the respondent is not a resident of the county.

APPEAL from Lane County.

This cause came on to be heard in this Court upon a motion to dismiss the appeal made by the respondent's counsel, for the reason that the transcript exhibits no judgment made and entered in the court below, and for the further reason that the notice of appeal has not been served as by law required. The return upon the notice of appeal is as follows: "I hereby certify that I served the within notice of appeal upon J. A. Stratton, the attorney for the within named defendant, and upon Joel Ware, clerk of said Circuit Court, on the 7th day of February, 1873, in Lane County, and State of Oregon, by delivering to each of them a copy of the within notice, certified by me to be true copies thereof." Dated and signed in the usual manner.

Boise & Willis, for the motion.

F. A. Chenoweth, contra.

By the Court, MCARTHUR, J.:

The record shows that Brown, the respondent, was indicted in the Circuit Court of the State of Oregon for the County of Lane, on December 10, 1872, for the crime of larceny in a

shop. He was duly arraigned, and after arraignment his counsel filed a general demurrer to the indictment, which, after argument of counsel and due consideration by the court, was sustained, and the following entry in relation thereto was made in the journal of said court: "At this time the demurrer filed in this cause by defendant's attorney, J. A. Stratton, Esq., and argued on the 11th inst., was by the court at this time sustained, to which ruling of the court the district attorney, F. A. Chenoweth, then and there excepted." This entry is of date December —, 1872. Further than this there appears to have been no action taken by the court below, and the appeal is from this naked order sustaining the demurrer. There was no judgment dismissing the indictment and discharging the defendant, and as there was no trial had and no verdict against the defendant, there was no judgment of conviction under the indictment. Upon this state of facts the question arises, Is the order above set forth an appealable order? The question must be answered in the negative. An order to be appealable must be one not only affecting a substantial right, but one which, in effect determines the action. It cannot, with any show of reason, be claimed that an order merely sustaining a demurrer necessarily determines the action, for upon such order some further action must be taken by the court before it can possibly be held to be final. There must be a judgment in the technical sense of the word on the demurrer; and this view is strengthened and fortified by subdivision 1 of § 227 of the Criminal Code.

In relation to the service of the notice of appeal, the Criminal Code, § 232, requires that if the appeal be taken by the State, as in this case, the notice must be served upon the defendant if he be a resident of or imprisoned in the county. The return of the sheriff shows that the notice in this case was served on J. A. Stratton, the attorney for the respondent, and upon Joel Ware, the clerk of the Circuit Court aforesaid. It does not show that the respondent was served with the notice, neither does it show that he was not a resident of the said county, or that he could not be found therein. In order to give this Court jurisdiction the return

on the notice of appeal should show that the same was served upon the clerk and the respondent, or that it was served upon the clerk; that the respondent could not after due and diligent search be found in the county and that it was served upon the respondent's counsel. It follows that the motion should be allowed and this appeal be dismissed. It is so ordered.

Appeal dismissed.

BURRELL B. TAYLOR, Respondent, v. T. PATTERSON & CO., Appellants.

BILL OF EXCEPTIONS—WHEN APPEAL MAY BE SUSTAINED WITHOUT.—It is not a sufficient ground to dismiss an appeal, that no bill of exceptions was filed in the case, if any of the errors assigned otherwise appear upon the record.

PLEADING—COMPLAINT NEED NOT ALLEGE A CONTRACT IN WRITING FOR GOLD COIN.—Although our statute requires (or at least contemplates) that a contract for the payment of gold coin, to be valid, must be in writing, yet the rules of pleading in such cases do not require the complaint to allege that such agreement was in writing.

IDEM.—The statute above refered to, and commonly known as the "Specific Contract Act," does not operate to change the rules of pleading in actions to recover gold coin, but only requires a different character of evidence. *Query.* Whether the weight of authority does not maintain that a recovery may be had for gold coin, on a verbal agreement, independent of statutory aid?

APPEAL from Multnomah County.

This action was brought to recover the sum of $5788.50 in gold coin, claimed to be due as follows: "That heretofore, to wit, on or about the 29th day of June, 1871, the defendants, as copartners, under the firm name of T. Patterson & Co., entered into a contract with the plaintiff. and in writing requested him to engage in service for them, the defendants, in the capacity of editing and writing for the certain newspaper then and still published in Portland, Oregon, known and called the "Daily Oregon Herald," and the "Weekly Oregon Herald," and the defendants then and there promised and agreed to and with the plaintiff that they, the defendants, would pay plaintiff for such labor and

service all his expenses in removing from the town of Mexico, Missouri, to Portland, Oregon, and also the sum of $50 in gold coin per week, for each and every week that plaintiff should be so engaged in and upon said newspaper in the capacity aforesaid. The defendants also promised and agreed that the employment and service of the plaintiff aforesaid should be permanent."

Plaintiff then alleges that there is a balance due him of $15.50 in gold coin, for expenses in removing from Mexico, Missouri, to Portland, Oregon, and a balance of $829 in gold coin for his services as editor of the "Herald" newspaper at $50 per week.

Respondent also claims $1000 in gold coin as his commission for services rendered by him for appellants at their request, in negotiating the sale of the "Oregon Herald" newspaper concern to the "Oregon Herald Printing Company," in January and February 1872.

Each of these allegations was denied. Upon the trial, the jury returned a verdict in favor of respondent for $650 in gold coin. Appellants moved for a new trial, which motion, after argument, was overruled, whereupon this appeal was taken. The notice of appeal specifies error in the refusal of the court to give instructions asked for by appellants, as well as other errors of law occurring at the trial.

No bill of exceptions, setting forth the errors complained of, is contained in the transcript. Respondent moved to dismiss the appeal upon this ground; but, after argument, the motion was overruled, for the reason that the fourth ground of error assigned appeared upon the record, to wit: "For error in rendering judgment in gold coin." Thereupon, by leave of court, the argument of this cause was heard upon the fourth ground of error, as above set forth, without printed briefs.

E. D. Shattuck, for Respondent.

Thayer & Williams, and William Strong, for Appellants.

By the Court, BONHAM, J.:

In this case it was argued, by counsel for appellants, that inasmuch as the complaint does not charge that there was a contract in writing between plaintiff and defendants for the payment of gold coin, the court erred in rendering judgment for gold coin, *non obstante verdicto*. Respondent's counsel argued that, by a fair construction of his pleading, in setting forth the count for services as editor of the "Herald" at $50 per week, it is averred that the contract for such service and compensation was in writing; but, that if the court should hold that such contract is not alleged to have been in writing, it would be immaterial, as such omission would not be fatal to plaintiff's right to recover gold coin. That, to recover upon a contract which the statute requires to be in writing, it is not necessary, by the rules of pleading, to so aver, but that it is only necessary to prove that the contract was in writing; and, that the presumption is, that such proof was adduced upon the trial.

Plaintiff, in his complaint as hereinbefore set out, only charges that defendants "entered into a contract with the plaintiff, and in writing requested him to engage in service for them * * * as editor of the 'Herald' newspaper;" but does not directly aver that defendants undertook and promised in writing to pay $50 per week for such service in gold coin. By the rule which requires that a pleading shall be most strictly construed against the pleader, we do not think that any of the demands of plaintiff are sufficiently charged to have been based upon a contract in writing for the payment of gold coin.

The next question, then, is, whether it is necessary to the right to recover gold coin to aver that the contract for its payment was in writing. Some of the authorities hold that where the statute requires a contract to be in writing the pleading is defective which does not so aver. (*Estep et al. v. Burke et al.*, 19 Ind. 87; *Le Roy v. Shaw*, 2 Duer, 626; *Thurman v. Stevens*, Id. 609.)

And while there are some good reasons for the rule as laid down in the authorities above cited, and especially

as a matter of practice to avoid consuming time in a controversy as to the sufficiency of the pleading, yet we are constrained to hold, from the preponderance of authorities, that the rules of pleading do not require such averment. (*Livingston v. Smith,* 14 How. Pr. R. 490; *Stern v. Drinker,* 2 E. D. Smith, 401; *Dewey v. Hoag,* 15 Barb. 365; *Washburn v. Franklin,* 28 Id. 27; *Elting v. Vanderlyn,* 4 John. 237; *State of Indiana v. Woram,* 6 Hill, 33; *Cozine v. Graham,* 2 Paige, 177; *Chaplin v. Parrish,* 11 Id. 405; *Lamb et al. v. Starr,* 1 Deady, 350; *Hedges v. Strong,* 3 Or. 18.)

In the first case above cited (*Livingston v. Smith,* 14 How. 490), the plaintiff sued for the specific performance of a contract for the sale of land, and omitted in her complaint to set out that the contract of sale was in writing; to which defendant demurred for that reason. Mr. Justice Harris, in overruling the demurrer, said: "The pleader may be supposed to know that when he alleges an agreement of this description he alleges what has no legal existence if it be not in writing. In the sense in which I am now considering the question the fact itself does not exist if there be no written proof of it. When, therefore, as in this case, the pleader alleges the existence of an agreement which would be void if not in writing, it should be treated in pleading like any other fact, and assumed to be true unless controverted by the adverse party. If after this issue shall be disposed of (the demurrer), the defendant shall see fit to put in issue the existence of the agreement stated in the complaint, the plaintiff will of course fail upon the trial of that issue, unless she can prove her allegation by producing written evidence of the agreement. She will fail, not for the want of sufficient allegations to sustain her action, but for want of sufficient evidence to sustain such allegations."

In the case in hand, although the plaintiff demands judgment for the entire sum claimed ($5788.50), in gold coin, yet he fails to allege that the agreement was to pay coin for any of the services rendered, except that of editing the "Herald" newspaper at $50 per week, and for such service he claims that there was due him a balance of $829 in gold coin. The presumption then would be, in the absence of

any showing to the contrary, that the jury, in their verdict for $650 in gold coin, based their finding on the claim of plaintiff for a balance of $829 due him as editor of such "Herald" newspaper. In the absence, then, of any showing that the jury erred in finding for gold coin, as expressed in their verdict, or that the court erred in its judgment for gold coin, based thereon, we find from the transcript of the record on file no error in the proceedings of the court below.*

Judgment affirmed.

E. D. SHATTUCK, Assignee of J. B. HARKER, Respondent, v. J. S. SMITH and W. K. SMITH, Appellants.

TENDER OF PERFORMANCE.—If a party purchase property and agree to pay therefor in other property at a stipulated valuation, on a day certain, he must tender performance by offering to convey on that day, otherwise the party to whom the debt is owing may elect to consider the debt a money obligation to the extent of such valuation, and may sue for its recovery in money.

CONTRACT BASED UPON A SEPARATE AGREEMENT INVOLVING DIFFERENT PARTIES—NOT VALID, WHEN.—A contract cannot be predicated upon a separate agreement between different parties, unless there has been a novation by which the new parties in the separate agreement agree to accept the performance in the first contract as a consideration for the second.

INSTRUCTIONS UPON MERE ABSTRACT PROPOSITIONS OF LAW MAY BE REFUSED.—It is not error for a court to refuse to instruct abstract propositions of law, however correct, or to instruct as to a hypothetical case upon which the jury is not called upon to pass.

APPEAL from Multnomah County.

About the 18th of October, 1869, J. B. Harker entered into a written contract with the appellants and one J. H. Hayden, who were then the owners of a steam saw-mill in

* Another view of the question involved in this case is suggested by recent decisions holding that, in the absence of any statutory authority, as embraced in our Specific Contract Act (Mis. Laws, ch. 54, § 1), a judgment for gold coin is authorized upon proof of a verbal contract for its payment. But without expressing an opinion on this view of the question, the attention of those of the profession who may be interested in their perusal, is invited to the following reported cases: *Chrysler v. Renois* (43 N. Y. 209.); *Kellogg v. Sweeney* (46 N. Y. 291); Aug. No. American Law Reg. 448.

the city of Portland, and the block of ground on which the same is situate, and doing business as copartners, by the firm name of Hayden, Smith & Co., by the terms of which contract it was provided that on the 1st day of April, 1870, Harker should pay to said firm the sum of $14,000 in coin, in consideration whereof he should become a member of said copartnership, and the owner of an undivided one-fourth interest in said mill and block of ground, with all the appurtenances. It was also further provided that on said 1st day of April, 1870, an account should be taken of the stock on hand at said mill, consisting of sawed lumber, etc., and that as soon thereafter as the value thereof was ascertained, Harker should pay to said firm one-fourth thereof in coin, and own an undivided one-fourth interest in the same, and that thereafter such new copartnership, to consist of Harker, Hayden and the two Smiths, should carry on its business under the firm name of Harker, Smith & Co. On the same day another contract was entered into between Harker and the two Smiths, by the terms of which it was agreed that Harker should, on or before the 1st day of April, 1870, convey to the appellants an undivided interest in a certain five-acre tract of land within the corporate limits of said city of Portland at the agreed valuation and price of $9333.33 1-3 in coin. This contract between Harker and the appellants appears to be lost, and there was a wide difference between the parties as to the nature and construction of it.

Harker testifies that it "was a *trade* of a two-thirds interest in five acres of ground for a one-fourth interest in another block of ground and sawmill, machinery and articles pertaining thereto, valued at $14,000, and that said two-thirds interest, in the five acres of ground, was to be valued at $9333.33 1-3;" while J. S. Smith claims that Harker was to be paid for the land appellants purchased of him by obtaining credit on the books of Hayden, Smith & Co. for its value, provided he, Harker, should at the same time comply with the remaining provisions and terms of his aforesaid contract with Hayden, Smith & Co. After these two written agreements, the one between Harker and Hayden,

Smith & Co., and the other between Harker and appellants, had been signed, and, on the same day, October 18, 1869, a deed was drawn up by J. S. Smith, and dated as of that day, to be executed by Harker and wife, conveying to the appellants said two-thirds interest in said five acres of ground for the consideration of $9333.33 1-3 in coin. This deed was not executed until some time afterward, and, when executed, was placed upon record by Harker, prior to April 1, 1870, and the appellants took possession of the land by virtue of that conveyance. Harker, when the 1st of April, 1870, arrived, was unable to complete his contemplated purchase of an interest in the saw-mill property, and finally proceedings in bankruptcy were instituted against him, to compromise which he conveyed his property to the respondent as his assignee. Appellants, refusing to pay said assignee the agreed value of $9333.33 1-3 for said land conveyed by Harker to them, this action was brought by the respondent seeking to enforce the payment of the said sum with interest from October 18, 1869, and, upon the trial, he obtained a judgment against them for said amount, and from that judgment this appeal is taken. The errors complained of consist in the charge of the court to the jury, and his refusal of other instructions asked for by the appellant. The following are the instructions given by the court and excepted to:

"Defendants could not put Harker in default so as to claim to retain the land mentioned in the complaint, without paying for it, unless the deed of Hayden, Smith & Co., to the real property mentioned in the agreement for a co-partnership, was made out and tendered to Harker on the 1st day of April, 1870, unless Harker waived all claim to have a deed tendered.

"If a party purchase property, and agree to pay therefor in other property at a stipulated valuation, on a day certain, he must tender performance by offering to convey on that day, or otherwise the party to whom the debt is owing may elect to consider the debt a money obligation to the extent of such valuation, and may sue for its recovery in money.

"If a party purchase property and agree to pay therefor in other property at a stipulated valuation, on a day certain,

A. MYER, Appellant, v. C. BEAL et al., Respondents.

MORTGAGE—STATUTE OF LIMITATIONS.—In this State mortgaged premises can, in a certain class of cases, be subjected to the payment of the debt secured by the mortgage after the Statute of Limitations has run against the notes.

IDEM.—Our Statute of Limitations simply suspends the remedy; it does not extinguish the debt.

STATUTE CONSTRUED.—Section 7, Chap. 6, Miscellaneous Laws construed.

APPEAL from Multnomah County.

All the necessary facts are stated in the opinion of the Court.

J. N. Dolph, for Appellant.

Townsend & Beal, for Respondents.

By the Court, MCARTHUR, J.:

This is a suit brought to foreclose a mortgage upon certain real estate in Multnomah County after the Statute of Limitations has run upon the notes which the mortgage was given to secure. The appellant is the assignee and owner of the mortgage, and Beal, the respondent, is the grantee of the equity of redemption. Beal demurred to the complaint. The demurrer was sustained and a decree rendered dismissing the suit with costs.

The question to be determined is, whether the mortgaged premises can be subjected to the payment of the debt secured by the mortgage, after the Statute of Limitations has run against the note. Reason and the weight of authority answer this question in the affirmative. (*Sichel v. Carillo*, 42 Cal. 498; *McElmoyle v. Cohen*, 13 Pet. 312; *Townsend v. Jemison*, 9 How. (U. S.) 413; *Sturges v. Crowninshield*, 4 Wheat. 122; *Waltermire v. Westover*, 14 N. Y. 20.)

The complaint alleges that a certain amount is due on the promissory notes set out and that a mortgage was executed to secure the payment thereof. The statute has run against the notes but not against the mortgage. From the fact that the appellant claims a certain amount as due on the notes,

the respondents' counsel concludes that the action is upon the notes and that this is not a suit to foreclose the mortgage. Upon no hypothesis except that of an implied promise after the statute has run can this view be sustained, and that hypothesis is incorrect. The Statute of Limitations in this State simply suspends the remedy; it does not extinguish the debt. Hence it was proper to plead the notes in conjunction with the mortgage. The entire pleading must be construed together, and when that is done we think that it sufficiently appears that this is a suit to foreclose the mortgage set out. Again, it is claimed that there can be no suit on this mortgage, for the reason that it contains no covenant for the payment of money. The statute (§ 7, ch. 6, Mis. Laws) declares: "No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgage shall be confined to the lands mentioned in the mortgage." The correct interpretation of this section is that when there is a covenant for the payment of a certain sum in the mortgage the remedy shall be against the land, and at the same time a personal judgment may be obtained to collect any amount which may remain unpaid after the proceeds of the sale of the mortgaged premises have been applied to the extinguishment of the judgment; and when there is no covenant for the payment of a certain sum in the mortgage the remedy is against the mortgaged premises only, and there can be no personal judgment for any deficit. The absence of a covenant does not destroy the vital force of the mortgage, but only limits the operation of any decree upon it to the described premises. The mortgage declared on is of the latter class. The decree in this suit can only operate upon the particular lands described, and there can be no personal judgment for any deficit. We think the court below erred in sustaining the demurrer. Hence the decree is reversed and the cause remanded for further proceedings.

Decree reversed.

AUGUSTINE RAYMOND, Appellant, v. EDWARD COFFEY and JAMES COYL, Respondents.

PAROL EVIDENCE—WHEN ADMISSIBLE TO FIX A BOUNDARY.—Parol evidence is admissible to fix a boundary which is variable, to show the location of a stake or stones referred to in a deed as a monument or to locate the boundaries where an ambiguity exists on the face of a deed. Such evidence is not objectionable on the ground that it alters, varies or contradicts the written instrument.

INCONSISTENT DESCRIPTIONS IN A DEED—HOW TREATED.—Where the parts of a description, in a deed, are inconsistent with each other, effect should be given to those consistent and intelligible portions which carry out the intention of the parties, and what is repugnant thereto rejected.

METES AND BOUNDS.—When a piece of land is conveyed by metes and bounds, this will control the quantity although not correctly stated in the deed.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Boise & Willis, for Appellant.

Parol evidence is not admissible to alter, vary or contradict a written instrument. (Code, § 771; 1 Greenleaf on Ev., §§ 275-285; 3 Greenleaf on Ev., § 360; 2 Starkie on Ev. 753-757; 2 Parsons on Con., 5th edition, 547-557; 2 Parsons on Con., note *d,* 550; 11 Barb. 149; 21 Barb. 398, 406-8; *Moore v. Jackson,* 4 Wend. 65.)

The deed must be so construed, if possible, that every word in it may be operative. (*Moore v. Jackson,* 4 Wend. 67; *Jackson v. Blodget,* 16 Johns. 178.) No estate will pass by the deed except such as will agree to each part of the description. (*Jackson v. Clark,* 7 Johns. R. 223; Tyler on Ejectment, 569.)

The intention of the parties as evidenced by the words of the deed must in an action at law prevail. (2 Washb. on Real Prop., side page 631.)

If the deed speaks by mistake, that can be shown only in a suit in equity to reform the mistake, and not in an action at law. (1 Greenleaf on Ev., § 296; *Jackson v. Sill,* 11 Johns. R. 213.)

If there was any ambiguity in the deed, it was patent, and parol evidence is not admissible to show patent am-

biguity. (1 Greenleaf on Ev., § 297, *et seq.*; 2 Starkie on Ev. 755.)

Mallory & Shaw, for Respondents.

If a deed contains more than one description, the first of which is entire and describes the land, and the last of which is inconsistent with the first, the last description must be rejected. That description must prevail concerning which a mistake was the least likely to have been made. (1 Greenleaf on Ev., § 301; 2 Phillips on Ev., note 520, top page 657; *Melvin v. Proprietors of Locks, etc.*, 5 Metcalf (Mass.) 28-30; 3 Washb. on Real Prop. 349, 353; Id. 344.)

As to the first description in this deed, there could have been no mistake, as monuments were erected and found on all sides of the premises described.

By the Court, MOSHER, J.:

The plaintiff brought his action to recover a part of the donation land claim of C. Bertrand and wife, situated in township four south, range two west, in Marion County. The deed under which the plaintiffs claims was executed March 12, 1857, by C. Bertrand to Joseph Hebert, and described the premises as "all that tract or parcel of land known and described as the east part of the donation claim of C. Bertrand. * * * Said east part, supposed to contain about two hundred and twenty-five acres, more or less, and bounded on the north by the claim of C. Lambert, on the east by the claim of E. Raymond, on the south by the claim of Louis Bergevain, and on the west by the claim of Michael Coyle." The deed under which the defendant claims, was executed February 25, 1856, by C. Bertrand to M. Coyle, and contained the following description: "Beginning at a stake on Louis Bergevain's north boundary, thence north eight degrees east, 40.25 chains to a stake on J. Lambert's south boundary; thence with said boundary to a point where it intersects Michael Coyle's east boundary; thence with said boundary to a point where it intersects Louis Bergevain's north boundary, to the place of beginning;

being parts of sections twenty-five and thirty-six, in township four south, of range three west." The issue in this case depends upon the establishment of the east boundary of Michael Coyle's land, and the error alleged is, that the court admitted oral testimony for that purpose.

It is too late to controvert the legal proposition that what constitutes a boundary in a deed is a fact for the jury and may be proved by any kind of evidence which is competent to prove any fact. Thus parol evidence is admissible to fix a boundary which is variable, to show the location of a stake or stones referred to in a deed as a monument, or to locate the boundaries where an ambiguity exists on the face of a deed. (*Opdyke v. Stephens,* 4 Dutcher, 89; *Brown v. Willey,* 42 Penn. St. 205; *Waterman v. Johnson,* 13 Pick. 261; *Blake v. Doherty,* 5 Wheat. 359, in which the court say that *identity* is the only question to be decided by a jury; and if they are satisfied the land held by the defendant is the same land which was granted to him, it is all that should be required.)

Such evidence is not objectionable on the ground that it alters, varies or contradicts the written instrument. In explaining by oral testimony where and how the objects referred to in the written documents were in fact made or existed, those muniments of title are not altered by parol evidence. The effect and meaning is explained by the facts referred to in the writings. In cases of lines thus established variant from the courses and bearings expressed on the face of the written document, the parol evidence does not contradict the deed, but shows the act and thing by oral evidence of the fact *in pais* to which the deed had allusion and was intended to describe. (*Baker v. Talbot,* 6 Monroe, 180.)

It is claimed by the appellant that the words in the deed under which the respondent holds, to wit, "being parts of sections twenty-five and thirty-six, in township four south, range three west," constitute the particular description which should govern, and that the beginning stake cannot be located outside of these sections. The true rule of construction, where the parts of a description in a deed

are inconsistent with each other, is to give effect to those consistent and intelligible portions which carry out the intention of the parties and reject what is repugnant thereto. If the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addition will not vitiate it. The description in the deed now under consideration is by metes and bounds, and if the beginning corner be established the whole tract intended to be conveyed can be easily and certainly ascertained. It is well settled that when a piece of land is conveyed by metes and bounds this will control the quantity, although not correctly stated in the deed. The words "being parts of sections twenty-five and thirty-six, in township four south, range three west," must therefore be treated as words of general description, and must be rejected if inconsistent with the description by metes and bounds.

All the questions in this case have been authoritatively settled by this Court in the case of *Lewis v. Lewis* (4 Or. 177), in which Upton, C. J., delivered the opinion of the court. It was there held that where the permanent and visible or *ascertained* boundaries or monuments are inconsistent with the measurement either of lines, angles or surfaces, the boundaries or monuments are paramount, and there is no reason why the locality at which a lost stake was set could not be determined and the true construction of a deed ascertained as well in a court of law as by a suit in equity.

It was not error in the court below to admit oral testimony to establish the beginning corner.

Judgment affirmed.

JAMES L. BAILEY and FRANK M. BAILEY, Respondents, v. JAMES FRUSH, Appellant.

TRIAL FEE—MUST BE PAID BY THE MOVING PARTY.—Section 1033 of the Code of Civil Procedure requires the plaintiff in the court of original jurisdiction, if he be the moving party, to advance the trial fee. If the defendant be the moving party in the court of original jurisdiction, he is then required to advance the trial fee. But in the appellate court the appellant is the party in all cases who is there required to advance such trial fee.

IDEM—WHEN PAYMENT OF, WILL NOT BE REQUIRED.—In no case is a trial fee required to be advanced if it be made to appear to the court, by affidavit of the party, that he is unable to advance the same.

IDEM—APPEAL MAY BE DISMISSED.—If the appellant in a cause refuse or neglect to advance the trial fee when required, the court may dismiss the appeal and affirm the judgment of the court below.

APPEAL from Multnomah County.

This action was brought in the County Court for Multnomah County to recover a balance of $320.43 for lumber sold and delivered by respondents to appellant. Respondents recovered judgment, from which appellant appealed to the Circuit Court. When the case was called for trial in the Circuit Court it was suggested that the trial fee of twelve dollars had not been paid, and both parties refused to pay the same, each claiming that the other was, under the law, required to pay such fee.

Thereupon appellant moved for a nonsuit, for the reason that respondents had abandoned their cause. The court overruled the motion for a nonsuit, and, upon its own motion, dismissed the appeal and affirmed the judgment of the court below, because of appellant's refusal to advance the trial fee, to which ruling of the court appellant duly excepted, and from which judgment he appeals to this Court.

Marquam & Beal and A. H. Townsend, for Respondents.

Hill, Thayer & Williams, for Appellant.

By the Court, BONHAM, J.:

The only questions presented by the appeal in this case are the validity and construction of § 1033 of the Code of

Civil Procedure, which reads as follows: "The trial fee is to be paid by the plaintiff, appellant or moving party, before he is entitled to, or can claim the trial or other proceeding upon which such fees is imposed; and if the party paying such fee prevail in the action, suit or proceeding, so as to be entitled to recover costs therein, such fee shall be allowed and taxed as a disbursement, and collected of the adverse party."

Upon the argument of this cause it was urged by counsel for appellant that the section of the statute above quoted is unconstitutional and void; but, if valid, that it required the plaintiffs in this case to pay the trial fee. In support of the position that § 1033 of the Code is in contravention of the Constitution of Oregon, counsel cite § 10 of the Bill of Rights (Code, p. 76), which declares among other things that "justice shall be administered openly and without purchase." Also, "that the right of trial by jury, in all civil cases, shall remain inviolate." (Code, § 17, p. 76.)

From these premises it is argued that inasmuch as appellant could not obtain a constitutional jury of twelve persons in the County Court, he had the unconditional right to appeal the cause to the Circuit Court, and there demand a jury trial, before he could legitimately be divested of his property to satisfy the judgment of the County Court against him.

While it is true that no person can rightfully be "deprived of life, liberty or property, without due process of law," yet we do not understand that the language of the Constitution, "justice shall be administered * * * without purchase," is to be given that broad, comprehensive and unqualified construction claimed for it by appellant's counsel.

While the statute provides whereby appellant might have secured a trial of his cause, by a constitutional jury of twelve good and lawful men, either by advancing the fee of twelve dollars, or by swearing that he was not able to do so, we do not think that the provisions of the Constitution cited contemplate that in civil cases a party has the right to absolutely demand such jury, without complying with the reasonable conditions and requirements of the statute.

The time has never been, since the adoption of our Constitution, and we presume it never was before, when litigants could conveniently either prosecute or defend civil actions and suits without the expenditure of more or less money in payment of the fees of officers of the court, witnesses, and other incidental expenses.

And it is not unusual to find law requiring these costs and expenses to be advanced or secured to the officer or person entitled to them before the service is rendered. It has always been a favorite doctrine, and is certainly an equitable one, that litigants should contribute materially toward the expense of maintaining courts of justice. And, where the litigant has the means to enable him to do so, we can see no impropriety in his attorney requiring him to advance a retainer before the trial of his cause is proceeded with. Briefly, and yet without passing over points made in the argument without due consideration we are disposed to hold that the language of our Constitution that "justice shall be administered * * * without purchase," means simply that justice shall not be bought with bribes, nor shall the attendant or incidental expenses of litigation, in the nature of costs and disbursements, be so exorbitant and onerous as to virtually close the doors of courts of justice to those who may have occasion to enter there. In other words, that the rights of the poor man to a redress of his grievances shall be equally respected with those of the rich, and that equal and exact justice shall be dealt out alike to all.

In the construction of the meaning of the language of § 1033 of the Code, we hold that upon a trial in the first instance in the court of original jurisdiction, the plaintiff, if he be the moving party in the trial, is required to advance the trial fee. If the defendant be the moving party in the trial, in the first instance, as where the allegations of the complaint are all admitted by the answer, but new matter is set up by the defendant by way of plea in avoidance, or as a counter-claim, in that case the defendant is the moving party, and the one required to advance the trial fee; because the only issues in the case are tendered by the de-

fendant, and accepted by the plaintiff; and the defendant is the party, who, by his pleading, renders a trial by jury necessary in the case.

But, upon appeal, the appellant is the party in all cases who is required to advance the trial fee, because the respondent is supposed to be satisfied with the trial already had, and the appellant is the party who, by his proceeding, makes the second trial necessary, and for whose prospective benefit the same is had.

Counsel for appellant claim (assuming it to be the correct construction of § 1033 of the Code) that the appellant in this case was required to advance the trial fee, that all the court could have done, as the result of his failure to pay, was to have refused a trial until such fee should be paid. In view of the fact that it is a cardinal principle in law that "justice shall be administered completely and without delay," as well as "openly and without purchase," we think that a construction of the section referred to is not warranted which would postpone the trial and leave the judgment of the court below suspended indefinitely, when the appellant is the only party who is not satisfied with the judgment already obtained. Such construction would operate to the inconveinence and injury of the party not in fault.

But it was further argued that, in any event, the court below had not the authority to dismiss the appeal for the failure of appellant to advance the trial fee. And while it is true, as claimed by counsel for appellant, that the statute does not, in express terms, authorize the court to dismiss an appeal for the reason that the trial fee has not been advanced, yet we hold that courts of justice, and especially those of general jurisdiction, possess certain implied or incidental powers in cases like this. The court has acquired jurisdiction of the parties, and of the subject-matter of the action, and is authorized to make an order requiring the appellant to advance the trial fee, which is done. The appellant refuses to pay. What is the remedy? We think that authority to proceed in such cases is provided in § 911 of the Civil Code, which reads as follows: "When jurisdic-

tion is, by the organic law of this State, or by this code, or any other statute conferred on a court or judicial officer, all the means to carry it into effect are also given; and, in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

We hold, therefore that the court below, for its own protection, as well as that of respondents, against the uncertainty and vexation of the delay and postponement of the trial indefinitely, had the authority to dismiss the appeal of the defendant as a penalty for his refusal to comply with the requirements of the statute making it his duty to advance the trial fee in the appellate court. And, possessing the authority to dismiss the appeal, it follows, as the sequence, that the judgment of the County Court should thereupon be affirmed. (Jus. Code, § 77.)

Judgment affirmed.

AUGUST TERM, 1874.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

AUGUST TERM, 1874.

JOHN SOUTHWELL, Respondent, v. JOSEPH BEEZLEY, Appellant.

STATUTE OF FRAUDS.—Where a contract by its terms may be performed within one year, and when it is within the contemplation of the parties that such a contingency was not only possible but probable, the case is not within the Statute of Frauds.

PERFORMANCE—WHAT CONSTITUTES A QUESTION FOR THE JURY.—The delivery of a certain number of sheep being essential to a performance of contract, it depends upon the peculiar circumstances of the case whether such delivery should be by a precise technical separation and counting of the sheep, or whether a delivery may not be made by a delivery of a greater number, including the number called for in the contract, and this is a question which may properly be left to the jury.

APPEAL from Wasco County.

The complaint alleges that about March, 1873, the parties hereto made a contract by which appellant was to sell respondent six hundred ewe sheep, and respondent was to pay therefor such price as he should pay for other sheep which he proposed to purchase in the fall of that year. Said sheep were to be delivered to respondent September

1, 1873, and respondent was to pay appellant for the same within three years, and as soon as he could make the money out of said sheep. That there was also a further understanding, that respondent should, in connection with William Beezley, the son of appellant, get a suitable sheep-ranch, and put up hay thereon during the summer of said year; that appellant was to let his son William have six hundred head of ewe sheep, and he, defendant, was to furnish twelve hundred head of sheep, and the three lots of sheep aforesaid were to be placed in one band and kept together, which band was to contain the several interests of the three parties aforesaid; that with the intent to carry out his agreement with appellant as aforesaid, he left employment where he was getting fifty dollars per month and his board, and in connection with said William Beezley, on or about the 20th of May, 1873, did hunt up and purchase a good sheep-ranch, and did furnish the same with proper farming implements, which cost respondent, in money paid out by him, about the sum of seven hundred dollars; that respondent has employed his time in securing and improving said ranch, and putting up hay thereon, from May 20 to October 30, 1873; that in pursuance of his said contract with appellant, on or about the 5th day of September, 1873, appellant did deliver and turn over to respondent the sheep he had bargained for and purchased as aforesaid, and at the same time and place has delivered the said six hundred sheep for said William, and twelve hundred head of sheep that were to be kept and herded for appellant; that after said delivery said sheep remained in the possession of respondent and said William Beezley, in pursuance of said contract, and thereafter respondent continued to give his time and service in herding and caring for said sheep, until the 30th day of October, 1873, when said appellant, disregarding his said contract, took the respondent's said sheep from him, and held and kept the same, and has converted the same to his own use.

The complaint contains several allegations of special damages. These allegations are all denied in the answer. The separate answer of the appellant alleges that appellant

made a contract with the firm of Beezley & Southwell, which was not performed or entered upon, and that the same was not in writing, and was not to be performed in one year, and was therefore void by the Statute of Frauds, and it alleges a settlement between the parties about the 30th of October, 1873.

It also alleges that the contract sued on was for personal property, of the value of more than fifty dollars, and was not in writing, nor was it in part performed.

The reply denied the copartnership and settlement set up in the answer.

Judgment was rendered for the respondent, upon a verdict in his favor.

The other facts and the errors relied upon in the appeal are stated in the opinion of the Court.

By the Court, SHATTUCK, J.:

Most of the argument in this cause has been directed to the question of the delivery of the sheep. Counsel for the appellant do not, however, abandon the position indicated by the pleadings and bill of exceptions that this cause falls within the provisions of the Statute of Frauds, relating to contracts which are not to be performed within a year.

Upon these points we hold in this case that this contract, so far as paying for the sheep was an element, might, by its very terms, have been performed within the year; and it was within the contemplation of the parties when it was made that such a contingency as Southwell's ability to pay and payment in fact within the year, was not only possible but probable. If so, the case is not within the statute.

Upon the question of delivery, the counsel insist upon a precise technical separation and counting out of the six hundred sheep, in order to fix any rights of Southwell under the contract. While the position of counsel may be correct as a general rule, we do not think it controls in this case; for this case had its own peculiar circumstances. The question of delivery was properly left to the jury to say whether, upon the facts in the case, the acts performed by

the parties were intended by them to operate as a delivery. Upon these points there was no error.

But we think there was error in giving the instruction numbered "second," of those asked by plaintiff's counsel. That instruction is as follows: "If the jury find that the parties plaintiff and defendant entered into the contract alleged in the complaint, and the defendant failed and refused at any time to carry out the same, the question as to whether or not there was a complete delivery of the sheep, does not affect the validity of the contract."

The whole case of the plaintiff rests upon the alleged fact of sale and delivery (in the qualified and peculiar manner set forth) of the sheep, and the fact that defendant did deliver them, in the manner intended by the parties, was one to be kept continually in view, and if there was no delivery, such as the parties contemplated, there could be no recovery. We think that this instruction should not have been given. If it did not operate to take away from the consideration of the jury the question of delivery, it no doubt diverted their attention from a due consideration of this important point.

We also think that there was error in the fourth general instruction given by the court. That instruction seemed to submit the question of sale and delivery, *in law and in fact*, to the jury, and they were told in substance that if they found that there was no sale or delivery in law and in fact, yet if the defendant, by his own acts, led the plaintiff to believe that there was, and he, acting on that belief, so managed his business and so devoted his time as to incur loss, if the sale and delivery were not consummated according to his expectations, he might recover compensation for his expenses and losses.

Upon a different state of facts, or upon a complaint differently framed, that instruction might have been proper, so far as the measure of damages is set forth; but the case before us is predicated entirely upon the theory of a sale and delivery of the sheep, and this instruction, like the one referred to above, we think might have misled the jury, and

caused them to take a view of the case altogether too general, and one not authorized by the pleadings.

For these reasons, we think the judgment should be reversed and a new trial ordered.

LUCIEN EVARTS, Administrator of the Estate of JACOB YARLETT, Deceased, Appellant, v. G. W. STEGER et al., Respondents.

EQUITY—REFORMING WRITTEN INSTRUMENT.—To entitle a party to have a written contract reformed in a court of equity, on the ground of mistake, the complaint must show that the alleged mistake was that of the parties to the contract, and that it was mutual.

PRESUMPTION.—The law presumes that a written contract contains all its terms.

PLEADING.—DEFECT IN COMPLAINT NOT WAIVED BY ANSWER.—The objection that the complaint does not state facts sufficient to constitute a cause of suit is not waived by answer, and may be urged in an appellate court.

APPEAL from Umatilla County.

Respondent Steger was, on the 12th day of June, 1871, appointed by the County Court of Umatilla County, administrator of the estate of Jacob Yarlett, deceased.

Said Steger as principal, with the other defendants herein as sureties, filed his bond as such administrator, which was approved by the County Court on the 15th day of June, 1871, and thereupon entered upon his duties as such administrator, and continued to act as such until the 5th day of August, 1872, when, on the application of the widow of the deceased, he was removed, on the charge that his undertaking was insufficient and that he was not faithfully performing the duties of his trust.

On the 9th day of April, 1873 the appellant was appointed administrator *de bonis non* of said estate, and after qualifying as such entered upon the discharge of his duties, and in his official capacity instituted this suit, alleging that said Steger, while acting as administrator of said estate, had wrongfully appropriated to his own use $2229.65 in gold coin of the assets of said estate, and had absconded there-

with to the province of British Columbia, where he still remains. Appellant sets out in his complaint a copy of the defective bond of said Steger, and asks to have the same reformed by the court, and for a decree against said Steger and his sureties for said sum of $2229.65, with interest.

That part of the bond in which the mistake is alleged to have occurred, is as follows: "Know all men by these presents, that George W. Steger as principal, and John T. Davis, William Penland, Nelson Jones and John T. Hinton as sureties, are held and firmly bound [in the sum of $10,000, payable] unto whom it may concern; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 12th day of June, 1871," etc.

The alleged mistake consists in the omission from this bond of the words, in brackets, "in the sum of $10,000, payable."

Defendant Steger was not served with process and did not appear, but his said sureties, Davis, Penland, Jones and Hinton, appeared in the court below, and demurred to the complaint upon the ground, among others, that it did not state facts sufficient to constitute a cause of action or suit.

The demurrer was overruled, whereupon the said sureties, who are appellants in this Court, filed their answer admitting the filing of a petition for the appointment of Steger, as administrator of said estate, in which petition the probable value of the property of said estate was estimated at $5000; but denying that the county judge of Umatilla County required, as a condition precedent to issuing letters of administration to said Steger, that he should file with the clerk of said court an undertaking in the sum of $10,000 or any other sum; or that the words "in the sum of $10,000, payable to whom it may concern," were accidentally or otherwise omitted from said undertaking; or that said Steger wrongfully retains from the heirs of said estate $2229.65, or any other sum, but aver that said Steger is entitled to credits as administrator of said estate to the full amount of said sum of $2229.65.

The answer further alleged that Steger has never had a settlement with the County Court of Umatilla County, as administrator of said estate, and that said court has never ordered a final settlement of his accounts, and that he has never been adjudged in default to said estate by the County Court.

Appellant in his reply does not controvert the allegation in the answer that Steger had not had a final settlement with the County Court, nor that he had never been adjudged in default to said estate by said court. But the appellant for further reply says: "That he has no knowledge nor information sufficient to form a belief as to whether Steger holds large demands against said estate, and hence denies the same; that he has no knowledge or information sufficient to form a belief as to whether said demands, together with the reasonable expenses of administration, are sufficient to offset all demands against said Steger, and hence denies the same, and avers upon his honor as a gentleman that he does not believe anything of the kind."

After issue joined, defendants moved for judgment on the pleadings, which motion was granted by the court, and plaintiff's cause was thereupon dismissed and judgment rendered against him for costs, from which he appeals to this Court.

L. Evarts, for Appellant, in person.

S. Ellsworth, for Respondents.

By the Court, BONHAM, C. J.:

Plaintiff's cause having been dismissed by the court below, on motion of defendant's counsel for decree upon the pleadings, the same was heard and determined in this Court virtually upon the demurrer to the complaint, and is decided upon the third ground thereof, to wit: "That the complaint does not state facts sufficient to constitute a cause of suit." It is well settled that the objection to the jurisdiction of the court and to the sufficiency of the facts stated to constitute a cause of suit, are not waived by answering over, but may

thereafter be properly urged in the appellate court as well as in the court below. True, for the convenience of practice, it is proper to raise such objections first by demurrer; but the failure to do so is no waiver of the right.

Although upon the argument of this cause it was insisted by counsel for respondents that the Circuit Court had no original jurisdiction to entertain plaintiff's suit in the absence of a previous adjudication by the County Court of Umatilla County in the premises, and although it was further insisted that the terms and conditions of the undertaking sued upon were of such a character that the same could not be reformed by a court of equity, yet this Court has thought proper to only pass upon the question whether the complaint sets out facts sufficient in any event to entitle the plaintiff to the relief prayed for.

It appears, from the allegations and argument of counsel for appellant, that he intended to base his claim to relief in the reforming of Steger's undertaking as administrator, on the ground of accident or mistake in its execution. Allowing that this instrument is of such character that it might be reformed by a court of equity, has the plaintiff stated facts sufficient to entitle him to the relief prayed for? We conclude that he has not. And in support of this conclusion we refer to the allegations of the complaint on this subject. The only averment in the complaint, touching the omission to insert a penal sum in said undertaking, reads as follows: "But plaintiff shows that the words or phrase, 'In the sum of ten thousand dollars, payable to whom it may concern,' were accidentally omitted therefrom by the said George A. La Dow; and that the defendant signed said undertaking; and that John Davis, William Penland, Nelson Jones and J. T. Hinton, justified thereto with the intention of making it appear that they actually were sureties, that the said G. W. Steger should faithfully perform the duties of his trust, and that they were severally worth the amounts mentioned in their justification; and that the words 'am worth,' which should have been inserted in said justification immediately after the words, 'I, the said John Davis,' were accidentally omitted by the said George A. La Dow."

The complaint further shows that La Dow was the attorney for Steger in drafting the undertaking in question, but it nowhere appears that the sureties were privies to, or cognizant of, any mistake made by said La Dow, or that it was ever agreed or understood, by said sureties, that they were to, or had signed, an undertaking in the penal sum of $10,000, or any other fixed sum. Neither does it appear, from the complaint or otherwise, that said sureties had any knowledge that Steger was required, by the County Court of Umatilla County, to execute an undertaking in the sum of $10,000, or any other sum. It is true that it does appear, from the affidavits of the sureties appended to the undertaking, that they are worth the aggregate sum of $10,000 over and above debts and liabilities and property exempt from execution; and that is the only intimation contained in the complaint, that it was understood or agreed by them that they were to be held and bound in that sum.

It does not appear that there was any blank left in the undertaking for the penal sum at the time that the same was executed, or that there was any understanding with the sureties that any penal sum should afterwards be inserted so as to bring the case within the rule invoked by appellant, and in support of which he cites *Wright & Co. v. Harris,* 31 Iowa, 272; *Inhabitants of South Berwick v. Huntress,* 53 Maine, 89; and 15 La. Ann. 551.

We think, then, that there is no sufficient allegation in the complaint to negative the idea that the undertaking, as signed by these sureties, was, in its terms, the instrument which they intended to sign. In this conclusion we are supported by the presumption that an agreement, when reduced to writing, has all its terms embraced in such written contract. (1 Story's Eq. Jur., § 153.)

To entitle a party to relief in a court of equity against a mistake, it must appear that such mistake was mutual; that it was the mistake of both parties to the contract. And as we have before indicated, there is nothing in this complaint, or at least no sufficient averment to show that respondents were mistaken as to any of the terms of the contract by them executed. (Id. 142.)

Decree affirmed.

L. FLEISCHNER, as Treasurer of the State of Oregon, Appellant, v. S. F. CHADWICK as Secretary of State of the State of Oregon, Respondent.

ACT VOID IN PART.—An act of the Legislature may be void in part for its unconstitutionality and good so far as it is constitutional.

REPEAL OF PART OF ACT BY IMPLICATION.—Where a subsequent statute is repugnant to a prior one, it operates as a repeal of the first so far as they conflict. Statutes which repeal prior ones by implication are not obnoxious to § 22, Art. IV of the Constitution.

CONFLICTING PROVISIONS OF INDEPENDENT ACTS—HOW CONSTRUED.—A subsequent independent act which does not attempt to revise or amend any prior act by reference to its title, is not unconstitutional because some of its provisions conflict with those of a prior act on the same general subject.

APPEAL from Marion County.

This is a special proceeding by petition for mandamus, brought by appellant against respondent before Hon. B. F. Bonham, in the Circuit Court for Marion County in vacation.

The object and prayer of the petition is to obtain a peremptory writ of mandamus directed to defendant to compel him to allow the account of the plaintiff theretofore verified and presented to him, and to issue warrants upon the treasury of the State for the amount of said account, which is for fifteen quarterly installments (to wit, from September 10, 1870, to June 10, 1874) of $100 each, of the compensation allowed plaintiff as a member of the "board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom," as constituted by § 5, Article VIII of the Constitution of the State of Oregon; which compensation is claimed to be due to plaintiff under the provision of § 14 of chapter 49 of the General Laws of the State, as found on page 887 of the Code (edition of 1864).

The petition alleges that plaintiff was duly elected to the office of Treasurer of said State, and defendant was in like manner elected to the office of Secretary of State, at a general election held in said State on the first Monday in June,

A. D. 1870, each for the term of four years; that both duly qualified, and have since September, 1870, held and performed the duties of their said offices respectively, including their labors and duties as members of said board; that there is now, in said "School Commissioners' Fund," money sufficient to pay the full amount of compensation due plaintiff as a member of said board, but that defendant refuses to allow said account, or to draw said warrants, and the prayer of the petition was for an alternative writ of mandamus against defendant, to be made final and peremptory upon a hearing. Defendant, in response to the order to show cause, appeared in person and filed his answer, alleging the repeal of § 14, chapter 49, of the General Laws, by § 13 of an act of the Legislative Assembly of the State of Oregon, approved October 28, 1868, and found on pages 33 to 38 of the laws of that session, as the reason for his refusal to allow said account and to draw said warrants.

Plaintiff demurred to said answer, which demurrer was overruled by the court, the answer sustained, and judgment rendered dismissing said cause and adjudging the costs againt plaintiff; from which judgment this appeal was taken and the case brought into this Court.

Dolph, Bronaugh, Dolph & Simon, for Appellant.

Syl. C. Simpson, for Respondent.

By the Court, BURNETT, J.:

It is admitted that the law of 1864, authorizing the payment of the salary in this case, has been repealed by the law of 1868, unless the repealing statute is unconstitutional. If the law of 1868, or that portion of it repealing the law of 1864, is not in conflict with the Constitution, then the court committed no error in dismissing the cause. To declare a law unconstitutional, the court must be satisfied beyond a reasonable doubt that it is so.

It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of the Legislature, passed with all the forms and ceremonies

requisite to give the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder on it as long as deliberation and patient attention can throw any light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt. (19 Pick. 95.)

A reasonable doubt must be solved in favor of legislative action and the act be sustained. (4 Dale, 18; 4 N. H. 16; 13 Pick. 61.)

The act of 1868 is an independent act, one object of which was to place a class of lands in market that had never been offered before, to wit, the university lands, and the first five sections of the act point out the manner in which all the school and university lands belonging to the State shall be disposed of; then follows § 6, which is disconnected from all the previous sections, as well as those that follow it, and is on an entirely different subject.

It is claimed that this § 6 of the act of 1868 is contrary to Art. VIII, § 5 of the Constitution. If it was the intention of the Legislature by this provision to take away from the Board of Commissioners the control of the funds arising from the sale of school and university lands and give it to the county treasurers of each county where such lands might lie, it is clearly unconstitutional; but, conceding that this § 6 of the law is unconstitutional, does the balance of the act fall with it?

The rule in such cases, as laid down in 5th Gray's Mass. Rep., cited by appellant's counsel, and which is no doubt correct, is "that where part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other." The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last

fall. Applying this test to the act of 1868, we think the sixth section might be treated as unconstitutional and the balance of it valid, for the whole act may read, leaving out the sixth section, without apparent defect or want of harmony.

Another objection made to the act of 1868 is, that it is contrary to § 22 of Art. IV of the Constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." The Constitution of Maryland contains a similar provision, and in giving a construction to it in the case of *Davis v. The State* (7 Maryland, 152), the court said: "This was intended to prevent incautious and fraudulent legislation. It does not apply to an independent act, establishing a new, or revising some previous policy of the State. In such cases the enactment of one law is as much a repeal of inconsistent laws, as if the latter were repealed by express words." (Sedgwick on Const. and Stat. Law, 572; 2 Or. 125.)

While the law of 1868 is an independent act, and does not profess to revise or amend any prior act, it is claimed that it does amend or repeal different sections of the prior laws of 1864 and 1866 on the same subject, by implication. When two statutes are enacted that are so inconsistent that they cannot both stand, the last one repeals the first by implication, for the last enactment being the latest expression of the law-making power will prevail. Statutes which repeal or amend others by implication are not obnoxious to § 22, Art. IV of the Constitution. (Cooley's Const. Lim. 150; 13 Mich. 496; 15 Ohio (N. S.) 573; 6 Ind. 41; 16 Ind. 497; 47 Mo. 29.)

It is claimed by the appellant that this case falls within the rule laid down in the case of the *City of Portland v. Stark* (2 Or. 69.) We have no hesitation in affirming that decision as being entirely correct, but an examination of that case will show that the act then under consideration was entirely different from this one, as appears from the following language found on page 74 of the opinion: "In the case at bar, the act of October 15, 1862, in its title pro-

fesses to amend an act entitled 'An Act to incorporate the city of Portland,'" etc., while in this case the act under consideration in entitled "An Act to regulate the sale of school lands, university lands, and to provide for the management of the funds arising therefrom," and contains no reference to any prior act whatever.

Judgment affirmed.

STATE OF OREGON, Respondent, v. THOMAS GARRAND, Appellant.

EVIDENCE—DEFENDANT'S CHARACTER MAY BE INQUIRED INTO, WHEN—PARTICULAR FACTS NOT ADMISSIBLE.—The question of character is one which the defendant alone has a right to enter into; and when he has done so, the prosecution, in rebuttal, is permitted to show only his general bad character. Proof of particular facts is inadmissible.

APPEAL from Marion County.

Thomas Garrand was indicted by the grand jury of Marion County, on June 10, 1874, for the crime of murder in the first degree, in killing one Thomas J. Hubbard, on April 12, 1874. He was tried and convicted, and on June 17 was sentenced to be hanged August 14, 1874. An appeal was taken to this Court, and the Governor reprieved the defendant until October 2, 1874. The bill of exceptions exhibits the errors complained of. After the defendant had rested his case, the State, to sustain the issues on its part, and as rebutting evidence to the testimony of good character introduced by the defendant, called W. S. Barker, and asked him the following question: "State what you know, if anything, of the prisoner's behavior while under your charge as jailer of the county jail of Marion County, charged with the murder of Thomas J. Hubbard." The defendant's counsel objected, on the ground of immateriality and incompetency. The objection was overruled, the defendant's counsel excepted and the witness, being allowed to testify, stated that while the defendant was under his charge, as jailer of the county jail of Marion County, he

attempted to escape, and, by breaking off two locks from the jail-doors with an axe, he had succeeded in getting outside the jail, and some distance away, before he was overtaken and brought back. The State then called on one Benjamin Blantain, and asked him the following question: "State what you know, if anything, of the defendant's conduct while in custody in the county jail of Marion County for the alleged killing of Thomas J. Hubbard." The defendant's counsel objected, on the ground of immateriality and incompetency. The objection was overruled, the defendant's counsel excepted, and the witness, being allowed to testify, stated that he was a fellow-prisoner with the defendant from the time he was arrested; that the defendant had, at one time, attempted to escape, and had broken the locks off the jail for that purpose; and that, at another time, the defendant told him (B.) that he was going to kill the jailer by hitting him over the head with a stick of wood; that he would kill him when he got a good opportunity, and that he would then escape.

After the evidence in the case was all in, counsel for the defendant requested the court to instruct the jury as follows: "If you have a reasonable doubt as to whether, under proper treatment, Hubbard might not have recovered, you cannot find the defendant guilty." Which instruction the court refused to give, and defendant, by his counsel, duly excepted.

Mallory & Shaw and John M. Gearin, for Appellant.

J. J. Whitney, District Attorney; J. J. Murphy and Boise & Willis, for Respondent.

By the Court, MCARTHUR, J.:

It is well settled that in all criminal prosecutions the prisoner will be allowed to call witnesses to speak generally as to his character, and it is equally well settled that the prosecution cannot in rebuttal enter into particular facts to show the general bad character of the defendant. Roscoe (Crim. Ev. 98) says that the prosecutor cannot enter into evidence

of the defendant's bad character, unless the latter enable him to do so by calling witnesses in support of his good character, and even then the prosecutor cannot examine as to particular facts. Phillips (1 Ev. 765) says evidence will not be admitted, on the part of the prosecution, to show the bad character of the accused person, unless he has called witnesses in support of his character, and even then the prosecutor cannot examine as to particular facts, the general character of the accused not being put in issue, but coming in collaterally. And again (1 Phil. Ev. 764), it is laid down that the inquiry must also be as to the general character, for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation, down to a certain period, would not then begin to act a dishonest, unworthy part. Proof of particular transactions in which the defendant may have been concerned is not admissible as evidence of his general good character. Nor, in reply, to such evidence. (8 Conn. 487, 488.) Chitty (1 Crim. Law, 575) says that evidence of character is more frequently called on behalf of the defendant, and in doubtful cases will often influence the jury to an acquittal. And even where the defendant thus opens the discussion, the prosecutor can ask no question as to particular facts, but must confine himself simply to general reputation and character.

In the argument it was contended by respondent's counsel that, as the facts testified to by Barker and Blantain tended to support the issues, on the part of the State, they were properly admitted. To maintain this proposition an exceedingly artificial construction of the bill of exceptions was resorted to. The bill sets forth that "the State, after the defendant had rested his case, and to sustain the issues on its part," etc. From this language we are asked to draw the deduction that the evidence was offered at that stage of the trial when testimony of an escape, or attempt to escape, was admissible, or the deduction that after the defendant had rested his case, the court having control over the

order of proof (Code, § 820), in the exercise of its discretion admitted the testimony.

If language has any force at all, that used in the bill of exceptions must convince the most cursory reader that the particular testimony objected to was admitted, not only after the defendant had rested his case, but as *rebutting evidence* to the testimony which the defendant had offered of his general good character. The premises being false, both the deductions are illogical and fallacious.

As a general rule, testimony in relation to attempted escape is admissible to show consciousness of guilt. (1 Wharton's C. L., § 714.) It should be offered at the proper time, and before the prosecution rests its case. Then the prisoner is not taken by surprise, and is afforded an opportunity to submit testimony overcoming or qualifying that of the State. Such testimony should not have been admitted under cover of rebutting testimony of general good character, and at that stage of the trial when the defendant could no longer be heard through his witnesses.

We think the admission of the testimony of Barker and Blantain, as set out in the bill of exceptions, was error.

Appellant's counsel made a point in the argument to which allusion seems necessary. It was contended that on the trial of a defendant charged with one crime, testimony is not admissible to show that he was engaged in plans for the commission of other crimes. This position *seems* well sustained by the authorities referred to. It cannot, however, apply in this case. The latter part of the answer of Blantain, as set forth in the bill of exceptions, was not responsive to the question asked. It was a voluntary statement and apparently unsought. It was the duty of counsel to have asked the court to withdraw it from the jury. Nothing of the kind was done. It cannot, therefore, be treated as error by this Court.

As to the instruction which was offered and refused, we think there was no error in its refusal. In cases of homicide, where the wound is the immediate cause of the death, it is no defense that the deceased might have recovered if greater

care or skill had been shown in his treatment. (1 Wharton's C. L., § 941.)

It follows, from the views of this Court upon the question first discussed, that the judgment of the court below should be reversed, and a new trial granted.

Judgment reversed.

THE CITY OF PORTLAND, Appellant, v. O. N. DENNY, Respondent.

POLICE JUDGE—JURISDICTION OF, UNDER THE CHARTER OF THE CITY OF PORTLAND.—By § 155 of the charter of the city of Portland, the police judge has jurisdiction of all crimes defined by any ordinance of said city.

IDEM.—In addition to such jurisdiction, by § 156 he has the jurisdiction of a justice of the peace, under the general laws of the State, identical with that of all other justices of the peace.

COMPENSATION OF POLICE JUDGE OF THE CITY OF PORTLAND.—By § 160, for his services in the capacity of a police judge proper, he is to be paid out of the city treasury, by a salary fixed by ordinance, not to exceed eighteen hundred dollars per annum. By § 173, when acting in the capacity of a justice of the peace, in enforcing the laws of the State, he is entitled to tax and receive fees in compensation for such services as other justices of the peace.

APPEAL from Multnomah County.

The complaint alleges that respondent is a police judge of the city of Portland, and while acting as such, in the years 1871 and 1872, in pursuance of authority vested in him by § 156 of a special act of the Legislature under and by which said city is incorporated, he exercised the jurisdiction and authority of a justice of the peace for the county of Multnomah, in said city of Portland, and subject to the general laws of the State prescribing the duties of justices of the peace.

That in pursaunce of said section, said respondent, in certain criminal actions tried before him, wherein the State of Oregon was plaintiff and divers persons charged with crimes and misdemeanors against the State were defendants, collected and received for his services, as aforesaid a large amount of money, to wit, $3289.60. That, although often

requested, he failed and neglected to pay the same into the city treasury.

To this complaint, respondent filed a general demurrer, on the ground that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment given against appellant for cost, from which judgment an appeal has been taken to this Court.

A. C. Gibbs and E. G. Hughes, for Appellant.

Dolph, Bronaugh, Dolph & Simon, and J. B. Waldo, for Respondent.

By the Court, PRIM, J.:

The respondent is police judge of the city of Portland, and has the jurisdiction and authority of a justice of the peace for the county of Multnomah within the limits of the city of Portland. While exercising the jurisdiction and authority of a justice of the peace in the trial of criminal actions prosecuted under the general laws of the State, he has received fees for services amounting in the aggregate to $3289.60.

It is claimed by appellant that these fees should have been paid into the city treasury, and respondent having failed to do so, this action is brought by the city to recover them.

The office of police judge is created by a special and local act of the Legislature under which the city of Portland is incorporated. By § 155, "the police judge has jurisdiction of all crimes defined by any ordinance of the city of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance." By § 156, it is provided that "the police judge has the jurisdiction and authority of a justice of the peace for the county of Multnomah, within the limits of the city of Portland, in criminal matters, and shall be subject to the general laws of the State prescribing the duties of a justice of the peace and the mode of performing them." In the case of *The State v. Wiley*, this section was construed by

this Court to mean that "the jurisdiction and authority of the police judge, when acting as justice of the peace, is identical with that of all other justices of the peace, and extends alike to civil and criminal cases." By § 160, it is provided that "the police judge shall receive an annual salary, payable quarterly, not exceeding eighteen hundred dollars, * * * which salary shall be fixed by ordinance by the Common Council, and paid out of the city treasury as other salaries are paid, and he shall receive no other compensation for his services." This is the section specially relied upon by counsel for appellant to show that the compensation therein provided is to be in full for the services of respondent, not only in the discharge of the duties pertaining to the office of police judge, but also in full for services performed by him while acting under the general laws of the State in the discharge of the duties of a justice of the peace. This section may be very properly construed as having reference to the compensation he is to receive for his services while acting *strictly* as police judge, in trying offenses committed in violation of city ordinances. In construing this section another fact which should be taken into consideration is, that the recorder, whom the police judge succeeded, was paid by fees, and by this act the police judge is not to be paid by fees, but by a salary; and the clause that he "shall receive no other compensation," may have been used to state that fact.

But the fact that § 160 has reference to the compensation to be received by the police judge for services performed in that capacity solely, and not as justice of the peace, is made still more apparent by § 173, which provides that "the police judge, when acting under or enforcing the laws of the State, shall be *entitled* to tax the *same fees* and compensation as a justice of the peace."

Mr. Justice Upton, in discussing this point in the Circuit Court, very appropriately said: "As the defendant acts in two distinct capacities, counsel differ as to what services are referred to in the section first above quoted. As police judge, his powers are created and defined by this special and local act. As a justice of the peace his jurisdiction and

duties are defined by the general laws of the State. As a police judge, he is a city officer; his services are rendered to the city, and unquestionably for those services he is to be paid by the city. As a justice of the peace, he is not strictly a city officer, but, as is disclosed in § 156 of the act, he has the jurisdiction and authority of a justice of the peace for the county." The defendant claims that the compensation mentioned in § 160 relates solely to services rendered as a police judge, while the plaintiff claims that it includes all the services to be rendered by him in both capacities. As a justice he is "entitled to tax fees and compensation." This phraseology certainly indicates that he is to have an interest in the fees. Using the word *entitled* rather than authorized, directed or required, indicates that he is to derive a benefit from the fees so taxed. If it was intended that he should derive no compensation from that source, it was a remarkable misuse of words to say he shall be "entitled" to tax fees and compensation, without placing any restriction upon him or giving any intimation that the fees may be otherwise appropriated.

Again he says: "The defendant, as justice of the peace, being authorized by the general laws of the State to receive fees for services, must retain that right, unless the language of § 156 is to be construed either to prohibit him from receiving them or to compel him to pay them into the treasury after he has received them. If it was intended that he should pay them into the treasury after receiving them, it is a very indirect mode of expression to say *he should not receive them.* And it is still more inconsistent with such construction that the same act should speak of these fees as compensation, and declare the defendant 'entitled to tax fees and compensation,' without a suggestion of paying them into the city treasury, or of any purpose or object different from that indicated by the general laws of the State.

"If we treat the salary as compensation for the services rendered as police judge, and the justice's fees as compensation for services rendered as justice of the peace, all the supposed contradictions disappear, and I think the act may

be thus understood without a forced or violent construction of any of its language.

"That construction necessarily follows, if it is conceded that § 160 refers to the services of the police judge performed in that capacity, and not as a justice of the peace. With this concession the several parts of the act harmonize and the whole act conforms to the Constitution; otherwise its provisions are conflicting."

There is a general law of the State providing how costs taxed and fines and penalties imposed by justices of the peace shall be disposed of. This general law must apply to the respondent as a justice of the peace, and dispose of all costs taxed as therein provided, unless repealed, or unless the general laws of the State do not apply to him as to other justices of the peace. If he is a justice of the peace, within the meaning of the Constitution, as held in *State v. Wiley*, he must be one within the meaning of the general laws concerning justices of the peace passed under the Constitution.

The general law not being repealed, it applies to him when acting as a justice of the peace the same as it applies to every other justice in the State.

The judgment of the Circuit Court, sustaining the demurrer, should be affirmed.

T. H. GLAZE, Respondent, v. SUSAN WHITLEY, Executrix, etc. (substituted for A. H. WHITLEY, Deceased), Appellant.

INSTRUCTIONS—It is not error to refuse instructions, however correct in principle, where there is no testimony tending to prove the facts material in the issue on trial.

EVIDENCE OF STATEMENTS BY A WITNESS CONTRADICTING HIS TESTIMONY IS AN IMPEACHMENT OF HIS CHARACTER FOR TRUTH, AND ADMITS TESTIMONY OF GOOD CHARACTER IN REBUTTAL.—Testimony going to show that a witness has made, at other times, statements inconsistent with his testimony, is an impeachment of his general character for truth and veracity, and in such a case evidence of general good character for truth and veracity may be offered in rebuttal. Evidence of good character is admissible whenever the character of a witness has been impeached in any of the ways permitted by the statute.

PROBABLE CAUSE—INTENTIONAL SHOOTING.—An intentional shooting of one person by another, which results in death, is sufficient in law to constitute probable cause for the arrest of the person who did the shooting, although a jury may find from the evidence that the shooting was in self-defense.

IDEM.—An intentional killing with a deadly weapon is *prima facie* evidence of probable cause for arrest and presentation before the grand jury.

MALICIOUS PROSECUTION—WHAT MUST BE SHOWN IN ACTION FOR.—To sustain an action for malicious prosecution in criminal cases, it must be shown both that the prosecution was malicious and that it was without probable cause.

APPEAL from Polk County.

This was an action in the Circuit Court for Polk County against A. H. Whitley in his lifetime for malicious prosecution.

The complaint charges that Whitley, maliciously intending to injure Glaze in his good name, without probable cause, charged him, in conjunction with one Frank McCann, with having purposely committed an assault with intent to kill one William Whitley by shooting him, and with maliciously and without probable cause procuring the said plaintiff to be arrested upon said charge.

Defendant answered the complaint, denying that he procured the arrest of said Glaze maliciously or without probable cause, and setting up as new matter that he did purposely shoot said William Whitley, from which shot Whitley died soon after. The answer also alleges that before making complaint to the justice he, defendant, counselled with an attorney to whom he stated fully all the circumstances of the shooting, and that he was advised by said attorney that there was probable cause for the arrrest of said Glaze, and that the arrest was procured upon said advice.

The replication admits the shooting and killing of William Whitley, but claims that it was done in self-defense, and denies that the arrest was procured on the advice of counsel.

The plaintiff recovered a judgment in the Circuit Court for eight hundred and sixty-six dollars and costs from which judgment an appeal has been taken to this Court.

P. C. Sullivan and E. C. Bronaugh, for Appellant.

J. J. Daley, L. Vinyard and John Kelsay, for Respondent.

By the Court, PRIM, J.:

At the trial of this action it appeared in evidence that the criminal prosecution against plaintiff was dismissed without any examination of the evidence before the examining magistrate, on the motion of J. A. Applegate, an attorney employed by A. H. Whitley for the prosecution. This motion was founded upon a statement made by said attorney, to the effect that, having diligently inquired into the facts concerning the killing of William Whitley, and a coroner's jury having investigated the matter, and having found that said killing was justifiable, he was satisfied the charge could not be sustained.

Upon this point the Circuit Court instructed the jury that "the discharge of the plaintiff, by the examining magistrate, is *prima facie* evidence of a want of probable cause sufficient to throw upon the defendant the *onus* of proving the contrary." This instruction, it is claimed by counsel for appellant, was erroneous. On looking into the authorities upon this question, we find they are very conflicting, and the court being divided in opinion upon the point, we decline to pass upon that question at present, since it is unnecessary to do so in order to decide the case, in the view we have taken of it.

Counsel for defendant then asked the court to instruct the jury that "if they believe, from the evidence, that defendant fairly stated all the facts and circumstances of the shooting of William Whitley by the plaintiff, to his counsel, J. A. Applegate, and that said counsel advised the serving out of said warrant, then said facts constitute, in law, probable cause for plaintiff's arrest."

This instruction was refused, and such refusal is assigned here, by appellant, as error. Although this matter appears to have been put in issue by the pleadings, it was not error to refuse the instruction, for the reason that the bill of ex-

ceptions fails to disclose any evidence tending to prove the facts pertinent to that issue, and if there was no evidence on this point, the instruction was not pertinent, and was properly refused.

Plaintiff, having been called as a witness in his own behalf, undertook to give a very full account of the row between himself and the Whitleys, and particularly of the circumstances in relation to the killing of William Whitley; and in cross-examination, having been asked if he had not, at certain other times and places, and in the presence of certain parties, made statements inconsistent with his present testimony, he denied having made statements to which his attention was particularly called. Several witnesses were afterwards sworn in behalf of defendant, who testified to statements made by the plaintiff at other times inconsistent with his testimony before the court. Plaintiff was then allowed to rebut, by swearing witnesses as to his character for truth and veracity, which testimony the defendant claims was improperly admitted, for the reason that plaintiff's character for truth and veracity was not involved in a suit for malicious prosecution. On the other side, it is insisted that plaintiff, being a witness as well as a party, and other witnesses having sworn to statements made by him at other times, inconsistent with his testimony in court, it was in some sort an impeachment of his general character for truth and veracity. In the latter view we concur. It is the proper one to be adopted under these circumstances. (1 Greenleaf on Ev., § 469.)

Section 830 of the Civil Code provides that "a witness may be impeached by a party against whom he was called, by contradictory evidence, or by evidence that his character for general truth is bad," etc. Section 831 provides that "a witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony." Section 832 provides that "evidence of the good character of a witness is not admissible in every action, suit or proceeding until the character of such witness has been impeached."

From this we infer that evidence of good character is ad-

missible whenever the character of a witness has been impeached in any of the ways provided for in the sections just above cited.

The defendant's counsel asked the court to instruct the jury that "if they believe, from the evidence, that about the 24th day of August, 1872, the plaintiff, Glaze, intentionally shot William Whitley, from the effects of which he died, and that the defendant procured the arrest of said plaintiff for said shooting, then said facts are sufficient in law to constitute probable cause for his arrest, although the jury may believe, from the evidence, that the shooting was done in self-defense."

Defendant also asked the following instruction: "In a prosecution for a homicide in a row by a person armed with a deadly weapon, the proof by the prosecution that defendant, in such prosecution, actually killed deceased, is *prima facie* evidence of probable cause for the prosecution."

Both of these instructions were refused, and we are of the opinion that both of them should have been given.

To sustain an action for malicious prosecution in criminal cases, it must be shown that the prosecution was malicious and without probable cause; both must concur. If probable cause exists and the prosecution be malicious and unfounded, the malice of the prosecutor weighs nothing—the action cannot be sustained. (2 Greenleaf on Ev. 453.)

The main question in this case is whether there was probable cause or not, and the question of probable cause is composed of both law and fact, it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause. (2 Greenleaf, § 454.)

If the plaintiff intentionally killed Whitley with a deadly weapon, such killing was *prima facie* evidence of a criminal killing and probable cause for the arrest, notwithstanding an investigation of the facts might prove it to be justifiable homicide.

In *Dietz v. Langfitt* (63 Pa. State Reports, 234), Chief Justice Thompson, in delivering the opinion of the court, said: "I presume it is the first time in the history of judi-

cial proceeding that, in a prosecution for homicide unmistakably committed, begun before it could be known whether it was willful, negligent or accidental, the prosecution was ever punished for putting the law in motion to ascertain whether there was guilt in it or not. As all homicides are presumably unlawful, the fact of itself is probable cause for proceeding against the perpetrator." He further said: "It is the duty of every citizen to procure a warrant where there is good reason to believe that a high crime has been committed."

These views sufficiently indicate that the judgment below should be reversed and the cause be remanded back for a new trial, and it is so ordered.

D. R. LEWIS et al., Appellants, v. D. B. LEWIS et al. Respondents.

PLEADING—SUIT TO REFORM A DEED.—In a suit to correct or reform a deed or written contract on the ground of mistake, the complaint should show distinctly what was the original agreement and understanding of the parties, and should point out with clearness and precision wherein there was a mistake, and should also show that the mistake did not arise from the gross negligence of the plaintiff.

IDEM.—In such a case the complaint should also state some circumstances relating to the nature or situation of the property, which show that an unfair advantage has been gained by the defendant through the mistake, and that it is against good conscience to allow the mistake to stand.

APPEAL from Polk County.

The facts are stated in the opinion of the Court.

R. S. Strahan and John Kelsay, for Appellants.

R. P. Boise and P. C. Sullivan, for Respondents.

By the Court, SHATTUCK, J.:

This suit was instituted in the court below by the appellants against the respondents, to correct an alleged mistake in a deed, and to enjoin an action at law for the recovery of possession of a portion of the land described in the deed.

The complaint alleges in substance that the plaintiffs, being owners of a certain donation land claim in Polk County (a description of which is set forth in the complaint), some time in the fall of 1855 entered into a verbal agreement with one Ira A. Hooker, whereby Hooker agreed to purchase a piece of land of the plaintiffs, situate in the southwest corner of their said donation claim; that the parties mutually agreed that one Hutchinson should survey the land included within said agreement, and ascertain the quantity of the same, and furnish a description thereof to be used in the deed that was to be made therefor; and that the said Hooker should pay therefor at the rate of six dollars per acre; that the said surveyor furnished a description, which was inserted in the deed, and is as follows: "Beginning at the southwest corner of David R. Lewis's land claim, as described in the field notes and plats of the United States in § 19; thence north one degree twenty-four minutes east, 59 chains distant; thence east 40 chains distant; thence south one degree twenty-four minutes west, 43.25 chains distant; thence south sixty-eight degrees twenty-five minutes west, 43 chains, to the place of beginning, containing 204.32 acres. The above tract is bounded on the west by the west line of David R. Lewis's claim, and on the southeast by the southwest line of David R. Lewis's claim."

That said Hooker paid plaintiffs, for said land, six dollars per acre, amounting to $1225.92; and they executed and delivered to him a deed, a copy of which is appended to the complaint, containing the above description, and dated December 20, 1855; that Hooker died in 1857, and the defendant, Delia B. Lewis, is his devisee, and succeeded to whatever rights Hooker had under the deed aforesaid; that the description contained in said deed was furnished by said Hutchinson, by accident, surprise and mistake, or through fraud, "the plaintiffs do not know which," and was false, and was not according to the agreement, intention or design of the plaintiff, or said Hooker.

That a true description of the real property agreed to be sold by plaintiffs to said Hooker, and included in the agreement aforesaid, and none other, is as follows: "Beginning

at the southwest corner of David R. Lewis's land claim, as described in the field notes and plats of the United States in § 19; thence north one degree twenty-four minutes east, 54.50 chains; thence east 40 chains; thence south one degree twenty-four minutes west, 39.70 chains; thence south sixty-eight degrees twenty-five minutes west, 43 chains to the place of beginning, containing 186.32 acres."

It is also alleged that the description contained in the deed embraces eighteen acres more land than the last above mentioned description, which plaintiffs did not intend to sell, nor said Hooker to buy; that the plaintiffs remained, and have been continually since the date of the deed, in the exclusive occupation and possession of said eighteen acres; and that said Hooker, during his life, and his devisee, the defendant Delia, recognized plaintiff's right and title until some time in 1870; and plaintiffs have, with the knowledge of the defendants, made permanent and valuable improvements thereon of the value of six hundred dollars.

The plaintiffs then aver the commencement, by defendant Delia, of an action at law against these plaintiffs to recover the possession of the said eighteen acres; prays an injunction against said action, and to have the deed reformed and corrected so as to convey only 186.37 acres, conformably to the alleged agreement and intention of the parties; averring also a tender by plaintiffs to the defendant, before suit brought, of an amount of money equal to the value of the eighteen acres, at six dollars an acre (the original purchase-price), without interest, and a willingness to submit to any terms or conditions of relief imposed by the court.

The defendants demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, or to entitle the plaintiffs to any relief; and on the special ground, that there was no equity on behalf of plaintiffs shown, in that there was no sufficient tender pleaded.

The court below sustained the demurrer and dismissed the complaint, and the plaintiffs bring this appeal.

It is to be observed that the complaint in this suit does not state directly and clearly what was the original verbal

agreement between the parties. It is said to be for a piece of land, the description and quantity of which was to be ascertained by a survey. But what data for the survey were agreed upon, if any, do not appear. We are not informed by the complaint whether the surveyor was to bound his survey by any known visible objects that were intended to limit the extent of the parcel to be conveyed, nor is it alleged that he was instructed to make the west line any particular number of chains long; nor that he was told to include a certain number of acres and no more. There is no allegation showing wherein the surveyor violated any specific instructions given him by the parties relative to the description, boundaries or quantity of the land which he was to survey. All these are matters that can only be *inferred* from the allegations of the complaint, and any inference as to any particular one of them is beset with doubt. It must also be noted that the conduct of the surveyor is characterized by the complaint in the alternative as "accident, mistake and surprise or fraud, the plaintiffs do not know which."

It is further to be observed that the description given in the deed differs from the one claimed by plaintiffs only in the length of the lines. In both descriptions the starting point is the same, and the west and southeast lines of the tracts are upon the same course, and as far as both reach are identical. In the deed the west line is stated to be 59 chains long; in the description contended for, that line is stated to be 54.50 chains, a difference of 4.50 chains.

It is also to be particularly noticed that the complaint shows upon its face that the plaintiffs received pay according to the terms of the agreement (six dollars an acre) for all the land described in the deed, including the eighteen acres now in controversy, and that the courses and distances stated in the deed include precisely the amount of land paid for. The case, as presented, is simply this: The plaintiffs sold for a price agreed upon and received by them, and conveyed, with covenants of warranty, 204.32 acres of land, but by some means remaining in possession, or being found, fifteen years after the conveyance, in possession of eighteen acres

of the tract conveyed, and being required to surrender the possession to the vendee they come into a court of equity and ask, upon such general and alternative allegations as constitute this complaint, to be allowed to keep these eighteen acres and to have their deed altered by the court, so as to relieve them of their covenants of warranty, having offered before suit brought simply to return to the vendee the original purchase price received fifteen years ago without interest.

If this Court shall hold that upon this complaint the plaintiffs are entitled to relief, a precedent will be furnished for attacking titles, deemed most secure, upon the most frivolous pretext, provided the grantors shall deem it to their advantage to rescind their bargains and are prepared to allege, in general terms, and procure proof of mistake, in description and quantity of land sold.

We do not, after careful examination, think that the law of this case is as the plaintiffs claim it to be, nor do we think that the authorities cited by the counsel for the plaintiffs sustain their positions concerning this complaint.

It is not every mistake in a conveyance that can call for the interposition of a court of equity. (Willard's Eq. 71.)

To entitle the party to relief the fact must be *material*, and also such that he could not with reasonable diligence have obtained knowledge of it. (Id. 70.)

In *Marvin v. Bennet* (26 Wend. 169), a case where a purchaser, who had received a deed for land and given back a mortgage to secure a part of the purchase-money, and on finding a deficiency in the quantity of land described, sought relief in equity, on the ground of mistake, against payment of the purchase-money for the amount of land deficient, the court say, that relief will not be granted if with ordinary vigilance the purchaser, before the completion of the contract, by *viewing* the premises or properly settling the description, might have guarded against the alleged mistake, and relief was denied.

The case here differs from *Marvin v. Bennet*, in respect to the party seeking relief. In that case it was the purchaser who sued; in this it is the vendor: but the relief sought is

substantially the same in both, and the principle is as applicable to the one as to the other.

Again, the class of cases wherein courts of equity interfere to correct mistakes are said (1 Story Eq. Jur. § 38) to be those where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued and the parties may still be placed in *statu quo*. But even in cases like these it is said that equity will interfere *in its discretion* in order to prevent intolerable injustice. The prevention of intolerable injustice appears to be the cause which, according to this authority, impels the court to grant relief.

The case now before us does not present a state of facts bringing it within any of the classes referred to by these authorities, nor is it one parallel to those cited by appellants' counsel. There was no injustice suffered by plaintiffs in having made a deed for two hundred and four acres of land, if they received the agreed price for that quantity, which the complaint shows.

This is not a case like *Gillespie v. Moon* (2 Johns. Ch. 585), where the agreement, clearly alleged and proven, was to sell and purchase only two hundred acres of land, but the deed was, by mistake, made to describe by metes and bounds a tract containing in fact two hundred and fifty acres. In that case the vendee had paid only according to his agreement, for two hundred acres, and was attempting unconscionably to hold fifty acres for which he had never paid anything, and which he had acquired through a mere mistake. The case presented other circumstances that rendered the existence of the deed, as made, a peculiar hardship to the vendor.

The case before us is not like the case of *Lindsay v. Davenport* (18 Ill. 380), where the deed described the *"northwest quarter"* of a certain section, while the land actually sold and paid for was the *"southeast quarter,"*—a totally

different and disconnected parcel, containing, as the evidence showed, less land, and sold for less than half the real value of the parcel erroneously described in the deed.

The allegations of the complaint in this case do not present a case like *Johnson v. Taber* (6 Selden, 319), where it appeared that the boundaries of the land sold were pointed out on the ground by the vendor to the vendee before the deed was made, and it appeared that the vendee understood and was informed by the vendor at the time that a certain tree and a fence shown him constituted the boundary, but by a mistake of courses and distances, recited in the deed, the boundary, as defined therein, was made to go beyond or across the fence and take in more land or other land than was pointed out to the vendee. In that case the vendor was relieved from his covenant of warranty, as to the land outside of the designated and understood boundaries, and the mistake in the deed substantially corrected.

Nor does this case present any such equities as *Brown v. Lamphear* (35 Vermont, 252), wherein it was alleged that there was an express agreement before the conveyance was made, that a certain spring and aqueduct, within the tract sold, on which the vendor depended for water to supply his dwelling-house, and other houses which he had contracted to supply with water, should be reserved and excepted, but by a mistake of the scrivener the reservation was not put into the deed, and the complainant signed it without reading it and without noticing the omission, having full confidence in the scrivener and supposing that the deed conformed to the agreement and understanding of the parties.

In that case the vendee attempted to hold property for which he had never paid anything and which he had not purchased. In addition to the great damage and inconvenience to which the vendor would be subjected, by having the spring taken from him, it appeared that the aqueduct and improvements, at the spring, had alone cost more than the entire purchase-price paid by the vendee for the land. The advantage sought by the vendee, through the mistake

in the deed, was unconscionable, and wrought a great injustice.

But in the case at bar there is no allegation that the boundaries were pointed out upon the ground before the survey was made; nor that the parties viewed the premises and gave instructions to the surveyor, which he violated in making his survey and description to be inserted in the deed. It does not appear that the eighteen acres in dispute are relatively of any greater value than the rest of the two hundred and four acres, or that the eighteen-acre tract contains any spring, or quarry, or mine, or timber, or watercourse, or any other thing rendering it of peculiar value to plaintiffs, and making it unconscionable for defendants—having paid for it according to agreement, as shown by the complaint—to keep it.

The only allegation raising any equity in favor of the plaintiffs is that concerning improvements, but that is not sufficient, because it does not appear what the improvements are, nor when they were made. Although it is alleged that they are permanent, yet they may have been only such as were necessary incidents to the use and occupation of the premises during the fifteen years that the plaintiffs aver they have been in possession, and only a fair offset to the value of such use and occupation. The improvements may have been made, so far as anything in the complaint shows to the contrary, since the plaintiffs knew of this alleged mistake, and since demand for possession was made.

Upon all the authorities cited upon the argument of this cause, the Court hold that in cases of this kind the complaint should distinctly show what was the original agreement and understanding of the parties, and should point out with clearness and precision wherein there was a mistake, and should show that it did not arise from gross negligence of the plaintiff. There should also appear some circumstances relating to the nature or situation of the property which shows an unfair advantage to have been gained by the defendant, and that it is unjust to allow the alleged mistake to stand.

The complaint in this cause, being defective in three particulars, is deemed insufficient.

The other point raised by the demurrer concerning the tender is not considered by the Court, the points referred to in this opinion being considered decisive of the case.

The decree of the court below is affirmed with costs.

BEN HOLLADAY, Appellant, v. A. W. PATTERSON, Respondent.

PUBLIC POLICY.—A CONTRACT TO DONATE MONEY TO SECURE THE LOCATION OF A RAILROAD DEPOT IS VOID.—H., being a Director and President of the Oregon and California Railroad Co., and the owner of a controlling interest in the stock of said company, agreed with P., that in consideration of a certain sum of money he would cause the line of said road to be located on a certain route, and a depot to be built at a certain place, instead of adopting another route then surveyed, which was shorter, and over which said road could be constructed at less expense: *Held*, that such a contract is contrary to public policy.

RAILROAD CORPORATION—PUBLIC INTEREST IN.—A railroad company is a *quasi* public corporation, and the public have an interest in the location of their lines of road and depots.

IDEM—WHAT AGREEMENTS WILL NOT BE ENFORCED.—An agreement which tends to lead persons, charged with the performance of trusts or duties for the benefit of others, to violate or betray them, will not be enforced.

APPEAL from Lane County.

The facts are stated in the opinion of the Court.

Dolph, Bronaugh, Dolph & Simon, for Appellant.

Thompson & Fitch, for Respondent.

By the Court, BURNETT, J.:

This action was brought upon the following agreement or subscription paper, signed by the respondent herein:

"In consideration that Ben Holladay will cause the line of the Oregon and California Railroad to be located across the Willamette River within three miles of Harrisburg, and constructed thereon on the west side of such river to some point within the corporate limits of Eugene City, and will

establish a depot within the corporate limits of said Eugene City; and, in consideration of one dollar to each of the undersigned, paid by Ben Holladay, the receipt whereof we severally hereby acknowlege, we, the undersigned, do severally hereby promise and agree to pay to the said Ben Holladay, within sixty days from the date that such railroad is completed to Eugene City, so that a locomotive can run over the same to said city, the several sums, in United States gold coin, which we have respectively set opposite our names hereto.

"A. W. Patterson.....$1000 (one thousand).
"Eugene City, Oregon, April 17, 1871."

Said subscription paper was signed by a number of other persons, with different amounts set opposite their names. It appears from the complaint that at the time this contract was made, to wit, on the 17th day of April, 1871, the plaintiff was the owner and holder of a controlling interest in the capital stock of the Oregon and California Railroad Company, which company then was a corporation duly organized under the laws of the State of Oregon for the purpose of constructing and equipping a railroad from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys to the southern boundary-line of the State of Oregon, and said company was then engaged in the construction of such railroad, which was at said date completed to a point some twelve miles north of the corporate limits of Harrisburg in Linn County, and that the plaintiff was at that date also one of the directors of said company, and the president of the board of directors thereof, and as such president, director and stockholder had the power to cause said railroad to be located and constructed on such line or route, as he, the plaintiff, might desire or determine, and was duly authorized to control such location by a resolution of said board of directors before that time duly adopted. That from said point twelve miles north of Harrisburg, southerly, two or more routes had been surveyed over which said railroad could be con-

structed—the one running some miles distant from Harrisburg and to the east thereof, and some three miles east of Eugene City and across the Willamette River at or near Springfield; the other running through the corporate limits of Harrisburg, and crossing the Willamette River to the west side thereof, at a point not further than three miles south of Harrisburg, and also running through the corporate limits of said Eugene City—the route running to the east of Harrisburg, and crossing the Willamette River at Springfield, being the shortest, and the one over which said road could be constructed at the least expense. That to induce the plaintiff Ben Holladay to cause said railroad to be located and constructed on the Eugene City route, and to locate a depot within the corporate limits of said Eugene City, the defendant made the agreement upon which this action is brought.

It is further alleged that the plaintiff caused said road to be located on the route last mentioned to Eugene City, and caused a depot to be established within the corporate limits of said Eugene City, according to said contract, and a claim for judgment for amount subscribed by defendant.

To this complaint there was a general demurrer interposed in the court below, which was sustained, and the case comes before this Court upon the points raised by the demurrer. The principal question presented is as to whether or not the contract sued on in this case is illegal. It is not disputed but that contracts against public policy are illegal and void, but the appellant insists that the contract in question is not of that character.

"Public policy" is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (§ 546), says "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule, however, may be safely laid down, that wherever any contract conflicts with the morals of the times, and contravenes any established interest of society, it is void as being against public policy."

In illustration of this rule, he says (§ 576): "Where,

therefore, a person occupying a public office agrees for a reward to exercise his official influence in questions affecting both public and private rights, so as to bring about the private advantage of persons interested, the contract would be void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiased exercise of his judgment in relation to a question of trust and confidence reposed in him is against public policy and good morals."

Railroad companies are defined to be *quasi* public corporations, and the directors act in a double capacity, to wit, as the agents for the company, and also as trustees for the public, clothed with an important public trust. 1 Redfield on Railways, 577, § 140, says: "The general duty of railway directors is an important and a public trust, and whether undertaken for a compensation or gratuitously, imposes a duty of faithfulness, diligence and truthfulness in discharge of its functions in proportion to its difficulty and responsibility."

It is, among other things, urged that this contract is not against public policy, because contrary to public interest, as the deflection of the line of the road from the more direct route of the original survey would best subserve the public interest, and promote the welfare of the community through which the road passes. The question of the validity of the contract does not, however, depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public.

Upon this point the case of *Fuller v. Dame* (18 Pick. 472) is pertinent. In that case it appeared that Fuller was a stockholder in the Boston and Worcester Railroad Corporation, and for a consideration, he agreed to use his influence in procuring that corporation to locate its depot at a particular place in Boston, it being expressed in the agreement that Fuller was of the opinion that the road ought, from a view to the public good, and the good of the

stockholders, to locate its depot at that place. The contract was held to be void, on the ground that the road was established for the public accommodation, although a private corporation, and that the public had an interest in the question of the location of the depot; and that, though the contract was not made to induce a party to do an unlawful act, it put him under an influence to do that which might injuriously affect the interests of the public. The court says: "Nor is it any satisfactory answer to say that when the agreement was entered into he had come to the opinion that the location in question was the best for the interests of the public and for the interests of the corporation. That opinion might be changed by new views and new offers, and besides, the terms upon which this boon was to be obtained was still an open question. But, upon all these questions, the influence of the promise of separate and distinct advantage deprived him of the power of exercising a free, disinterested and unbiased judgment."

It is claimed, by appellant, that the contract under consideration should be viewed as though made by the respondent directly with the railroad company, and we will examine the question in that light.

The directors of the company were clothed by law with the power of locating their line of road and depots. What is the nature of that trust? As has been heretofore remarked, they were acting for the company, but they were also acting for the public, and if the public have an interest in the route selected for a railroad; being the nearest and best, and the depots located so as to best answer the convenience of the traveling public, would the contract entered into by the appellant, Ben Holladay, with the respondent, by which they were to receive money to adopt the route by Eugene City, instead of the route by Springfield, which was a shorter route, and over which the road could be built at less expense, have a tendency to make them disregard either the interests of the company or of the public? If so, it cannot be enforced, for "an agreement which is designed, or which in its nature and effect tends to lead persons who are charged with the performance of trusts or duties for the

benefit of others, to violate or betray them, is contrary to public policy." That the public have an interest in the location of the line of all railroads, as well as their depots, I think cannot be disputed.

The Supreme Court of the State of Illinois, in the case of *John L. Marsh v. The Fairbank, Pontiac and Northwestern Railway Company,* in discussing this question, uses the following language: "Railroad companies are incorporated by authority of law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise, on their behalf, of the right of eminent domain in the taking of private property for the purpose of their construction." And in the case of *Walther v. Warner* (25 Mo. 281), it is said, "that the building of railroads by private corporations, under the authority of the Legislature, for the public accommodation, was a public use for which private property might be lawfully taken."

In the case of the *Pacific R. R. Co. v. Seely* (45 Mo. 212), the court, in speaking of railroads, uses the following language: "In all these enterprises there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain." (And see further, 3 Paige Ch. 45; 18 Wend. 1.)

It is urged by counsel for the appellant that there are adjudicated laws which sustain contracts similar to the one upon which this action is brought, and the case of *McClure v. The Gulf Railroad Company* (9 Kansas, 373), is cited and relied on for that position; but an examination of that authority will show that, while the decision was based mainly upon a statute peculiar to that State, the question that is presented here was not passed upon in that case. Plaintiff in error there claimed that the contract to induce the railroad company to adopt the Baxter Springs route instead of the Tar Creek route, the latter being the most direct route to Preston, Texas, the objective-point of said road, was against public policy; but the court laid out of view entirely that question, as will be seen by the language of the opinion, which is as follows: "It is said that the objective point of

the road was, and is, Preston, in the State of Texas; that the running of the road to Baxter Springs was simply a choice of routes to Preston, Texas. But as Preston is beyond the boundaries of Kansas, and as no railroad company can be chartered in Kansas with power to build a railroad beyond its boundaries, the location of Preston, or the choice of routes to it, can have no bearing in this case." In the case of *Cumberland Valley Railroad Company v. Beale* (2 Am. R. R. Cases, 187), it is said "that the right to determine a question of location being a corporate one, is paramount even to public convenience." If it is meant by this statement that the directors of a railroad company, or a majority of them, can sell out the location of their line of road or depots, and adopt that location where the most money is offered, without regard to the interests of the public, such a view is not sustained by any other decision, nor do we believe it is correct. It was argued in the case last above cited, that unless the railroad company was allowed to enforce conditional donations made toward building a bridge, that the company might not have been able to build the bridge at all. Whatever force there might have been in such an argument in that case, it has none in this, for it appears that the railroad company was proceeding in the construction of their road when they were induced by the contract set out in the complaint to change their line from a more direct route and cross the Willamette River to the west side, and thence to Eugene City; but we conceive such reasoning to be entirely unsound. While it is right and proper for railroad companies to avail themselves of any voluntary aid from private individuals that they can obtain to assist in building their roads or bridges, it is not to be supposed that they rely on such uncertain aid. When a railroad company organizes for the purpose of entering upon the enterprise of building a railroad, their capital stock is fixed at an amount sufficient to cover the cost of building the road, and it is from the stock taken in good faith and honestly paid up that the means are mainly to be derived to build such road; and that is the source pointed out by law from which such funds are to be derived, which, in addition to the munificent grants of land made to this company by Congress,

ought certainly to enable them to build their road without speculating on the necessities or avarice of the communities through which they pass at the expense of the public interests.

There has been some considerable discussion in some of the authorities cited as to whether conditional subscriptions for stock could be upheld, and authorities are somewhat conflicting. In New York it has been held that conditional subscriptions of stock in turnpike and plank roads were invalid on the ground that to allow subscriptions to the stock of such a corporation to be received, conditioned that a particular location of the proposed road should be adopted, would be contrary to public policy, as by such means improper influences might be brought to bear upon the question of location. (15 N. Y. 585.) But whatever view might be taken of conditional subscriptions to stock, they stand on an entirely different footing from the case at bar.

It may be conceded that ordinarily the interests of the company, in locating their lines of road and depots, will be the interests of the public, and the location or choice of routes safely left with the directors; but this confidence, however, could only be safely so reposed under the belief that all the directors and members of the company would exercise their best and their unbiased judment upon the question of such fitness without being influenced by distinct and extraneous circumstances. (*Fuller v. Dame,* 18 Pick. 472.)

If one neighborhood, town or individual may make valid conditional promises to pay large sums of money to a board of directors of a railroad company to so locate their road or depots as to enhance the value of the property of the promisors, every other town or individual may make like bids, and there is great danger of the public interests being lost sight of entirely in a mercenary conflict of local and private interests.

Judgment affirmed.

PRIM and MCARTHUR, JJ., concurred.

BONHAM, J., and UPTON, C. J., dissented.

H. C. DRAY, Assignee of WM. McINTYRE, Respondent, v. GEORGE MAYER and WM. H. MUSGROVE, Appellants.

ASSIGNMENT.—Right of action on the undertaking required by section 10 of Justices' Code does not pass to an assignee by the assignment of the judgment in the cause.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

H. T. Bingham, for Appellants.

Charles Gardiner, for Respondent.

By the Court, McARTHUR, J.:

This is an appeal from a judgment rendered in the Circuit Court for the County of Multnomah. Previous to the commencement thereof, Mayer brought an action in a Justice's Court in said county against one, McIntyre, who, in due form, made a motion under § 10 of Justices' Code, that the plaintiff therein, Mayer, give security for costs. This motion was allowed and the required undertaking was given, with one Musgrove as surety. The trial in the Justice's Court resulted in a judgment in favor of Mayer. McIntyre appealed to the Circuit Court, and the trial therein resulted in favor of McIntyre, who recovered a judgment against Mayer for his costs and disbursements in both the Circuit and the Justice's Court. This judgment was assigned by McIntyre to Dray, who brings this present action upon the undertaking. There was no assignment of the undertaking. The simple question presented to this Court for consideration is, whether, when the judgment of the Circuit Court was assigned, it carried with it as a necessary incident the undertaking given in the action in the Justice's Court. Under our view of the law this undertaking was a separate and independent contract between McIntyre, on one side, and Mayer, as principal, and Musgrove, as surety, on the other. We are of the opinion that the assignment of the

judgment could not carry with it the undertaking so as to affect the rights of Musgrove. That is to say, in this action Dray cannot recover upon the undertaking against Musgrove, he (M.) not being a party to any of the suits or actions, being, as just stated, simply a surety for Mayer in the undertaking in the original action in the Justice's Court. This view of the law is sustained by the case of *Moses v. Thorne* (6 Cal. 87). This action having been brought by Dray upon the unassigned undertaking, is not brought in the name of the real party in interest in the undertaking—McIntyre being such real party in interest.

Judgment reversed.

EVELINE SMITH, Appellant, v. DAVID H. SMITH, Respondent.

DIVORCE—PREPONDERANCE OF EVIDENCE SUFFICIENT.—In a suit for divorce, brought upon grounds that involve a criminal charge against the defendant, it is not necessary to prove the allegations constituting such charge beyond a reasonable doubt. It is sufficient if they be established by a preponderance of evidence.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Thayer & Williams, for Appellant.

Mallory & Shaw and P. C. Sullivan, for Respondent.

By the Court, SHATTUCK, J.:

This is a suit for divorce and alimony.

The complainant (appellant in this Court) charges the defendant with adultery and with cruel and inhuman treatment, rendering her life burdensome.

One act of adultery charged appears upon the face of the complaint to have been condoned, and the chief grounds insisted on for the divorce are the alleged cruel and inhuman treatment, on the part of the defendant, in associating with lewd women, and having become infected with the venereal

disease, recklessly communicating it to complainant, whereby her health was impaired and her life endangered. The answer denies the material allegations of the complaint. It is conceded that the facts alleged, if proven, constitute cruel and inhuman treatment.

The case was tried in the court below upon oral testimony, before the judge, and the divorce denied. It comes into this Court to be tried upon the transcript and agreed statement of the evidence.

The evidence is contradictory. It is claimed on the one side that the testimony shows that both parties were diseased; on the other hand it is claimed that there is no sufficient evidence that the defendant was diseased at all, and that the disease of the complainant may have been other than she supposed.

The case, as presented, involves a subject upon which it is held, in a leading case, that the facts are not of a technical nature; they are determinable upon common grounds of reason—in other words, that the rational and legal interpretation must be the same. (*Loveden v. Loveden,* 1 Bishop, Mar. and Div., § 614.)

And the same author (§ 633) says, concerning cases of this kind, that "consulting reason, rather than specific authority, evidence should be received of the entire course of life and the associations and temptations of the parties severally," and that the divorce should be granted only when, upon such a view of the case, the court was satisfied. The rule suggested amounts simply to this, that each case is to be tried and determined upon its own peculiar circumstances and upon a reasonable interpretation of the evidence.

Some discussion was had upon the argument concerning the rule by which the sufficiency of the proof should be determined. The evidence being contradictory it is proper to decide according to what rule the finding shall be. Shall the court decide according to the preponderance of evidence, or must the charge be established beyond a reasonable doubt?

The charges made in the complaint involve a crime, and a

decree for the complainant virtually decides that the defendant is guilty of a crime. This view affords some grounds for holding that the charge of adultery should be established beyond reasonable doubt. But we are of opinion that the statute has furnished the rule for our guidance.

It is provided (Civ. Code, Subd. 5, § 835) "that in civil cases the affirmative of the issue shall be proven, and when the evidence is contradictory the finding shall be according to the preponderance of evidence; that in criminal cases guilt shall be established beyond reasonable doubt."

Adopting these rules, we hold that this is a civil case within the meaning of the statute, and that notwithstanding the alleged grounds of relief involve a charge of crime against the respondent; yet it is to be decided upon a preponderance of evidence, upon a rational view of its own peculiar circumstances, and upon a rational rather than technical interpretation of the facts presented.

It is not necessary to enter into a review and analysis of the testimony. The Court are agreed that upon a preponderance of evidence the allegations of the complaint are proven, and that the complainant is entitled to a divorce.

The decree of the court below will be reversed and a decree entered allowing the divorce, and for costs, and remanding the case to the court below for further proceedings upon the allegations of the complaint relative to the property of the parties.

DECEMBER TERM, 1874.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

DECEMBER TERM, 1874.

J. N. DOLPH, Respondent, v. HARLOW BARNEY, Appellant.

DONATION ACT—A GRANT IN PRAESENTI.—The Donation Act is a grant *in præsenti* of an estate in fee, subject to be defeated by non-compliance with the conditions subsequent therein expressed.

IDEM.—Upon compliance with the requirements of said act, title vests in virtue of the act itself.

PATENT—ISSUING OF A MINISTERIAL ACT.—The issuing of patent under the act is a ministerial act, and the patent is mere evidence of title in the class of cases to which this belongs.

TITLE MAY BE CONVEYED BEFORE PATENT ISSUES.—Where W. and wife resided upon and cultivated a land-claim under the Donation Act, and made proof of compliance with the provisions thereof, they have had, since the amendment of 1854, full power of alienation by deed before the issuance of patent.

TITLE OF MARRIED WOMAN, WHERE CONVEYANCE IS MADE AFTER COMPLIANCE WITH THE STATUTE, AND WHERE SUCH MARRIED WOMAN DIES BEFORE PATENT ISSUES, PASSES.—W. and wife, after full compliance and proof, and since the passage of said amendment, having alienated by deed, the wife having died before issuance of patent, the patent when issued being to W. and wife and their heirs: *Held*, that the sale was valid and effectual to pass the title, and bound the title which would otherwise have come to her heirs by reason of her death.

CONVEYANCE—QUITCLAIM.—Under the laws of Oregon, a deed of quitclaim and release is sufficient to pass all the estate which can be conveyed by a deed of bargain and sale.

CERTIFICATE OF AN OFFICER—PAROL EVIDENCE NOT ADMISSIBLE TO IMPEACH, WHEN.—Where the certificate of an officer to acknowledgment of a deed appears on its face to be in substantial compliance with the statute, parol evidence to impeach it is inadmissible, unless there are allegations in the pleadings to warrant it.

PRESUMPTION THAT AN OFFICER DOES HIS DUTY.—The law presumes that a person acting in a public office was regularly appointed to it, and also that official duty has been regularly performed.

JUDICIAL KNOWLEDGE.—The courts are charged with knowledge of the acts of the Legislative Assembly in virtue of which county superintendents of common schools proceed in the sale of school lands to private individuals.

PRESUMPTION IN FAVOR OF DEED OF SCHOOL SUPERINTENDENT.—The deed of such superintendent is to all intents and purposes a patent from the State, and if regular on its face, the *power* of the grantor need not be first shown in order to admit the deed. It will be presumed until the contrary is shown.

ERROR.—Error must be affirmatively shown by the record; it will not be presumed.

RECORD—WHEN OFFERED IN EVIDENCE, ERASURES MUST BE EXPLAINED, IN WHAT CASES.—Where a record which is offered in evidence is interlined, erased and mutilated, the interlineations, erasures and mutilations should be fully and satisfactorily explained, especially where it is sought, by a record in such condition, to contradict a certified copy which appears to have been formally and regularly transcribed.

IDEM.—In order to overcome such certified copy by a record in which erasures, interlineations and mutilations appear, the offer should be to prove that the certified copy was not a true copy of the record at the time it was made.

AFTER-ACQUIRED ESTATE—CONVEYED BY COVENANT OF WARRANTY.—A deed containing a covenant of warranty operates to transmit any after-acquired estate of the grantor.

ERROR—DOES NOT RENDER JUDGMENT VOID, WHEN.—Error does not render a judgment void when attacked collaterally.

JUDGMENT—VOID ONLY FOR WANT OF JURISDICTION.—A judgment is only void when the court rendering it had not jurisdiction of the parties or the subject-matter of the controversy.

SALE—PROVISION REQUIRING PROPERTY SOLD IN SEPARATE PARCELS, DIRECTORY.—The provision of the Code, that when a sale is made of real property upon execution, and the real property consists of several known lots or parcels, they shall not be sold separately, is directory.

ORDER CONFIRMING SALE.—An order confirming a sale upon execution is a conclusive determination of the regularity of the proceedings

concerning the sale, as to all persons in any other action, suit or proceeding.

SHERIFF'S DEED—RECITALS IN.—Where the preceding and necessary steps have all been regularly taken, a sheriff's deed is evidence of title, and the recitals therein are *prima facie* evidence.

ESTOPPEL IN EJECTMENT.—In ejectment, where both parties derive their title from the same person, neither is at liberty to deny that such person had title.

CERTIFICATE OF PURCHASE AT TAX SALE—EVIDENCE OF EQUITABLE TITLE—PARTY CLAIMING UNDER, MUST FIRST SHOW, WHAT.—A certificate of purchase at a tax sale does not convey a legal title. It is, however, evidence of an equitable title. A party claiming any rights under a tax sale certificate must first show strict compliance with the statutes in all steps necessary to be taken previously to the execution of such certificate.

EVIDENCE—DECREE.—A decree which operates as a deed may be admitted as evidence in an action of ejectment.

TENANT IN COMMON MAY RECOVER COMMON PROPERTY.—A tenant in common of real estate may recover the entire common property in ejectment as against a stranger.

CROSS-BILL—CANNOT BE FILED, WHEN.—Where an answer sets up a full and complete legal defense to an action, a cross-bill in equity cannot be filed under § 377 of the Code.

APPEAL from Polk County.

This was an action of ejectment brought by respondent Dolph to recover possession of nine hundred and twelve acres of land, situated in Polk County, Oregon. The opinion of the court contains a digest of the pleadings. A cross-bill was filed in the court below, which, after setting forth various matters of inducement, alleged that a decree in a certain suit, wherein one Scovell was plaintiff and one Barney was defendant, and by which a certain deed hereinafter to be described was declared void, was procured through fraud and perjury. This cross-bill was stricken out on motion. The ruling of the court in striking out the cross-bill is assigned as error by appellant.

The following writings were offered by the respondent in the court below, and were received in evidence: Patent from the United States to John Waymire and wife Clarissa, to six hundred and forty acres of land, issued in 1873; deed from John Waymire and wife to Riggs, dated December 9, 1867, recorded December 27, 1867; certified copy of deed from John T. Outhouse, for two hundred and seventy-two

acres of land, the remainder of the nine hundred and twelve acres, as superintendent of common schools for Polk County, to said Riggs, dated January 17, 1861; deed from Riggs and wife to Haworth, dated February 21, 1866; deed from Haworth and wife to Scovell, dated July 26, 1867; deed from Scovell to Thayer, dated December 21, 1872; deed from Thayer and wife to Dolph, dated April 28, 1874; judgment-roll in the case of *Mallory et al. v. Scovell*, in the County Court of Marion County, dated July 7, 1873, during a regular term; execution in due form, dated August 5, 1873, and directed to the sheriff of Polk County, with the usual command; notice of sale, describing the premises levied on, and setting forth that they were to be sold on three executions: one in favor of S. W. Smith, another in favor of Samuel Parker, and another in favor of Mallory *et al.*, the judgments in both these last cases being assigned to S. W. Smith; return on said execution by the sheriff of Polk County, showing sale of the premises in controversy to S. W. Smith, on September 27, 1873; order of the County Court of Marion County, confirming said sale, entered in term time, February 13, 1874; deed of S. T. Burch, sheriff of Polk County, to J. H. Mitchell and J. N. Dolph, dated April 20, 1874, and reciting the execution, the sale to S. W. Smith and order of confirmation; also that said Mitchell and Dolph, being lien creditors of Scovell, did, in due form of law, redeem the premises from said sale.

The ruling of the court in admitting these writings, except in admitting the patent to Waymire, is in each instance assigned as error relied upon by the appellant on appeal.

A deed from Scovell to appellant Barney, dated February 15, 1870, and duly witnessed, acknowledged and recorded, was offered in evidence by appellant and received by the court.

The following writings were offered in evidence by the appellant, and were rejected by the court, which rulings are, in each instance, assigned as errors relied upon on appeal: Deed from John Waymire to Harlow Barney, the appellant, dated August 18, 1873; deed from Mary A. Waymire, heir at law of John and Clarissa Waymire, to Barney,

dated August 18, 1873; certificate of tax sale, in due form, by the sheriff of Polk County to S. W. Smith, dated February 24, 1874.

Respondent then offered in evidence a decree of the Supreme Court of Oregon, in a suit by Scovell against Barney, setting aside the deed of February 15, 1870, from Scovell to Barney. The evidence was admitted by the court, and this ruling is assigned as error by the appellant. The decree is as follows:

"It is adjudged and decreed that the said decree of the said Circuit Court, so appealed from, be and the same is hereby, in all things, reversed; that the deed executed by said appellant, Ezra Scovell, to the respondent, Harlow Barney, dated February 15, 1870, which purported to convey the following described premises, to wit (here follows description), was procured by fraud, and is fraudulent and void, and that the allegation of the complaint is true. And it is further ordered, adjudged and decreed, that said deed be, and the same is hereby set aside, and held for naught and cancelled of record, and that the said respondent make, execute and deliver to the said appellant, within ten days after the entry of this decree in the court below, a good and sufficient deed to the said above-described premises, and, in default thereof, it is ordered and adjudged that this decree stand for such deed."

Then follows an order for the payment by the clerk of certain moneys deposited by Scovell to Barney, etc. This decree was entered in the journal of the court below on February 26, 1873.

Appellant offered testimony to impeach the certificate of acknowledgment in the deed of Clarissa Waymire, and to show that said Clarissa did not sign the said deed freely and without fear or compulsion, and that she was not examined as to such signing separate and apart from her husband. The court rejected the testimony, and this ruling is assigned as error. Appellant also offered the record of deeds for Polk County in evidence to prove that the certified copy of the deed of Outhouse was not a true copy, which was rejected by the court. This ruling is assigned as error. The

court gave the following instructions to the jury, which appellant excepted to and assigns as errors in this appeal:

1. "But the only evidence offered by defendant Barney, which was admissible under the rules of evidence, was the deed of Ezra Scovell to him of date February 15, 1870."

2. "It is the duty of all good citizens to respect and obey the mandates of the Supreme Court and its adjudications, so long as they may stand unreversed; and when a conveyance has been adjudged fraudulent and void by the highest judicial authority of the State, it is in contempt of that authority for a person to disregard it and set it at defiance, in any other way than by the legitimate means recognized and provided by law."

3. "And one tenant in common may, in an action of ejectment, recover the possession of the entire premises owned by him and his co-tenant, if the evidence shows that they are entitled to the possession thereof as against the defendant in the action.

The judgment-entry in the case of *Mallory et al. v. Scovell,* offered in evidence by the respondent and received by the court, is, in its material part, as follows: "And the court having fully heard and considered the allegations and proofs of the parties, and the argument of counsel, it is ordered and adjudged by the court that the plaintiffs have and recover of the defendant herein the sum of fifty dollars, together with the costs and disbursements of this action, taxed at the sum of nineteen and fifty-five one-hundredths dollars, and that execution issue therefor." Dated July 7, 1873, during a regular term.

R. P. Boise, P. C. Sullivan, and Daly & Myers, for Appellant.

Under the donation law, a conveyance by a settler before patent issues, although he has fully complied with the requirements of the act, conveys nothing more than the naked possession. The patent, when issued, carries the fee-simple title direct from the government to the patentee. (Donation Act, §§ 4 and 8; 1 Deady, 378, 379, 381, 452; 2 Washb.

on Real Prop. 311 to 317; 13 Wall. 102, 431; *Mizner v. Vaughn*, Deady, J., Decisions Supreme Court, 1872, 256.)

In an action of ejectment, parol evidence is admissible to impeach the certificate of acknowledgment, and of private examination by the officer, of a married woman's deed. (4 John. 161, 469; 12 Id. 469; 1 Id. 498; 2 Wend. 308; 10 Minn. 427; 18 Md. 305; 23 Cal. 259; 2 Phil. Ev. 587, 590, 591; 1 Greenl. Ev. 289; 3 Washb. 192.)

A deed executed by a school superintendent to school lands belonging to the State, upon a public sale made for that purpose, cannot be received in evidence until it is first shown that the requirements of the statute have been complied with.

A certified copy of a deed having been offered in evidence, the original record of deeds may be introduced to prove that the said certified copy is not a true copy. (Cited in support of both the above propositions: Session Laws, 1855, 69; Mis. Laws, ch. 6, 27; Civil Code, §§ 734, 735; 4 Wheat. 77; 4 Cranch, 405; 5 Hamm. 370; 6 Mart. Lou. 347; 2 Gill & J. 114; 4 Id. 323; 4 Dana, 567; 3 Mon. 99; 1 Id. 154; 1 Denio, 145; 3 Id. 242; 25 Wend. 465; 38 Barb. 92; 18 John. 501; 11 Wend. 425.)

In admitting the deeds from Riggs and wife to Haworth, from Haworth and wife to Scovell, from Scovell to Thayer, and from Thayer and wife to Dolph, the court erred. To make them admissible a good legal title must first be shown in Riggs, Haworth or Scovell. To recover in ejectment the plaintiff must show that he holds the better legal title. (53 Barb. 155; 12 Ill. 420.)

A certified copy of a judgment is not admissible in evidence when it is disclosed in the record that there was issue joined upon a question of fact, in the cause in which the judgment was rendered, and it does not appear that a jury was waived or that there was any findings of fact by the court sitting as a jury. (Civ. Code, §§ 176, 178, 215; 15 Ky. 74; 1 Scam. 553; 12 Mich. 120; 16 Cal. 103; 29 Mo. 22; 4 Bosw. 663; 22 Mo. 583; 6 Bosw. 668; 14 How. Pr. 426; 2 Wheat. 221, 225; Freeman, § 117; Statute of Mich., § 3440.)

An execution is not admissible in evidence to prove title derived through sale thereunder, when it appears that the premises were sold as a whole and not in separate parcels; neither is the confirmation by the County Court of such sale admissible, when it appears that the purchaser at the sale was the judgment creditor. (1 John. Ch. 592; 6 Id. 411; 18 Johns. R. 355.)

The sheriff's deed under such sale is inadmissible as evidence, for the reasons contained in the last two statements above. And further, it must appear that the grantees in such deed have redeemed the premises from the purchaser at the sale or from some other redemptioner, or that they have the right to redeem, or have taken the necessary steps to redeem. (Rorer, 312, 316; 7 Hill, 177; 27 Barb. 55; 34 N. Y. 235; 4 Wheat. 77; 4 Cranch, 403; 9 Id. 64; 7 Cow. 88; 3 N. H. 340; 8 Lou. 195; 10 Id. 286; 1 Seld. 366; 2 Denio, 323; 2 Com. 66; 10 Bosw. 60; 4 Dana, 567; 1 Min. 155; 3 Id. 99; 18 Wend. 598; 20 Id. 555; 2 Id. 120; 19 Barb. 644; 3 Hill, 619; 12 N. Y. 575; 12 Cal. 124; 4 Hill, 76.)

A purchaser at a tax sale, upon the receipt of his certificate of sale from the sheriff, is entitled to immediate possession of the premises purchased, or to the rents and profits, if the same are under an unexpired lease, and his right then becomes vested. A tax title outstanding in another person, unredeemed, will prevent a plaintiff in ejectment from recovery until redeemed by him. (Tyler on Ejectment, 564; Mis. L., ch. 57; §§ 82, 88; Blackwell, 293, 296, and ch. 16; 29 Iowa, 356; 18 Wis. 45; 14 Ill. 136; 15 Cal. 541; 4 Gil. 274, 278; 11 Paige, 484.)

Plaintiff in rebuttal offered in evidence a decree of the Supreme Court of the State declaring void a deed which forms a link in one of appellant's chains of title, which was received. Such decree, if good, constitutes no legal title upon which recovery can be had in ejectment. (3 How. U. S. 750.)

W. W. Thayer and E. C. Bronaugh, for Respondent.

Upon the completion of the residence and cultivation

prescribed in the Donation Act, the title of the settler becomes complete. The patent when issued is simply the evidence of a previously acquired title. (2 Or. 236, 267; 1 Deady, 113; 3 Or. 396; 2 How. U. S. 344; 3 Dallas, 465; 8 Op. Atty.-Genl. 247; 9 Id. 42.)

The court did not err in excluding evidence to impeach the certificate of acknowledgment in the deed of John Waymire and Clarissa, his wife, to Riggs. Title-deeds, regular upon their face, cannot be impeached in an action of ejectment against one who was not a party to them. (1 Or. 17; 8 Wall. 109; 65 N. C. 619; 42 Ill. 518; 18 Iowa, 90.)

The certified copy of the deed of the school superintendent was properly received in evidence, and the record-book, containing a record of said deed, to prove that the said copy was not a true copy, properly rejected. It is a presumption of law that a person acting in a public office was regularly appointed to it, and that official duty has been regularly performed. (Civil Code, § 766, Subd. 14, 15; Greenleaf Ev., §§ 83, 92; 5 Denio, 597.)

Appellant is estopped to deny Scovell's title. When both parties in ejectment claim under the same grantor, they are mutually estopped to deny his title, and the plaintiff need not shaw title in such grantor. (1 John. Ca. 81; 12 John. 201; 13 John. 316; 1 Cow. 613; 3 Barb. Ch. 528; 1 Coms. 491; 38 Geo. 597; 6 Wall. 715; 4 Pet. 11, 83; 5 Dana, 271; 9 Paige, 649; *Doe v. Oliver,* Smith's Leading Cas. 712.)

The certified transcript of a judgment offered in evidence by respondent was properly received. A judgment cannot be impeached collaterally, and especially by a stranger, on grounds merely affecting its regularity. Matters which show it void may be insisted on. (*Voorhes v. Bank,* 10 Pet. 475; *Thompson v. Tolmie,* 2 Pet. 169.)

It is a matter largely in the discretion of the court as to the order in which parties may introduce their evidence. (*Bedell v. Powell,* 13 Barb. 183.)

An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit or proceeding whatever. (Civ. Code, § 93, Subd. 4.)

The objection that two or more adjacent parcels of land were sold in gross comes too late after the time for redemption has passed, in the absence of fraud, injury, mistake or illegality, or other evidence than the mere return of the sheriff. (*Griswold v. Stoughton*, 2 Or. 61.)

The objection that there is no evidence that Mitchell and Dolph were lien creditors of Scovell, or had a right to redeem of the execution purchaser, is not well taken. The recitals in the sheriff's deed, although liable to be disproved, are yet *prima facie* evidence of the facts recited and are sufficient until disproved. (*Stafford v. Williams*, 12 Barb. 244; *Jackson v. Vanderheyden*, 17 Johns. 167; *Jackson v. Sternberg*, 20 Johns. 49; *Jackson v. Roberts*, 7 Wend. 83; *Jackson v. Roberts*, 11 Wend. 422.)

The recitals in a conveyance for a sale for taxes are not evidence unless the statute so declares. The facts recited must be established *aliunde*. A simple *certificate* of a tax sale is not entitled to be read in evidence unless its execution be first proved. (*Sharp v. Spier*, 4 Hill, 76; *Varick v. Tallman*, 2 Barb. 113; *Hill v. Draper*, 10 Barb. 454; *Hoyt v. Dillon*, 19 Barb. 644; *Jackson v. Shepard*, 7 Cow. 88; *Wilding v. Homer*, 50 Ill. 50.)

One tenant in common may, in an action of ejectment, recover the possession of the entire premises owned by him and his cotenant, if the evidence shows that they are entitled to the possession thereof as against the defendant in the action. (*Stark v. Barrett*, 15 Cal. 371; *Touchard v. Crow*, 20 Cal. 162; *Hart v. Robertson*, 21 Cal. 346, 348; *Sharon v. Davidson*, 4 Nev. 416.)

By the Court, MCARTHUR, J.:

This was an action of ejectment brought by Dolph against Barney and Holman, to recover possession of nine hundred and twelve acres of land in Polk County, and particularly described in the complaint. It is alleged that Dolph is the owner in fee-simple of an undivided five-eighths of the premises described, as tenant in common with one Mitchell, who is the owner of the remaining three-eighths, and that he, Dolph, is entitled to immediate possession as against

Barney and Holmon, who wrongfully withhold possession from him. Holman answered separately, that he had no interest in the premises except that he was in possession as tenant under Barney, and asked that Barney be made sole defendant. Barney answered denying the allegations of the complaint, and setting up title in himself to a portion of the premises in dispute, and title in the State of Oregon as to the residue, and also an outstanding tax title to the whole tract in one S. W. Smith, unredeemed. The reply denies all the averments of new matter in the answer, and the cause was tried upon the issues joined in the pleadings filed by Dolph and Barney.

Upon the trial, Dolph, to prove his alleged title, offered in evidence a patent from the United States to John Waymire and Clarissa Waymire, his wife, to six hundred and forty acres of the land in dispute. To this no objection was interposed. Thereupon Dolph offered in evidence a quitclaim deed to said six hundred and forty acres from John and Clarissa Waymire to M. S. Riggs, of date December 9, 1867. It was admitted by the parties that Waymire and wife were donees of the United States, under the Donation Act; also, that Clarissa died before the issuance of patent or patent certificate, but that, before her death, she and her husband had resided upon and cultivated said six hundred and forty acres, and had performed all the requirements of the act so as to entitle them to a patent. Objection was made to the introduction of said quitclaim deed as evidence of title in Dolph (who deraigns title from Riggs), for the reason that, although executed subsequently to the four years' residence and cultivation, and filing of proofs, required by said Donation Act, yet, as it was executed before the issuance of patent or patent certificate, it was ineffectual to carry the title.

The court overruled the objection, and such ruling is charged as error.

Without dwelling upon the importance of the question presented, further than to remark that it was one of the most important that has ever arisen under the Donation Act, we proceed at once to its discussion. In *Lee v. Sum-*

mers (2 Or. 266), this Court, having under consideration the rights of a donee of the United States under the act, held the words thereof to be words of present grant, actually conveying the legal title to the premises, and said: "When Congress grants lands in words of present grant, the legal title passes to the grantee. (13 Pet. 499; 6 Cranch, 128; 8 Id. 244; 2 Wheat. 198; 12 Pet. 454.) The cases just cited show that the title vests immediately in the donee, none the less because the title vests in him conditionally, and subject to be defeated by his failure to comply with the law, nor because the boundaries are yet to be determined." Some time prior to the rendition of the opinion just cited, the case of *Chapman v. School District No.* 1, arose in the United States Circuit Court, and Justice Deady (1 Deady, 113), in passing upon the character of the grant, said: "The donation law is a grant in the present, and gives the fee simple to every settler who avails himself of its provisions from the date of his settlement. (2 How. 76; 11 Opinions Attorneys-General, 29.) True, until the completion of the subsequent conditions of residence and cultivation, and proof thereof, it is an estate upon condition —what is known at common law as a base or conditional fee, subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee nevertheless, and upon the completion of the residence and cultivation, or other conditions, it becomes absolute and unqualified." In *Lamb v. Davenport* (1 Sawyer, 632), Justice Sawyer held the terms of the act to be terms of present grant, notwithstanding the grant itself was liable to be defeated by a failure to perform the conditions subsequent.

To the views of the character of the grant, as expressed in the opinions referred to, we yield our full assent, and hold the Donation Act to be a grant *in praesenti* of an estate in fee, subject to be defeated by non-compliance with the conditions subsequent therein expressed. Upon the completion of the residence and cultivation required by the fourth section, the conditions of defeasance no longer attached, and the estate, from a base or qualified fee, became

a fee-simple absolute, which, by relation, must be held to have had its inception at the date when the donees first entered upon the land with the intention of complying with the requirements of the law.

The title of John and Clarissa Waymire in no way depended upon the issuance of patent, for the issuance thereof under this act is a ministerial act, and the patent itself mere evidence of title. Even if this were not so, still their right to a patent having vested, they must be regarded as having the patent. (*Stark v. Starrs*, 6 Wall. 402.)

As against this position, counsel for appellant cite *Gibson v. Chouteau* (13 Wall. 102.) In that case Justice Field, who delivered the opinion, quotes from the opinion of the court in *Bagnell v. Broderick* (13 Pet. 450), as follows: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government, which by the patent passes to the grantee, and he is entitled to recover in ejectment." Both these cases arose under an act of Congress of February 17, 1815, for the relief of the New Madrid sufferers. In the first section of that act it is provided that those owning lands which were injured by the earthquake of November 10, 1812, "shall be and they are hereby authorized to locate," etc. (3 Stat. at Large, 211.) Those words do not import a present grant, as do the words "there shall be and hereby is granted," etc., in the fourth section of the Donation Act of September 27, 1850. (9 Stat. at Large, 497.)

While, therefore, we are not disposed to question the correctness of the ruling in *Bagnell v. Broderick*, or in *Gibson v. Chouteau*, we do not think that they are parallel cases to the one before us, nor do we think that the patent is the superior and conclusive evidence of legal title to lands granted under all other acts of Congress. In *Wilcox v. Jackson* (13 Pet. 486.), which arose under the Pre-emption Act of June 19, 1834 (4 Stat. at Large, 678), Justice Barbour, having decided that nothing but a patent passes a

perfect and consummate title, excepts from this general rule that class of cases where an act of Congress grants lands, as is sometimes done, in words of present grant. The Donation Act must certainly be regarded as falling within the excepted class.

Having reached the conclusion that the title vested in virtue of the act, the question arises whether John and Clarissa Waymire had power to alienate their estate. The quitclaim deed to Riggs was executed in 1867, long after they had complied with the conditions of the Donation Act, and made due proof thereof, but before the issuance of patent.

Under the proviso in the fourth section, all future contracts for the sale of lands granted were declared void. By the amendatory act of July 17, 1854, that proviso was repealed, and since that time donees have had full power of alienation in all cases where they had resided upon the land for four years and made the proper proof of residence and cultivation. The original and amendatory acts, being *in pari materia*, must be construed together. Hence, since the passage of the amendment of 1854, where married persons have complied with the provisions of the original act, and either have died before patent issues, the survivor and children, or heirs of the deceased, are entitled to the share or interest of the deceased in equal proportions except where the deceased has otherwise disposed of it by testament, or has alienated it by deed duly executed according to law. Therefore the quitclaim deed from John Waymire and Clarissa, his wife, to M. S. Riggs, was executed at a time when they had full power of alienation.

In this connection it must be borne in mind that under our statute a deed of quitclaim and release, of the form in common use, is sufficient to pass all the estate which a grantor can lawfully convey by a deed of bargain and sale. (Mis. L., ch. 6, § 3.)

The bill of exceptions shows that the patent was issued to John Waymire and wife. From the analogies of *Lamb v. Davenport* (18 Wall. 317), we are of opinion that as the sale of Waymire and wife to Riggs was valid it was binding

upon the title which would otherwise have come to her heirs by reason of her death.

After the admission of the quitclaim deed from the Waymires to Riggs, the appellant's counsel, though somewhat irregularly, offered to introduce evidence tending to show that Clarissa Waymire did not sign the same freely and voluntarily, and that she did not acknowledge the same separate and apart from her husband. The respondent's counsel objected, and the court sustained the objection, which ruling is charged as error.

That a deed may be set aside, or the enforcement of its terms successfully resisted, on the ground of fraud or imposition, when the deed is itself the subject of litigation in a court of equity, is a well-settled and a familiar principle; but, in an action of ejectment, we are of opinion that no evidence should be received to invalidate an acknowledgment of a deed when such acknowledgment meets the requirements of the statute. The certificate of acknowledgment to the deed of John Waymire and Clarissa, his wife, to Riggs, comes up with the bill of exceptions, and an inspection thereof shows that it conforms to the statute. In all such cases the deed may be read in evidence without further proof thereof. (Mis. L., ch. 6, § 22.)

We have examined the authorities relied upon by appellant's counsel. Some of them seem to support the position taken, but most of them will, upon examination, be found to be cases where the evidence offered was designed to supply proof of facts necessary to give validity to the acknowledgment. With these we have nothing to do; the others we will proceed to examine.

The case of *Jackson v. Humphrey* (1 John. 497) was an action of ejectment tried in 1806. The principal point in controversy was in relation to the admission of certain testimony tending to show that the judge, before whom the proof of the execution of a certain deed was taken, was, at the time of taking the same, out of the jurisdiction of the State.

The testimony was declared admissible. The report of the case is very meagre, and the opinion is not so apparently

well considered as to be ranked as an approved precedent.

Jackson v. Schoonmaker (4 John. 160) was an action of ejectment tried in 1809. A deed was introduced and its admission objected to, because there was no evidence of possession accompanying it, and therefore not to be received as an ancient deed. An offer was also made to show that one of the grantors was *non compos mentis* at the time of the acknowledgment. The court held that the certificate of the proof or acknowledgment of a deed, taken before a judge, is not conclusive, but the party affected by the deed may contest its validity and the force and effect of the formal proof.

Jackson v. Hayner and *Jackson v. Ferguson* (12 John. 468) were actions of ejectment tried in 1815. The title of both parties was derived from the same source. The question in these cases was whether a certain assignment, indorsed on a certain lease, was fraudulent and void. The point decided was, that where an illiterate man is induced to sign a deed by a misrepresentation of its nature and contents, the deed is void.

Jackson v. Perkins (2 Wend. 304) was an action of ejectment tried in 1829. The material question was as to the delivery of the deed. The only evidence of its delivery was the proof of its execution by one of the subscribing witnesses, before a master in chancery, for the purpose of putting it upon record. Among other things the court declared that proof of acknowledgment is *ex parte,* and any person who may be affected by the deed may, at any time, question its validity and show that in fact it was not duly executed or delivered. The cases in 4 and 12 Johnson, *supra,* are cited in support of this position.

These cases were all tried under the general issue, and, as near as can be ascertained, under a statute which declared that "neither the certificate of acknowledgment or of proof, nor the record, is conclusive, but may be rebutted and the force and effect thereof contested by any party affected thereby. If the contestant shows that the proof was taken on the oath of an interested or incompetent witness, neither the conveyance nor record can be received in evidence until

established by other competent proof." (1 Rev. Stat. 759, § 17.)

We have been unable to find any cases in New York, since the adoption of the Code, holding the doctrine of the cases just noticed.

Edgerton v. Jones (10 Minn. 427) is not in point. That was an action brought by the plaintiff against A. B. Jones, Mary M. Jones, his wife, and others, to foreclose a mortgage purporting to be executed by defendants, A. B. and Mary M. Jones. The only issues made in the pleadings, material to the points decided, are in regard to the execution and acknowledgment of the mortgage by defendant, Mary M. Jones. The cause was tried by a referee, who admitted parol testimony to contradict the official certificate of the acknowledgment of the mortgage. This the court held not to be error. We presume that in a suit in equity, and upon issue joined by the pleadings, it would not be contended that evidence tending to contradict a certificate of acknowledgment would not be admissible. In the opinion, in the case just cited, it is stated that the question presented was fully discussed and decided in *Dodge v. Hollingshead* (6 Minn. 25). That case has not been furnished us, and we have been unable to ascertain the length to which it goes. It is evident, however, that the opinion did not meet with the unqualified approval of the court in *Edgerton v. Jones,* for, after referring to *Dodge v. Hollingshead,* it is said: "We acquiesce in the conclusion arrived at, so far as the case at bar is concerned."

We are of opinion that the true rule upon this question is that laid down in *Graham v. Anderson* (42 Ill. 514). That case was much stronger than the one before us, for there were allegations touching privy examination of the wife, etc. The court, after discussing some other features of the case, said: "But another more important question remains, and that is, in the absence of fraud or imposition, in proving the execution of a deed by a wife, is parol evidence admissible in an action of ejectment to impeach the certificate? We have examined the authorities on this point, and we think where the certificate of the privy examination of a married

woman is in the form required by statute, it is not sufficient, in order to impeach it, to allege that there was no private examination, that she did not acknowledge the deed as her act and deed, that she did not release her homestead right. There must be some allegation of fraud or imposition practiced toward her, some fraudulent combination between the parties interested and the officer taking the acknowledgment." (3 H. & McH. 321; 3 Whart. Pa. 557; 6 Texas, 208.) *Green v. Godfrey*, (45 Maine, 25), which was an action of ejectment, is to the same effect.

We are therefore of opinion that in an action of ejectment, where the certificate of the officer as to the acknowledgment appears on its face to be in substantial compliance with the statute, parol evidence to impeach it is inadmissible, unless there are allegations in the pleadings to warrant it.

The respondent offered in evidence a certified copy of a deed from Outhouse, executed in the capacity of Superintendent of Common Schools for Polk County, to Riggs, for two hundred and seventy-two acres of land, the residue of the tract in controversy. The appellant's counsel objected, and urged as a reason therefor that no foundation was laid for its introduction. The court below overruled the objection, which ruling is charged as error.

It is contended that before a deed executed by a school superintendent to school land belonging to the State, after sale made, can be admitted as evidence, it must first be shown that the said officer had authority to sell the land, to execute the deed, and that he had fully complied with all requirements of the statutes in relation thereto.

This deed refers to the act of the Legislative Assembly in virtue of which it was executed, and bears upon its face evidence of having been executed according to the requirements prescribed by the act. This is not one of the cases in which the power of the grantor must first be shown in order to let in the deed. It is to all intents and purposes a patent of the State of Oregon; and, until the contrary is shown, we must presume that it was regularly executed and delivered by one having authority so to do. That a person ac-

ing in a public office was regularly appointed to it, and that official duty has been regularly performed, are declared to be presumptions of law by the Code. (Civ. Code, § 766, Subd. 14, 15.) Besides, it is the duty of the courts to take judicial notice of the public and private acts of the legislative department. The court, being charged with knowledge of the law under which Outhouse acted, and the presumptions referred to applying to him and his deed, did not err in overruling the objection. If regular on its face, as it is, the burden of proof was upon appellant to show want of excess of authority. (*People v. Mauran*, 5 Denio, 398.)

At this point appellant's counsel offered to show by the record of deeds which was in court, that the certified copy of the Outhouse deed, which had been admitted as evidence, was not a true copy of the record. At that stage of the trial such offer was irregular. Some system and order must be observed in the trial of a cause. (Civ. Code, § 194.) We have, however, examined into the assignment of error, based upon the ruling of the court below, in refusing to admit the record. The bill of exceptions does not show wherein there was any material difference between the certified copy and the record. If there was none, no error was committed in refusing to admit the record. Error must be shown affirmatively. We must presume that there was no substantial variance between the certified copy and the record, in the absence of anything showing that there was. It does appear, however, by the bill of exceptions, that "said record was interlined and erased and mutilated." Under such circumstances, we are of opinion that the party offering an interlined, erased or mutilated record, should also offer to fully and satisfactorily explain the interlineations, erasures and mutilation, especially where what purports to be a certified copy is fair upon its face, and regularly and formally drawn. The admission of interlined, erased or mutilated records is a matter of a very serious character, and where it is sought to contradict a certified copy by such record, we think the offer should be to show that the certified copy was not a true copy of the record at the time when it purports to have been transcribed.

The court admitted a number of deeds from Riggs, Haworth, Scovell and Thayer, overruling the objections of appellant's counsel. As error is charged in each instance, and as the point presented and argued covers each deed, we have considered these assignments of error together.

The objection to the admission of the deed from Riggs to Haworth is based upon the assumption that Riggs had not been shown to have become possessed of the title to the entire tract. As, in our opinion, the Waymire deed carried to Riggs the six hundred and forty acres, and the Outhouse deed carried to him the two hundred and seventy-two and ninety-six one-hundredths acres, this objection cannot be sustained. The fact that the deed from Riggs to Haworth antedates the deed from Waymire and wife to Riggs is a matter of no consequence, for it contains a covenant of warranty, and had the effect to immediately transmit to Haworth any after-acquired estate of his grantor. (*Jackson v. Murray,* 12 John. 201; *Jackson v. Stevens,* 13 John. 316; *Jackson v. Hubble,* 1 Cowen, 613; *Bank of Utica v. Mersereau,* 3 Barb. Ch. 528.)

The objections to the admission of the deeds from Haworth to Scovell, from Scovell to Thayer, and from Thayer to Dolph, were that no title had been shown in Haworth, or Scovell, or Thayer. Having reached the conclusion that Riggs had title, these objections cannot prevail.

The respondent offered in evidence a certified transcript of a judgment of the County Court of Marion County, as a portion of one of the links in his chain of testimony. Appellant's counsel objected, for the reasons that the trial was had by the court without the intervention of a jury; that the judgment entry did not show that jury had been waived, and that there were no findings of the court to support the judgment. The transcript was admitted, notwithstanding the objection, and this is charged as error. The bill of exceptions, and accompanying exhibits, show this to have been a judgment in favor of Mallory et al., and against Ezra Scovell. Barney is in no way connected with it.

Counsel claim that this judgment is a nullity, for the reason that it shows the defects mentioned in the objection.

The judgment of the County Court of Marion County is not a void judgment; and, in view of the authorities, we are not at liberty to declare it a mere nullity, because the journal entry does not contain the findings of fact. It is irregular and erroneous, and the irregularities and errors would doubtless have been corrected upon appeal. The attack now made upon it is collateral, and by a stranger. Error does not render a judgment void when attacked collaterally. A judgment is only void when the court rendering it had not jurisdiction of the parties to the judgment, or the subject-matter of the controversy. In *Winston v. Affalter* (49 Mo. 267), which was ejectment, a similar question to that raised in this case was presented. There were some irregularities in entering the judgment, which was offered in evidence, and the court held that the parties attacking the judgment, being strangers to that record, had no right to attack it collaterally, and thereby call in question the alleged irregularities. We have examined all the authorities cited by appellants counsel upon this point which we have been able to procure, and the cases are rendered inapplicable, for the reason that they are direct attacks upon the judgments by appeal.

Respondent then offered a copy of an execution on said judgment in the County Court of Marion County, and the return thereon, together with the notices of a sale of the property in question to satisfy the same. Appellant's counsel objected, for the reason that the premises were sold as a whole, and not in separate parcels; and for further reason, that the notices described three several executions in three different causes. This testimony was admitted against the objection, and error is charged therefor. We think the case of *Griswold v. Stoughton* (2 Or. 61), settles this point against the appellant. The court then had under consideration, among other matters, the words "when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately," which occur in § 20, p. 124, of the statute of 1855; and it was held that that provision was directory, and not mandatory in its application. The identical language occurs in § 289 of the Civil Code. The question, therefore, is no longer an open one.

The order of the County Court, confirming the sale, entered February 2, 1874, was then admitted against the objections of the appellant's counsel, who contended that, from the proceedings previously offered being irregular and void, the same was inadmissible. We have already expressed our opinion upon so much of this objection as referred to the proceedings previously offered, and but one question is left, that is, as to the effect of the order. This question also grows out of the previous objection, and both objections, so far as relates to this question, will now be considered.

When a motion is made for the confirmation of a sale upon execution it is the duty of the court to examine into the regularity thereof, and before ordering confirmation to see that all the requirements of the statute have been complied with. After the order has been made confirming the sale, the regularity thereof cannot be questioned, for it is provided by § 293, subdivision 4, of the Code, that "an order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit or proceeding whatever." The statute settles this point against the appellant.

Exception was also taken to the admission of the sheriff's deed, executed after the sale, upon the execution issued on the judgment of the County Court, which has already been considered. We are of the opinion that it was not error to admit the deed. The necessary and preceding steps having been all properly taken, a sheriff's deed is evidence of title in the grantee, and the recitals therein are *prima facie* and are sufficient evidence of the facts recited until disproved. (*Jackson v. Sternberg,* 20 John. 49; *Stafford v. Williams,* 12 Barb. 244; *Jackson v. Roberts,* 12 Wend. 422.)

The respondent then rested his case, and the appellant offered, without objection, a deed from Scovell to himself for the entire tract in controversy, which deed was dated prior to the deed from Scovell to Thayer, and prior also to the judgment upon which was based the sheriff's deed already mentioned. Thus it will be seen that both appel-

lant and respondent claim under Scovell; and this fact is important in its bearing upon many questions raised by the appellant's counsel. Had the court below erred (which it did not) in its rulings upon any of the questions in relation to admission of evidence prior to the admission of the deed from Scovell to said Thayer, and the judgment, execution, sale, order of confirmation and sheriff's deed, already sufficiently described, the appellant, it seems from the authorities, could not be considered as having been prejudiced thereby, for the rule is, that when both parties derived their title from the same person, neither is at liberty to deny that such person had title. (*Hightown v. Williams*, 38 Geo. 601; *Gaines v. New Orleans*, 6 Wall. 715.)

In relation to the quitclaim deed from Waymire to Barney (subsequent in date to the deed from Waymire and wife to Riggs), attention need only be attracted to the conclusion reached upon the first point presented in this case in order to show that Waymire, when he executed the deed to Barney, had no estate in the lands described; and from the views already expressed it also becomes apparent that the deed from Mary Waymire (admitted to be the daughter of John and Clarissa) conveyed no estate to the appellant.

Appellant's counsel offered to introduce in evidence a certificate of the sheriff of Polk County, showing a sale of the lands in controversy to one S. W. Smith, for the taxes for the year 1872. Upon objection, the court below refused to admit the certificate, for the reason that no proper foundation had been laid therefor. This ruling is charged as error. It is insisted that the tax certificate is regular, and that when a purchaser at a tax sale pays his money upon the acceptance of his bid and receives his certificate from the sheriff, he is entitled, instanter, to the possession of the premises purchased, or to the rents and profits, if the same are under an unexpired lease, and his right then becomes vested.

The certificate of purchase at a tax sale does not convey a legal title; it is, however, evidence of an equitable title to the land, and enables the purchaser to call in the legal title. (8 Ohio, 216.) As an officer in selling land for delin-

quent taxes exercises a mere naked power, based upon statutes in derogation of the common law, a party desiring to avail himself of a certificate of the character of the one under consideration for any purpose, must show, step by step, that everything has been done which the statute makes essential to the due execution of the power. (*Varick v. Tallman*, 2 Barb. 115.)

Upon the question whether the recitals in a tax deed are *prima facie* evidence, we do not pass, for that question is not before us, but we are of opinion that certificates of this character should not be admitted in evidence unless the rule above stated is complied with.

A question as to the admissibility of the tax warrant is made by the bill of exceptions, and was presented in argument. The bill shows that the warrant was offered, objected to and refused, and exception allowed. It alludes to the warrant as being attached to the bill and made part thereof. It is not, however, so attached, and there is nothing to show that any error was committed in rejecting it, for, as has been already stated, the error must appear affirmatively, and not appearing affirmatively we are obliged to presume that, upon inspection, the court below found the warrant defective or improperly issued, and hence rejected it.

We are of opinion that there was no error in admitting the decree of the Supreme Court, in the case of Scovell against Barney. That decree was not conditional. It was evidence tending to show that the deed from Barney to Scovell, which Barney had introduced, was cancelled. An inspection of the decree, which accompanies the bill of exceptions, shows that it was intended to operate as a deed in the event that Barney did not reconvey to Scovell within a certain time, and that time having passed, and no deed having been executed and delivered by Barney to Scovell, the decree operated as a deed.

The court below, among other things, instructed the jury "that the only evidence offered by defendant Barney, in support of his claim to title, which was admissible under the rules of evidence, was the deed of Ezra Scovell to him

of date February 15, 1870." This instruction was excepted to. Under the view we have taken of the various and numerous questions presented in this case, this instruction was correct, and could not have misled the jury. In the instruction upon the decree of the Supreme Court and the authority thereof, which was excepted to, there is no error. The instruction is a clear and correct statement of the law.

The court below also instructed the jury "that one tenant in common may, in an action of ejectment, recover the possession of the entire premises owned by him and his co-tenant if the evidence shows that they are entitled to the possession thereof as against the defendant in the action."

It is charged that this instruction is erroneous. It is not, however, for it comports with the rule that a tenant in common of real estate may recover the entire common property in ejectment as against a stranger. (*Sharon v. Davidson*, 4 Nev.; *Hart v. Robertson*, 21 Cal. 346.)

The appellant also charges that the court below erred in striking out the cross-bill filed by him. Barney had already answered the complaint in ejectment, fully denying the plaintiff's title, and setting up title in himself, and title in another. Under such circumstances it is not proper practice to file a cross-bill, under § 377 of the Code. The cross-bill can only be allowed when the answer does not set up a complete legal defense.

It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

STATE OF OREGON, Respondent, v. THOMAS GARRAND, Appellant.

RES GESTAE.—To make declarations a part of the *res gestae* they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in time.

EVIDENCE—ATTEMPT TO ESCAPE.—Evidence of attempts to escape by a prisoner is admissible and tends to establish guilt.

IDEM—DYING DECLARATIONS.—Dying declarations to be admissible must be shown to have been made under a consciousness of impending death, and respecting the cause of the death.

INSTRUCTIONS.—If, on trial for murder, there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury.

GOOD CHARACTER.—Evidence of good character when offered by a prisoner ought to be submitted to the consideration of the jury together with the other facts and circumstances of the case, to be weighed by them with the other evidence in the case, in determining the guilt or innocence of the accused.

MURDER IN THE FIRST DEGREE—WHAT CONSTITUTES.—To constitute murder in the first degree, the killing must be done purposely and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery or burglary.

MURDER IN THE FIRST DEGREE—WHAT DELIBERATION NECESSARY TO CONSTITUTE.—There is no length of time fixed by the law for the deliberation necessary to make an offense murder in the first degree, which would otherwise be murder in the second degree; but the evidence must show that the design to kill was formed in cool blood, and not *hastily* upon the occasion.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

E. C. Bronaugh and John M. Gearin, for Appellant.

J. J. Whitney, District Attorney; J. J. Murphy and Boise & Willis, for Respondent.

By the Court, BURNETT, J.:

The defendant (appellant herein) was tried at the November term, 1874, of the Circuit Court for Marion County, for the crime of murder, in killing Thomas Hubbard, and found guilty. The case comes into this Court on appeal, on

exceptions to the ruling of the court below on the admission of evidence, and certain instructions given by the court to the jury.

The first objection is to the testimony of the witness Castleman, as to what the prisoner said soon after the shooting took place, where it was done.

This testimony was properly admitted. Defendant's threat to shoot the witness for simply inquiring what was the matter, had a tendency to prove wickedness and malice in the transaction that had just before taken place.

To make declarations a part of the *res gestae* they must be contemporaneous with the main fact, but in order to be contemporaneous they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. (*Mitcheson v. The State,* 11 Geo. 615.)

The next objection is that the court erred in admitting evidence that the prisoner attempted to escape. This objection is not well taken. Attempts to escape are always admissible, and if shown, tend to prove guilt. (1 Whart. § 714.)

The next objection is to the admission of the testimony of Dr. Bailey, the attending physician, as to the declarations of the deceased after he was shot.

It is claimed, first, that no sufficient ground was laid for the admission of the statements of the deceased, as dying declarations. Second, that the declarations themselves are not competent.

Upon the first point in this objection I would remark that it is certainly correct that the declaration must be made under a consciousness of impending death. Mr. Wharton, in his excellent work on criminal law, gives several instances of cases in which such declarations have been rejected as well as those that have been received. The following case is very similar to the one at bar. "A statement concluded with these words: 'I have made this statement

believing I shall not recover.' At the time it was made the deceased was in such a state that his death must speedily follow, and he died seven days afterward. But it appeared also that shortly before he made the declaration he had said to a constable, who asked him how he was, 'I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better, but I do not myself think I shall ultimately recover.'" Afterwards, on the same occasion, he said he could not recover. It was held that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence. (1 Whart., § 673.)

In the case of *The People v. Lee* (17 Cal. 79), the court says: "There was sufficient foundation laid for the admission of the dying declarations of the deceased. Her wound was mortal and she appeared to be fully aware of her condition. She stated that she could not live, and requested her mother to send for a priest."

In the case at bar it appears that soon after the deceased was shot he said to Dr. Bailey, the witness: "Doctor, I am gone." Could there be a stronger expression of a consciousness of impending death? Men seldom think of the great event of death till its shadow falls across their own pathway, and when, for the first time, they realize the fact that their hold on this life is almost gone, that they must go out upon the great unknown sea, it is then, at that awful moment, that you can read the innermost thoughts of the soul by the agonizing expression of the lips, and it will be given in that language which habit has made common to the individual. It further appears that he told the witness twice afterwards that he did not think he would recover, making it a stronger case than either the case cited from Wharton or 17 Cal. It is further objected that deceased was in such a condition of mental aberration as to exclude his declarations, but the evidence goes no further than to show that deceased, at the time of making said declarations, had considerable fever and had taken an opiate, but it does not appear that either had affected his mind a particle, and the court cannot presume that he had become insane in the ab-

sence of any evidence of that fact. Upon the second point it is proper to state that, under the rule laid down by Wharton, dying declarations are admitted from the necessity of the case to identify the prisoner and to establish the circumstances of the *res gestae,* or to show transactions from which the death results. This would seem to be the rule as laid down substantially by our own statute. It is further said that they are not admissible to show old malice on the part of the prisoner toward the deceased, leaving the inference that they may be admitted to show the malice of the prisoner toward the deceased at the time of the transaction that resulted in the death of the deceased, and that they are a part of the *res gestae.* (1 Wharton, § 670; 3 Greenleaf, §§ 15, 144.)

The following are the declarations objected to, as appears by the bill of exceptions: "The witness answered as follows: 'On the second or third day after the shooting, I said to the deceased, "Tom, is it true that after you were shot you were left alone in the store with Garrand?" He answered, "Yes," I said, "And did he make you go on your knees and beg for your life, or he would shoot you dead?" He answered, "Yes," very feebly, in a whisper.'"

The form and manner of these answers of deceased to the questions put by the witness is fully sustained by the case of the *Commonwealth v. Thomas Casey* (11 Cush., Mass. 417), and had a tendency to show how the death of Hubbard was brought about. One of the inquiries before the jury was as to the grade of the offense committed by the prisoner, and the fact that after giving Hubbard the fatal shot he compelled him to get down on his knees and beg for his life, tended to show that Hubbard's death was not caused by the provocation that he gave the prisoner at the store, nor that the design in the prisoner's mind to take his life was formed hastily upon that occasion; it further tended to show that the prisoner was guilty of an act of brutality that could have only been born of deliberate and premeditated malice, and that the fatal shot previously given was the result of a design to take Hubbard's life, formed and matured in cold blood.

Human experience shows that, usually, passions suddenly excited soon subside. The passion which could survive the fatal shooting, and which, so far from subsiding or giving way to remorse, in view of the crime it had committed, and of the agony and helplessness of its victim, is capable of the conduct described in these dying declarations, indicates more than a hasty purpose formed on the occasion. The jury might, and perhaps would be justified in saying that they ought to, infer a purpose to kill long formed from malice so deep seated.

The next objection is to that part of the charge to the jury which is as follows: "There is no evidence in this case tending to show in any event that the killing of Thomas Hubbard was done under such circumstances as to reduce the crime to the degree of manslaughter, and, under the testimony in this case, you can only find one of the following three forms of verdict: 1. Guilty as charged in the indictment; 2. Guilty of murder in the second degree; 3. Not guilty."

To ascertain whether this charge is erroneous or not it will be necessary to ascertain whether there was any evidence tending to establish the crime of manslaughter; if there was it was error in the court to give the instruction above set forth, for the jury are the exclusive judges of the facts and of the weight of the evidence; but if on a trial for murder there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter. (27 Cal. 507.)

In the case last cited the instruction objected to is as follows: "In the case that is now being submitted to you there is no evidence on any points or matters given in proof which reduces the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this case."

The Supreme Court of the State of California, in passing on this instruction, holds, that if the instruction assumed

to pass upon the weight of evidence, it was erroneous; on the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous. Looking into the transcript in this case we see no evidence of facts and circumstances that would reduce the crime from murder to manslaughter. Error will not be presumed; it must affirmatively appear from the record. (*O'Kelly v. Territory of Oregon*, 1 Or. 51.)

The next objection is to the instruction in respect to the effect of proof of good character.

There is a great conflict in the authorities as to the effect of evidence of this kind, and there seems to be no well-settled and definite rule upon the subject. Many of the authorities cited go further than the court below did in its instruction on this point. To show the different views held on this subject I will refer to some of the authorities cited. Judge Deady, in the case of *United States v. Jacob Mayer*, instructed as follows, upon the question of good character. "One thing more as to character. Evidence has been introduced, by the defendant, to show that he had a good character for truth and veracity. Character is only important as evidence when a case is doubtful. No proof of good character, against plain proof of guilt, can be considered, because experience has shown that the best of men have fallen; but, in cases of doubt, if it appears that a man has had a good character in the community in which he has lived, the fact should be taken into consideration by you as a circumstance against the probability of guilt." (*United States v. Jacob Mayer*, 1 Deady, 138.)

The rule as laid down by Russell on Crimes is in the following words: "It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. * * * It is, however, submitted with deference, that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted

to the consideration of the jury, together with the other facts and circumstances of the case." (2 Russell on Crimes, § 785; 3 Greenl. on Evidence, § 25.)

Admitting the rule laid down in Russell to be correct, does the instruction on this point violate this rule? It is true that in the case cited from 43 N. Y. it is said by the court that evidence of good character will sometimes of itself create a doubt, when without it none would exist; but they did not go so far as to hold that proof of good character would create such doubts as to entitle the prisoner to an acquittal, against the other evidence in the case sustaining the charge. The case of *Cancemi v. The People* (16 N. Y. 16), as well as the celebrated case of the *Commonwealth v. Webster* (5 Cush., Mass. 295), are cited in the 43d N. Y. as sustaining that case; but neither of those cases go so far as the case in 43 N. Y.; and in fact that portion of the opinion in the case last referred to is to some extent *dictum,* for the instruction, upon which they were passing, held to be erroneous, is as follows: "It is only in cases where you have a well-reasoned doubt, a doubt logically arrived at, arising out of all the testimony, that evidence of good character steps in."

In the case of *The People v. Ashe* (44 Cal. 288), the instruction held to be erroneous is as follows: "Evidence of good character is entitled to no weight except in doubtful cases," etc.

The instruction objected to in the case at bar is as follows: "The legitimate effect, however, of evidence of previous good character, is not to screen a person from punishment for crime if his guilt be satisfactorily proved; but the legal effect of such evidence is only to strengthen and support any reasonable doubt which may exist in the minds of the jury as to the guilt of the accused, and it might have the effect in certain cases to raise a doubt, which would otherwise not be considered a reasonable one, to the standard of a reasonable doubt." We think the ideas conveyed by the language of this instruction are not contrary to the rule heretofore referred to as laid down by Mr. Russell in his work on crimes, and that it is sustained by the case in 16 N. Y., as well as the case in 5 Cushing.

The rule laid down in the 16 N. Y., above referred to, is as follows: "The principle upon which good character may be proved is, that it affords a presumption against the commission of the crime. This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, but they are exceptions; the general rule is otherwise. The effect of this presumption from character will necessarily vary according to the varying circumstances of different laws. It must be slight when the accusation of crime is supported by the direct and positive testimony of credible witnesses, and it will seldom avail to control the mind in cases where the testimony, though circumstantial, is reliable, strong and clear. But in cases where the other evidence is nearly balanced, but slightly preponderating against the defendant, the presumption from the proof of good character is entitled to great weight and will often be sufficient to turn the scale and produce an acquittal."

In the case of the *Commonwealth v. Webster,* heretofore referred to, Chief Justice Shaw, in charging the jury upon this question of character, uses the following language: "There is one other point remaining to which it is necessary to ask your attention, and that is the evidence of character. There are cases of circumstantial evidence where the testimony adduced for and against a prisoner is nearly balanced, in which good character may be very important to a man's defense. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crime. He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But when it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience, it is so manifest that the offense, if perpetrated, must

have been influenced by motives not frequently operating upon the human mind, that evidence of character and of a man's habitual conduct under common circumstances must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is, therefore, in smaller offenses, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such a case where the evidence is doubtful, proof of character may be given with good effect."

In fact, it seems to be somewhat difficult to conceive of a case in which there would not have to be some doubt or misgiving in the minds of the jury as to the truth of the charge made against the prisoner, upon the evidence independent of that of character, before proof of good character alone would justify them in finding a verdict of acquittal or reducing the grade of the crime, especially when we consider that the law clothes the prisoner with the presumption of innocence and good character to begin with, and juries are far more likely to be misled by being told that proof of good character alone is sufficient to create a reasonable doubt upon which a prisoner should be acquitted, than to be told that it is only where the other evidence is nearly balanced, but slightly preponderating against the defendant, that good character would be of any value. Evidence of good character, when offered by a prisoner, ought to be submitted to the consideration of the jury with the other facts and circumstances of the case, to be weighed by them with the other evidence in the case, in determining the guilt or innocence of the accused.

The next objection is to that portion of the charge contained in the following language: "To constitute the deliberation or malice aforethought, which the law contemplates as a necessary ingredient or element of murder in the first degree, it is not necessary that the purpose or intention, on the part of the accused, to take the life of Hubbard, had been formed or resolved upon for any particular length of

time prior to the killing; but it is sufficient if you are satisfied, beyond a reasonable doubt, from the evidence, at some time prior to the killing, the defendant, in cold blood, and without provocation to excite his passion, conceived in his mind, and resolved (either on condition that Hubbard would not pay him, or otherwise) to take Hubbard's life, and that defendant did, without justification, shoot and kill Hubbard—whether at the precise time of the shooting defendant was in a passion or not, the act would be murder in the first degree."

Our statute defines murder in the first degree in the following language: "If any person shall, purposely and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

The rule, then, as laid down is, that to constitute murder in the first degree, the killing must be done purposely and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery, or burglary. No definite time has been fixed for the deliberation and premeditation necessary to make the crime murder in the first degree, which would otherwise be murder in the second degree; nor can there be in the very nature of things. Section 519 of the Criminal Code furnishes the only test on this subject, and that reads as follows: "There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion."

In the instruction above referred to, the court told the jury, in substance, that in order to convict the prisoner of murder in the first degree, they must believe, from the evidence, that he had deliberately made up his mind, in cool blood, to kill Hubbard, and that he did kill him without

justification. It is a well-settled rule that the instructions to the jury must be applicable to the case made by the evidence; and as the evidence tended to show that the prisoner, on his way to the store where the shooting took place, formed the design to kill Hubbard, and when charged by Hubbard immediately before the shooting, in presence of the witnesses at the store, with threatening to kill him as they came there, admitted that he had, and there being no evidence tending to show that he had abandoned such design previous to the shooting, the instruction referred to, in the light of the testimony contained in the bill of exceptions, must be taken to be that the killing in this case, if not justifiable, was presumed to be in pursuance of the design previously formed to take Hubbard's life, and in this view of it we think the charge ought to be sustained.

There is another objection urged against that portion of the instruction last referred to, stating that it made no difference "whether at the precise time of the shooting defendant was in a passion or not." Of course the charge must be taken altogether; and reading it in that way, we do not think it is open to the objection urged against it. When we consider that under the statute, to reduce the crime from murder to manslaughter, the killing must be done without malice, express or implied, and without deliberation, upon a sudden heat of passion which must be caused by a provocation apparently sufficient to make the passion irresistible, and we further consider that in this case there was no evidence to reduce the crime to manslaughter, the defendant could not have been injured by that expression, for it is contrary to human experience that men should remain cool, and not exhibit any passion when they are taking the life of their fellow-man, though they may have coolly and deliberately made up their minds to do it, and it is only where there is a provocation, apparently sufficient to create a passion that is irresistible, that the passion that a party is in will cut any figure in reducing the grade of the crime.

The Supreme Court of California, in the case of *The People v. Bealoba* (17 Cal. 394), in construing a statute similar to ours, says: "The acts of homicide by poison, etc., carry

with them conclusive evidence of premeditation, and the jury would have no option but to find the prisoner guilty in the first degree, upon proof of the crime; but it does not follow that the same result should not flow when other proof of deliberation than that afforded by the circumstances existed; for the statute is express that *all other* kinds of deliberate, willful and premeditated murder is murder in the first degree. To fall within this class the crime must be premeditated, willful and deliberate." These adjectives are, as used, nearly synonymous.

The jury, in this case, under the instructions given by the court and from the evidence, must have found that the prisoner formed the design to kill Hubbard before they arrived at the store, or at least for a sufficient length of time to deliberate on the subject, for, after being out some time, as appears by the bill of exceptions, they came into court and asked to hear again the charge of the court, in regard to the length of time which must elapse between the formation of the design to kill and the killing to constitute deliberation and premeditation, and render the offense murder in the first degree.

The last objection made is to the following action: "The jury, after receiving the instructions of the court, and at about the hour of eight o'clock in the evening, before retiring to consider of the verdict, were informed by his honor, the judge of the court, that he would not adjourn the court for two hours, but would hold the court open awaiting their verdict, should they agree. At about the hour of eleven o'clock in the evening, his honor, the judge of the court, communicated to the jury, through the bailiff, a message that he was about to adjourn court for the evening; whereupon the jury, by message sent through the bailiff, requested of his honor that he would hold the court open for twenty-five minutes longer, and when the said period of twenty-five minutes had about elapsed, the jury, through the bailiff, requested of his honor, the judge of the court that he would not adjourn the court for five or ten minutes more, which request was granted." Under our statute, the court clearly had a right to communicate with

the jury through the bailiff. (Civ. Code, § 200.) And unless there was an abuse of authority to the injury of the substantial rights of the appellant, the judgment will not be reversed on that ground.

In the case in 1st Pickering, the court had sent instructions to the jury, without the knowledge or consent of the parties to the action, and though that practice had been acquiesced in for a long time, the Supreme Court thought it had better be stopped. No doubt that was a correct conclusion, especially when we consider that their statute had no provision like ours, allowing a communication to be made upon the order of the court.

It does not appear that any substantial right of appellant was injured by these communications. The court, in the case of *O'Kelly v. The Territory* (1 Or. 59), very properly said: "Time was when the unfortunate accused was dragged to trial without counsel or a fair chance for self-defense; then other rules prevailed, and courts tried to make technicalities the means of justice; but when a prisoner comes before our courts with more privileges and presumptions in his favor than he otherwise could have, these olden rules cease with the reasons on which they rested, and criminals cannot be allowed to take refuge from the judgments of our liberal laws in the cobwebs of an antiquated practice. The awful import of these views to the appellant is not forgotton; but criminal laws were made to prevent crime, and their firm enforcement by courts is a duty as plain as it is painful."

Judgment affirmed.

THE O. & C. R. R. CO., Appellant, v. WM. POTTER, Respondent.

Valid Contract—Consideration.—In order to render an agreement to forbear, and the forbearance of a claim a sufficient consideration for a new promise, it is essential that the demand forborne should be sustainable at law or in equity, and the consideration will fail if the demand is without foundation.

Appeal from Lane County.

This is an action by appellant against respondent on a promissory note for three hundred dollars, with interest, executed, as alleged, by respondent on the 15th day of May, 1872. The respondent, in his answer, denies the execution of the note for value or any indebtedness; then, and for a further defense, alleges, that about April 18, 1871, he executed with others a writing, in favor of the appellant, through its agent, Ben Holladay, in the form of a subscription, whereby he promised to pay three hundred dollars, in coin, to appellant, in consideration that the said appellant, the O. & C. R. R. Co., would thereafter cause the line of their railroad, then in course of construction, to be located across the Willamette River within three miles of the town of Harrisburg, and constructed on the west side of said river to some point within the corporate limits of Eugene City, and a depot to be established within the corporate limits of such city; that the note upon which the action is brought was given to appellant in satisfaction of said subscription, and for no other purpose, and without any other consideration than the pretended claim of appellant on said subscription.

To this answer appellant filed a general demurrer, which was overruled; whereupon appellant filed a reply admitting substantially the new matter contained in the answer, but alleging further that the respondent, in order to induce appellant to forbear and to obtain further time for the payment of said subscription, agreed with said company and promised to pay the said sum of three hundred dollars, in coin, on July 1, 1872, and executed the note described in the complaint therefor, and that said note was executed in consideration of such forbearance and extension of time.

Respondent demurred to this reply, and the demurrer was sustained. From the judgment rendered upon the order sustaining the demurrer this appeal is taken.

The errors relied upon in the appeal are stated in the opinion of the Court.

Dolph, Bronaugh, Dolph & Simon, for Appellant.

Thompson & Fitch, for Respondent.

By the Court, Shattuck, J.:

The appellant, as one ground of objection to the judgment below, insists that there appears to be an issue of fact made by certain allegations of the answer and denials thereof in the replication, which is not disposed of by the demurrer. This would be a valid objection if the pleading itself, taken as a whole, did not dispose of this issue. The answer avers that the note in question was given to plaintiff in satisfaction of the subscription described in the answer, and for no purpose and without any other consideration than the pretended claim of the plaintiff against defendant on said subscription.

The replication denies that said note was given to plaintiff without any other consideration than the claim of the plaintiff against defendant on said subscription.

If this were all that appeared we should be of opinion that an issue of fact is made that could not be disposed of by the general demurrer to the replication; but it appears that the replication contains a full recital of the facts and circumstances of the subscription referred to, and of the giving of the note in question, and contains this allegation: "That in order to induce said Holladay to forbear bringing said action, and to obtain further time for the payment of said subscription, defendant agreed with said Holladay and promised to pay said sum of three hundred dollars, coin, on the 1st day of July, 1872, to the plaintiff, and thereupon executed to plaintiff the note described in the complaint, and the same was executed to the plaintiff upon the strength and in consideration of such forbearance to bring said action and said extension of time in which to pay said sum." By this averment the plaintiff has fully disclosed the consideration, and rendered any evidence upon the issue above mentioned unnecessary and superfluous. The demurrer then went to the whole pleading and was properly considered in that view.

The appellant insists that the original subscription, described in the pleadings, was valid, and argues this view at length. That question was disposed of by this Court at

the last term, in *Holladay v. Patterson* (ante, p. 177), and is no longer here an open question, and if this case does not stand upon some other foundation than that subscription, the judgment below should not be disturbed.

Counsel for the appellant, however, ask a reversal upon two aspects of the case—that the facts detailed in the pleadings show the consideration to have been a compromise of a doubtful claim, and that forbearance to sue the original claim was sufficient consideration to support the new promise.

If the facts pleaded presented a case of compromise, within the rule of the authorities cited, a reversal ought to be had, notwithstanding this Court have, since the execution of the note, declared (*Holladay v. Patterson*) that the contract of subscription was invalid; for when this note was made, the questions raised and decided in *Holladay v. Patterson* had not been settled. The decisions on the subject by the courts of other States were far from uniform, professional opinion in our own State was divided, and as it appears in that very case the decision of our Court was not without dissent. If, then, in this state of the law, the parties had disagreed as to the facts and the law relating to the subscription, and there had been between them an actual controversy and difficulty, and they had settled it by a mutual agreement to waive questions of law and fact relating to the subscription, and upon mutual concession had entered into the new contract, I should think it ought to be sustained and a recovery had upon the note, upon the authority of the cases cited (13 Ill. 143; 3 Hill, 504), which hold that "the compromise of a doubtful claim is a sufficient consideration for a promise, and it is immaterial on whose side the right ultimately turned out to be, as it must always be on one side or the other," and that such a compromise may involve as well questions of law as of fact. But these pleadings do not present such a case. It is simply alleged that the subscription was overdue, and that payment was demanded and suit threatened, and thereupon it was agreed to extend the time of payment, and the note was given for the amount—a mere forbearance, nothing more.

In order to render the agreement to forbear and the forbearance of a claim a sufficient consideration for a new promise, it is essential that the demand forborne should be sustainable at law or in equity, and the consideration will fail if the demand is without foundation. (Chitty on Contracts, pp. 35 and 36, and notes; 3 Pick. 83.)

The facts pleaded and the decision of this Court in *Holladay v. Patterson,* bring this case within this rule of Chitty, and appellant's argument on this point fails.

Appellant insists further that this case is upon the same footing as *Smith v. Case,* decided by this Court (2 Or. 190), or at least is like cases cited in the books where void or voidable contracts have been ratified. But there is a distinction which must be kept clearly in view. In this case, the invalidity attaches to the very nature and subject-matter of the original transaction, and is not removed by change of time or person, while in *Smith v. Case* the invalidity of the original contract grew out of the time when it was made (on Sunday). The defendant had received so much money of plaintiff on Sunday, and on the same day had given his note for it, a transaction forbidden on that day, but valid on any other day. Afterwards, on a work day, the defendant acknowledged the receipt of the money and the giving of the note, and promised to pay the money. Most of the other cases cited by counsel are those where a party under some disability, such as coverture, infancy or duress, has entered into a contract which could not be enforced at law, but has sanctioned and ratified the contract after the disability had ceased. In these cases, the subject-matter of the transactions and the consideration of the agreements were lawful, and the disability was only personal and temporary, and did not exist when the new promise was made. In the case before us, the new promise was only a continuance and in furtherance of the original transaction, and must stand or fall with it.

The judgment must be affirmed.

NEWELL RUSSELL, Respondent, v. J. M. SWIFT, Appellant.

PLEADING—CONTRACT FOR PAYMENT OF GOLD COIN NEED NOT BE ALLEGED TO BE IN WRITING.—Our statute contemplates that in order to obtain a judgment for gold coin the contract should be in writing; but under the rules of pleading it is not necessary the contract should be averred to be in writing, but if questioned or denied it must be proved on the trial by the writing.

APPEAL from Baker County.

This was an action to recover an alleged balance of two hundred and twelve dollars on an account for labor performed, for which, it is alleged in the complaint, the defendant promised to pay plaintiff at the rate of thirty-five dollars per month "in gold coin," and the further sum of eighteen dollars, alleged to be due the plaintiff on account of money received by defendant and to his use from plaintiff. The answer alleges that before the commencement of the action the plaintiff accepted from the defendant sixty-four dollars and five cents in full satisfaction and discharge of the several alleged promises and items of indebtedness set forth in the complaint.

The reply denies the satisfaction and discharge set up in the answer.

A jury having been waived, the questions of fact presented in the pleadings were tried by the court and determined in plaintiff's favor. Judgment was entered upon these findings for plaintiff for two hundred and thirty dollars in gold coin, from which judgment this appeal is taken.

S. F. Chadwick, for Respondent.

Knight & Lord, for Appellant.

By the Court, PRIM, J.:

It is claimed by appellant that a judgment for gold coin can only be rendered on a written contract to pay such particular kind of money and that it should be averred in the complaint that the contract was in writing. Our

statute provides "that the several courts, within this State, in giving judgment * * * on a written contract, for the payment of gold coin, * * * shall, if either party require it, adjudge that the principal sum, so contracted, and the interest thereon, shall be paid in the kind of money so specified in said contract." (Mis. Laws, ch. 54, § 1.)

In this cause it is alleged in the complaint that the defendant promised to pay gold coin without averring that the contract was in writing. This allegation is not denied. The only defense made in the answer is payment and satisfaction. And this defense not having been made out, and the allegations of the complaint not being denied by the answer, they are to be taken as true, and the court below so found.

The judgment is for coin, and the question arises, Does the failure to aver that the contract was in writing render the complaint insufficient to sustain such judgment? To this we answer that in cases of this kind it is not necessary to allege in the complaint that the contract was in writing; but if it is questioned or denied, it must be proved on the trial by the writing. (*Taylor v. Patterson,* ante, p. 121.)

The principle laid down in that case, we think, is decisive of this one. Bonham, J., who delivered the opinion of the court, said: "Although our statute requires (or at least contemplates) that a contract for the payment of gold coin, to be valid, must be in writing, yet the rules of pleading in such cases do not require the complaint to aver that such agreement was in writing. The statute above referred to, and commonly known as the 'Specific Contract Act,' does not operate to change the rule of pleading in actions to recover gold coin, but only requires a different quality of evidence." The authorities cited fully sustain the decision announced.

The majority of the court are of the opinion the judgment should be affirmed.

Mr. Chief Justice BONHAM dissented.

JOSEPH KNOTT, Respondent, v. JAMES B. and ELIZABETH STEPHENS, Appellants.

A SUIT BY ONE OBLIGEE IS NOT A BAR TO A SUBSEQUENT SUIT TO ENFORCE THE RIGHTS OF BOTH OBLIGEES.—A suit brought by the assignee of one of two obligees, in a bond for the conveyance of real estate, is not a bar to a subsequent suit for specific performance between the same parties, and concerning the same land, commenced after the plaintiff in the former suit had acquired the interest in the land of both obligees in the bond.

TIME—ESSENCE OF CONTRACT, WHEN.—Time is not of the essence of a contract to convey land at a future day, unless the language of the contract clearly indicates that it was so intended by the parties.

IDEM.—Where, by the terms of the contract, time is not made material, either party may enforce performance by executing, or tendering the execution of the contract on his part, and demanding the same of the opposite party.

APPEAL from Multnomah County.

On the 10th day of March, 1866, the defendant, James B. Stephens, contracted with Joseph Long and William Foster to sell them block No. 23, in the city of East Portland, for the agreed price of six hundred dollars in coin, of which sum one hundred dollars was then paid; and said Long and Foster executed and delivered to said Stephens their joint and several promissory note for the payment of the remaining five hundred dollars two years after date, with interest at one per cent. per month.

On the same day (March 10, 1866), James B. and his wife, Elizabeth Stephens, executed and delivered to said Long and Foster, a bond for a deed to said block No. 23, in the penal sum of five hundred dollars, the conditions of which read as follows: "Now, therefore, on the payment of said note ($500), the said James B. and Elizabeth Stephens, their heirs, executors or administrators are to make, execute and deliver, or cause to be, a good and sufficient warranty deed, in fee-simple, to the following described * * * real estate * * * to wit, block No. 23, in the city of East Portland, in Multnomah County, Oregon." By the terms of this bond the obligors therein

reserve to themselves any ferry rights or franchises which now, or in the future, may appertain to said block.

On the 12th day of March, 1867, sixty dollars, or one year's interest, was paid on said note. In the fall of 1867, Long died intestate. On the 28th day of June, 1870, Foster, for himself and as surviving partner of Long, deceased, undertook, for the consideration of two hundred dollars and the payment of said five hundred dollar note to Stephens, to sell and assign to said Knott all the right, title and interest of himself and Long, deceased, in and to said block No. 23, and did in that manner assign said bond to Knott. Thereupon said Knott, on the 2d day of July, 1870, offered and tendered to said James B. Stephens seven hundred and sixty dollars in coin, as the amount then due upon said note, and demanded a deed to said block, which money Stephens declined to receive, and refused to execute such deed.

On the 22d day of July, 1870, Knott commenced suit in the Circuit Court for Multnomah County against Stephens and wife, to compel the specific performance of said contract of sale by the execution of a deed to said block according to the terms of said bond. After issue joined by the pleadings and upon trial by the court, defendants obtained a decree dismissing plaintiff's cause, and for their costs and disbursements, which decree was rendered on the 13th day of February, 1871. Afterwards, in said year 1871, Wm. Foster was duly appointed as administrator of the estate of Jos. Long, deceased, by the County Court of Multnomah County, and by proceedings regularly had thereafter, sold at public auction said Long's interest in and to said block No. 23, which was purchased by Joseph Knott for two hundred and fifty dollars in coin, and a deed thereto was duly executed by said Foster, as administrator of Long's estate, and delivered to said Knott on the 13th day of May, 1872. Upon obtaining this deed, Knott made a tender of eight hundred and fifteen dollars in gold coin, as the amount then due on said five hundred dollar note, including accrued interest. Stephens refused the tender, and refused to execute a deed, claiming that the bond had been rescinded by the failure

of Foster to comply with the contract of sale on his part. Thereupon, on the 17th day of May, 1872, plaintiff commenced this suit, and prays a decree for the specific performance of said contract.

Appellants allege that Long's representative and Foster had forfeited their right to a specific performance at the time of the alleged assignment to respondent Knott, and further, that after the forfeiture of said bond by said Foster, they being ignorant of any pretended assignment of said bond to the respondent, or of any claim of Foster to said block, commenced improving the same in June, 1870, by driving piles thereon, and otherwise improving the same without objection from respondent or said Foster, until July 9, 1870, when respondent for the first time set up claim to said block under the assignment of said bond of June 28, 1870.

Appellants also plead, in bar of respondent's right to recover in this suit, the adjudication had between the same parties and concerning the same property, in which appellants, on the 13th of February, 1871, obtained judgment against plaintiff dismissing his bill and for costs. Appellants, in their answer in this case, tender to plaintiff the one hundred and sixty dollars paid by Foster and Long on the block, with accrued interest thereon, and offer to surrender up said five hundred dollar note, and pray a decree rescinding said contract.

Respondent replying, denies substantially the new matter set up in answer.

The cause was by agreement of the parties referred to W. H. Effinger, Esq., to take and report the testimony and his findings of fact, and on the filing of his report it was stipulated that a *pro forma* decree might be entered by the court, as each party intended, in the event that the cause should be decided adversely to him or them, to appeal to this Court. Whereupon the court below decreed the relief prayed for by plaintiff, and defendants appeal.

By the Court, BONHAM, C. J.:

The determination of this cause involves the consideration of the following principal questions:

1. Is the decree of the Circuit Court, rendered February 13, 1871, in favor of the defendants and against the plaintiff, dismissing his bill, conclusive of this suit, by placing the subject-matter thereof *res judicata*?

2. In bonds or agreements for the conveyance at a future time of real estate, when is time material, or of the essence of the contract?

3. When, by the terms of a bond, time is not made of the essence of the contract, how can it be made so by the subsequent action of the parties, or either of them?

4. When time becomes material, what steps are necessary to be taken to operate as a rescission of the contract?

The objection to plaintiff's right to maintain this suit because of the decree rendered against him February 13, 1871, we think cannot be maintained. In the suit in which that decree was rendered, although between the same parties and concerning the same property, yet it is apparent from the complaint in that case that the plaintiff was not in a condition to demand specific performance of the contract of sale, because he had then only acquired the interest of Foster in the bond of defendants by the assignment thereof of June 28, 1870. The attempt of Foster by the assignment referred to to transfer to Knott the one-half interest of his deceased partner, Long, in and to block No. 23 was a nullity; because he (Foster) had at that time no right or authority in law to so transfer the same as surviving partner of Long. Knott could in no event have compelled the execution of a deed to him until he had succeeded to the entire interest of Foster and that of the estate of Long, deceased. The interest of Long's estate in the property in question was not obtained by plaintiff until May 13, 1872, when he secured Foster's deed as administrator of the estate of Long to his (Long's) interest in the block. This was the title to the other half interest in said block No. 23, acquired after the adjudication of February 13, 1871; and Knott was

then, for the first time, in a situation, under any circumstances, to demand of Stephens and wife a deed to the premises in controversy. The subject-matter of the cause determined February 13, 1871, is not identical with that of this suit. Section 726 of the Civil Code declares, "That only is deemed to have been determined by a former judgment, decree or order which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto." A person who litigates for the title to property which he does not own, is not estopped thereby from setting up an after-acquired title. (*Burt v. Sternburg,* 4 Cowen, 563; *New Eng. Bank v. Lewis,* 8 Pickering, 117; Freeman on Judgments, § 329.)

The time specified in a bond for a deed when the purchase-price is to be paid and the deed executed, is material, and must be strictly observed where, from the language employed, it is evident that it was the intention of the contracting parties to so regard it. But in order that the obligee in a bond may be justly held to have forfeited his equitable interest in the land contracted to be conveyed on his failure to pay the purchase-price or any part thereof remaining unpaid, the conditions of the bond must clearly and unequivocally express the intention of the parties that it should so operate.

Compensation, and not forfeiture, is a favorite maxim with courts of equity; and, where the vendor, by his contract to convey, has not affirmatively expressed his intention to make the time of payment material, courts of equity will infer that it was understood that interest on the deferred payments would be a sufficient compensation for the delay. (*Smith v. Robinson,* 13 Ark. 533; *Moore & Cail v. Anders,* 14 Ark. 634; *Gouldin v. Buckelew,* 4 Cal. 107; Hopkins's Ch. 548; 9 Johns. 448; 1 Story's Eq. Jur., §§ 788-9.)

The conditions of the bond in this case are, that the defendants will execute a good and sufficient deed to block No. 23, on the payment by the obligees, Long and Foster, of the five hundred dollar note by them executed to James B. Stephens. No words are used to indicate an agreement or understanding that Long and Foster were to forfeit the

money already paid, or their rights under the contract, in any respect, if they should fail to make prompt payment when the note should become due. We, therefore, conclude that, by the terms of the bond in this case, time was not regarded as material; but, that the obligors (unless their relations were otherwise changed) ought to be regarded as the holders of the legal title in trust for the obligees, and as a security for the purchase-price until the same should be paid. (*Huffman v. Hummer,* 2 C. E. Green's N. J. Equity R. 263; *Leggett v. Edwards,* Hopkins's Ch. 599; *Tyree v. Williams,* 3 Bill (Ky.) 367; *Andrews et al. v. Sullivan,* 2 Gilman, 327; *Quinn v. Roath,* 37 Conn. 16.)

In *Huffman v. Hummer,* above cited, the Chancellor says: "As a general rule in equity, time is not deemed to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. And one of the most frequent occasions on which courts of equity are asked to decree the specific performance of contracts is, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with." (1 Story's Eq. Jur., § 776.)

Regarding the bond in this case, then, as not providing by its terms that time is of the essence of the contract, the next question is, did the circumstances of the transaction, or the subsequent action of the contracting parties, cause it to become so? The block of land in question was, at the date of the execution of the bond to convey the same, vacant and unimproved, and no actual pedal possession of the same as a distinctive block was had until June, 1870, when Stephens, assuming that the bond had been forfeited by the failure of Foster, the surviving obligee, to pay the balance of the purchase-price thereof, took possession of the same and commenced driving piles and preparing to build thereon. Until this time there was nothing in the situation of the premises to indicate that the purchasers would be expected to be more prompt in the fulfillment of their engagements than would ordinarily be expected in cases of the sale

of vacant lands, where time was not made material by the terms of the contract.

If a person in the actual occupancy of lands which it was necessary for him to use and improve, either for purposes of agriculture, or for trade and commerce, should contract to convey the same at a future day, on the payment of the purchase-price, the situation of the owner of the premises might be such as to indicate that his interests would demand prompt compliance with the terms of the contract on the part of the purchaser. In such case, the situation of the owner of the land, and the purpose for which the same was being used at the time of the contract to sell, would be circumstances to indicate that time was regarded as material on account of the damage which might result to the owner in the event of delay in the full consummation of the agreement. But the pleadings and proofs in this case do not show such a state of facts.

In this case, then, although time is not made of the essence of the contract, either by the terms of the bond or by the situation of the parties to the premises in controversy, yet defendants, if they had chosen, might have made it become so by demanding payment of the balance of the purchase-price, and by tendering a deed to the premises and notifying the obligees, or their legal representatives, that the contract would be regarded as rescinded, unless it was executed by them within a reasonable time. But before a rescission of the contract could be insisted upon by the obligors in the bond, they should have tendered back the money already paid by Foster and Long, with legal accrued interest thereon, and offered to deliver up the five hundred dollar note which they held against them, and thereby place them *statu quo*.

In this case we think, as the referee found, the fact to be that Stephens did once, and perhaps twice, demand payment of the note from Foster shortly after the same became due in March, 1868, but nothing more. There is no pretense on the part of defendants that they or either of them ever tendered back the one hundred and sixty dollars paid on the land, or that they offered to surrender up the note in

question until after the commencement of this suit. It is true that defendants aver in their answer that at divers times during the year 1869 they offered to execute the deed called for in the bond, and notified Foster, the surviving obligee, that they would rescind said contract to convey unless he paid the note in question. But plaintiff denies this in his replication, and upon the proofs the case stands upon the oath of Stephens opposed by that of Foster, and regarding each witness as standing equally fair in point of veracity, the fact must be found against the defendants.

Either party in this case, upon his own motion, might have caused the time of performance of the contract to become material, by executing or tendering an execution of the contract on his part and by demanding the same of the opposite party. But it comes too late for the defendants, in order to demand a rescission of this contract, to tender back for the first time, after the commencement of this suit, the five hundred dollar note, and the one hundred and sixty dollars with interest which had been paid upon the land.

We conclude, in view of all the facts in this case, that the defendants ought in equity to be compensated for the improvements which they placed upon the block of land in controversy in June, 1870, which we find from the evidence were of the value of four hundred dollars, in gold coin; and that a decree of specific performance should be awarded on the payment of that sum, in addition to the balance of the purchase-price tendered and on deposit in court.

Plaintiff having accepted the condition on which the decree for specific performance was awarded by the court by the payment of said sum of four hundred dollars, the decree of the court below is modified accordingly.

GRANT COUNTY, Respondent, v. F. C. SELS, Appellant.

ILLEGAL PAYMENT TO COUNTY OFFICER MAY BE RECOVERED.—Money claimed by and paid to a county officer under a claim of right for his services as such, if he be not entitled thereto, is an illegal payment and may be recovered back by the county.

CONSTITUTIONAL ACT.—The act of October 26, 1870, fixing the salary of the county judge of Grant County at eight hundred dollars per annum is not unconstitutional.

STATUTE MAY BE REPEALED BY IMPLICATION.—When two statutes are inconsistent and repugnant so that both cannot stand, the one last enacted shall be considered in force, and to repeal by implication all prior acts or parts of acts that conflict with it.

Per Bonham, Chief Justice, dissenting.

AMENDMENTS BY IMPLICATION.—Section 22, Art. IV of the State Constitution, prohibits amendments by implication. Every law as *amended*, should not only show in itself what the law in force on that subject is, but it should be a direct index to the law which has been superseded.

APPEAL from Grant County.

The facts are stated in the opinion of the Court.

B. Whitten and Thayer & Williams, for Appellant.

John Catlin and B. Killen, for Respondent.

By the Court, BURNETT, J.:

The complaint in this case alleges that the respondent is a public corporation and a county in the State of Oregon, duly organized according to the laws thereof, under the name of Grant County. That on the first Monday in June, 1870, the appellant was duly elected judge of said county, and thereafter, on the first Monday in July, 1870, duly qualified according to law and entered upon said office, and that he continued as such officer until the first Monday in July, 1874. That during his said term of office, to wit, from the first day of July, 1872, to the sixth day of July, 1874, the said appellant had and received from said county, without any consideration whatever, in warrants drawn upon the treasury of said county, the sum of eight hundred dollars. That said sum was taken and received by defendant (appellant) from

said county upon a pretended right that he was entitled to have and receive from said county an annual salary of one thousand two hundred dollars as compensation for his services as judge of said county, for said time, when, in truth and in fact, the defendant (appellant) was, from the first day of July, 1872, until the sixth day of July, 1874, only entitled by law for said services to the annual salary of eight hundred dollars and no other or greater sum. Then follows a list of the county warrants alleged to have been drawn in favor of the appellant, and received by him, for the two years from July, 1872, to July, 1874, and amounting altogether to the sum of $2400 (eight hundred dollars of which, it is alleged, was issued without authority of law), and demand for judgment for eight hundred dollars and interest.

To this complaint appellant by counsel interposed a demurrer in the court below, upon the grounds: (1.) That plaintiff (respondent) has no legal capacity to sue in this action, in this, that § 346, pages 234 and 235 of the Code, inhibits plaintiff from prosecuting actions of this nature. (2.) That complaint does not state facts sufficient to constitute a cause of action.

The court below overruled the demurrer, and rendered judgment in favor of Grant County, the plaintiff therein, for the sum of eight hundred dollars, but did not allow any interest thereon.

The defendant appeals, and assigns in his notice of appeal the following grounds of error: (1.) That the court erred in deciding that the law of 1870 did not repeal, revise or amend the law of 1868, relating to the salary of the county judge of Grant County, Oregon. (2.) That the court erred in not deciding that the law of Oregon, passed 1870, in relation to the salary of the county judge of Grant County, was unconstitutional and void. (3.) That plaintiff had no legal capacity to sue.

The principal question presented to the Court by this appeal is, whether the act of the Legislature of October 26, 1870, entitled "An Act to regulate the salaries of county judge and county treasurer of Umatilla and Grant Counties,"

is void or not, as being contrary to § 22, Art. IV of the Constitution.

The section above referred to reads as follows: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

It is a well-settled rule, and one that has been more than once announced by this Court, that before a statute will be declared unconstitutional it must appear very clearly to be so. The opposition between the Constitution and the law should be such that the judge feels a strong and clear conviction of their incompatibility with each other. (*Fletcher v. Peck*, 6 Cranch, per Marshall, C. J.)

Mr. Justice Washington, says Cooley in his work on Constitutional Limitations, gives a reason for this rule which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." (*Ogden v. Saunders*, 12 Wheat. 270.)

The authorities are uniform upon this subject, giving the acts of the Legislature the benefit of a reasonable doubt.

If, then, we are to hold that the act of 1870, heretofore referred to, is void, it must appear, after a careful examination, to be in plain violation of that section of the Constitution above referred to. We are not prepared to say that such is the case. There may be some doubts about it, and that is as far as we can go; and, being in doubt, we feel bound, in the language of Mr. Justice Washington, to resolve that doubt in favor of the validity of the law in ques-

tion, and to hold that the law of 1870, fixing the salary of the judge of Grant County at eight hundred dollars, is valid, and repeals by implication all prior acts, or parts of acts, that conflict with it. The doctrine of repeal by implication is not prohibited by our Constitution, and has been recognized and adopted by this Court in the cases of *State v. Benjamin* (2 Or. 125.); *Fleischner v. Chadwick,* ante, p. 152, and *Hurst v. Hawn,* post, p. 275.

The Constitution of the State of Missouri has a similar provision to that in § 22, Art. IV of our Constitution, and the Supreme Court of that State, having that provision before them in the case of *State of Missouri ex rel. C. Maquire, Relator, v. Daniel M. Draper, State Auditor, Respondent* (47 Mo. 29.), says: "Counsel for relator, to sustain the position that the constitutional mode of amending laws has not been complied with, refers to Article IV, § 25, which provides that 'the act revised or re-enacted, or the act or part of act amended, shall be set forth and published at full length, as if it were an original act or provision.' * * * The statute under consideration, however, does not purport in terms to amend or repeal any particular act or section, and can only be held to have that effect by implication."

The court further says: "Counsel urge upon our consideration the embarrassments and inconveniences arising from attempting to amend by implication such important statutes as those pertaining to revenue, and show that the doubts and uncertainties as to what is really the law, against which the constitutional provision referred to was provided, still exist if such implied amendments or repeals are sustained.

"We are fully aware that doubts and uncertainties not only must exist from imperfection of language and want of foresight, but also are often created by the careless or inconsiderate action of legislative bodies. But still we can not pronounce that action illegal, and invalidate the enactment, unless it plainly contravenes some constitutional provision.

"The Constitution has gone so far as to prohibit amend-

ments in terms, except in a particular way, but it has not prohibited amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz., that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. This must be so, in the nature of things, for the last enactment is the latest expression of the legislative will, and must prevail, unless it contains some inherent vice that prevents it becoming a statute. In many cases it would be difficult, if not impracticable, to re-enact and repeal all statutes inconsistent with a new enactment. * * * *

Counsel have cited no authorities which deny the power of repeal by implication, and I have been unable to find any. On the other hand cases are numerous, and that have arisen under constitutions like our own, where such repeals are sustained."

Again, in the same opinion, it is said: "The Constitution is silent upon the question of implied repeals; and whether or not, as so elaborately argued by counsel, the same evil results from allowing such repeals as those specially provided against in that instrument, we cannot create a new prohibition, or give the present one a scope beyond its import and beyond the construction universally given it."

It is claimed, by counsel for appellant, that this case falls within the case of *Stock v. The City of Portland* (2 Or. 69); but this is a mistake, for in that case the act in question was entitled "An Act to amend an Act entitled 'An Act to incorporate the city of Portland;'" and the court say it was an attempt to amend an existing law by mere reference to the title, without setting the same forth at full length as amended, showing an entirely different case from the one at bar.

The next point upon which error is assigned is, that the county has not legal capacity to sue. We are disposed to treat this action as for money had and received, and think the action can be maintained under subdivision 1 of § 346

of the Code; for if the appellant received county orders of the value of eight hundred dollars which he has no right to retain, there would be an implied contract raised by the law in favor of the county, and against the appellant, upon which it could sue. It was further argued, by counsel for appellant, that this was a voluntary payment by the county to the appellant, and that the county cannot recover it back. It is, perhaps, a sufficient answer to this position to say that no error has been assigned on this point, and though the demurrer in the court below contained an objection to the complaint on the ground of its insufficiency, yet the appellant seems to have abandoned that point on his appeal, and the rule is well settled that the appellant can only correct those errors assigned in his notice of appeal, in an action at law. But, admitting there was a proper assignment of error on this point, or that that point could be raised for the first time in this Court, I do not think a county is in any manner bound by the illegal act of one of its officers. The duties of such officers are pointed out by law, and if they go beyond them their acts are void. If the clerk issues county orders on the county treasury, either with or without directions from the County Court, that there is no authority in law for issuing, they are void. The party who takes such warrants obtains no advantage that will estop the county from asserting her rights and refusing to pay them, or from recovering back their value if the party refuses to surrender them.

In the case of *People v. Supervisors of El Dorado County* (11 Cal. 170), the Supreme Court of the State of California held that the board of supervisors of a county possess no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer; that such a claim is not authorized by law, and the power of the board to allow accounts against the county is confined to those legally chargeable; that county warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been trans-

ferred, or in what faith they may have been taken. If illegal when issued they are illegal for all time.

There is no doubt of the general rule of voluntary payments, as claimed by appellant's counsel, but that such does not apply to the case at bar seems to be well sustained by reason as well as by the authorities. In the case of the *American Exchange Fire Insurance Company v. Britton et al.* (8 Bos., N. Y. Rep. 149), it is held that money exacted by and paid to public officers under a claim of right for their services as such, if they be not entitled thereto, is illegally exacted and may be recovered back, and that such a payment is not a voluntary payment.

Judgment affirmed.

BONHAM, C. J., dissenting:

I regret that I have not been able to agree with my brethren in the conclusions arrived at in this case. While I fully concur with them in the rule of construction, as stated, that a law ought not to be declared unconstitutional and void by the courts until it is clearly made to appear that it contravenes some provision of the fundamental law, yet to my mind the act in question does this beyond any reasonable doubt.

Section 2 of the act of October 24, 1868, fixes the salary of the county judge of Grant County at one thousand two hundred dollars, and the other provisions of the same section fix the salaries of all the other county judges in the State at the sums therein stated respectively. (Session Laws, 1868, p. 9.)

Section 1 of the act of October 24, 1870 (Session Laws, 1870, p. 62), undertakes, without even referring to the title of the act of 1868, to amend § 2 of said act by altering or changing its provisions, so far as the same refer to the salary of the county judge of Grant County, leaving the remaining portion of said § 2, so far as the same provides for the salaries of all the other county judges in the State, as the existing law on that subject.

Section 22 of Article IV of the Constitution of this State declares, "No act shall ever be revised or amended by mere

reference to its title, but the act revised or section amended shall be set forth and published at full length."

What is meant by the amendment of a section of a law? I maintain that it means to alter or change such section by adding something to or taking something from such section, or in some way modifying some of its parts or provisions, leaving the remainder thereof to stand as valid and operative law. If I am correct in this, the corollary follows that the act of October 24, 1870, operates as an amendment of § 2 of the act of October 24, 1868. But it is argued by counsel for respondent that the act of October 24, 1870, does not profess to amend § 2 of the act of October 24, 1868. In other words, that it is not in terms declared to be amendatory of such section, and that it does not refer to the title of the act of 1868, and therefore it does not fall within the inhibition of § 22 of Article IV of our State Constitution, and does not contravene its provisions. To my mind, this argument is briefly but pertinently answered by counsel for appellant when they say, "If mere reference to its title is insufficient, certainly no reference at all would be much more fatal."

It appears to me that the mischief intended to be obviated by § 22 of Article IV of our Constitution is materially lessened where the amendatory act refers to the title of the act proposed to be amended, from what it would be where no reference at all is made; because such reference furnishes an index to the act to be amended, although it does not come up to the requirements of the Constitution, by pointing out the specific part of such act which is amended, and by setting the same out word for word as it will read when amended. The object of the framers of our Constitution in prohibiting amendments by mere reference to the title of the act amended, I apprehend was to interdict the usual practice of accomplishing amendments in that manner, which by the customs of legislation had obtained when and where no such constitutional prohibition existed against it. The word *mere* suggests diminution, and is defined to mean, "Only this, and nothing else; such and no more; simple, bare." (Webster.) And if *mere* reference

to the title, and nothing more, is insufficient, certainly a more objectionable form of proceeding, where the amendatory act furnishes no index whatever to the act amended, ought to be prohibited, and in my judgment was intended to be by the section of the Constitution referred to. That which clearly appears to be within the spirit of the rule is within the rule.

Section 22 of Art. IV of the Constitution was doubtless intended to accomplish a twofold object:

1. To require legislators, before proceeding to tamper with a law by ingrafting amendments upon it, to know by a direct reference to such law, as it is written, what are its provisions, so that they may intelligibly vote upon its amendment.

2. That when the harmony and proportions of an act are destroyed by the revisal of the same, or where a like result occurs to one or more sections of an act by an amendment of the same, such harmony shall be restored in the amendatory act, by setting out the act as revised, or the section or sections as amended, so that each will be perfect and complete within itself, in order that the people, who are required to know the law, may be furnished with the means of finding it out. Every law, as amended, should not only show in itself what the law in force on that subject is, but it should be a direct index to the law on that particular subject which has been superseded and which is not in force.

The case of *State of Missouri ex rel. Maguire v. Draper, State Auditor* (47 Mo. 29), cited in support of respondent's position on this question, I concede appears to be a case in point; but, with due respect for the wisdom of the court rendering that decision, it does appear to me that the reasoning of the court is subject to criticism, and that it cannot be sustained either upon principle or in the light of the preponderance of the authorities on this question. The court in that case say: "The Constitution has gone so far as to prohibit amendments in terms, except in a particular way, but it has not prohibited amendments by implication." The provision of the Missouri Constitution in question reads: "The act revised, re-enacted, or the act or part

of act amended, shall be set forth and published at length as if it were an original act or provision." If the doctrine of the Missouri case referred to is correct, all that a legislator need do to *evade* the operation of this constitutional provision is, to proceed directly to enact a law which, to all intents and purposes, is in effect amendatory of a pre-existing law, without in terms naming the amendatory act as such, and the object is accomplished and the act is amended by *implication*, the very thing which the framers of the Constitution intended to prohibit.

To my mind this appears to be a sacrifice of *substance* to matter of *form*, and a surrender of the spirit of the constitutional provision in question to excessive technicality. I cannot believe that it was ever intended by the framers of a constitutional provision like this, which was intended to prevent a mischief of such great magnitude, that the effects intended to be avoided might be accomplished by indirection in the manner suggested. It is, in my judgment, wholly immaterial whether the act is *eo nomine* amendatory or not; the evil against which the constitutional provision in question was directed, is amendments which are such *in effect*, and is not limited to those which are so *named* in the title or preamble of the act.

The decision of this Court, in *The City of Portland v. Stock* (2 Or. 69), as I read and construe it, is decisive of the same question presented in the case at bar. It is true that the act in question, in that case, was in *terms* amendatory of the charter of the city of Portland, but Mr. Justice Wilson, in announcing the opinion of the court, did not seem to attach any importance to that circumstance, but proceeded directly to the consideration of the *nature* and *effect* of the act in question by saying: "The first question for determination is, whether § 7 of the act of October 15, 1862, operates as a revision or an amendment of any part of the charter of the city, passed January 24, 1854, and if so, of what part?" And, after a review of the law and facts of the case, the court concludes, "that the act of 1862 is a statute which operates as an amendment to the charter," and is therefore void. And again, in *Arnoult v.*

New Orleans (11 La. 56), which is cited by Mr. Justice Wilson in *City of Portland v. Stock,* the law on this subject appears to me to be very clearly expressed in these words: "It was intended that each amendment, and each revisal, should speak for itself; should stand independent and apart from the act revised or the section amended. It was, therefore, provided that, in such cases, if the *object* was *to revise* an act, it should be re-enacted throughout; and if the *object* was to *amend* an act, then the section *amended* should be re-enacted and published."

I have regarded *Portland v. Stock* as a well-considered and decisive case on the question determined by it, and do not think that its authority has been directly shaken, or materially qualified by this Court, until the decision of this case. I might pursue this subject much further by a review of the authorities which have been cited on the interesting questions presented in this case; but without deeming it advisable to express an opinion on any of the questions involved, other than the one which I have hurriedly attempted to discuss, I will conclude my unpleasant task of writing a dissenting opinion by only adding that I have always regarded § 22 of Art. IV of our Constitution as a monument of the wisdom of the framers of our fundamental law; and without the strict enforcement of its provisions it would be a violent presumption that any one, much less *every one,* should know the law, and the maxim *ignorantia legis neminem excusat* would soon become regarded as exceedingly harsh if not tyrannical in its application.

S. H. CHRISTIAN, Appellant, v. J. H. EVANS, Respondent.

NOTICE OF APPEAL.—The notice of appeal must describe with reasonable certainty the decree appealed from, the court in which such decree was rendered, the time when such decree was rendered, the names of the parties and the fact that one party or the other intends to appeal to the Supreme Court.

APPEAL from Lane County.

In this suit the notice of appeal, after naming the court and giving the title of the cause, is couched in the following language: "Appeal from a judgment on a writ of review. To Messrs. Thompson & Fitch and J. J. Walton, Jr., attorneys for the plaintiff: You and each of you will please take notice that the defendant appeals from the judgment rendered in said Circuit Court at the April term thereof, 1874, upon a writ of review annulling and declaring void the judgment rendered by T. J. Holland, Esq., a justice of the peace for South Eugene Precinct, wherein the above-named defendant was plaintiff, and *against you as defendant,* for the sum," etc.

Thompson & Fitch, for the motion.

George B. Dorris, contra.

By the Court, MCARTHUR, J.:

The views of this Court, in relation to what is required in a notice of appeal, have been expressed in numerous cases, the last two of which are *Lewis v. Lewis* (4 Or. 209), and *Whiteaker v. Vanschoiack.** In *Lewis v. Lewis,* which has been frequently cited by the Court since its decision, it is held that in case of a decree the notice of appeal must set forth with reasonable certainty, first, the decree appealed from; secondly, the court in which the decree was rendered; thirdly, the time when rendered; and fourthly, the names of the parties and the fact that one party or the other intends to appeal from the decree to the Supreme Court.

In actions at law the appellant must also specify the errors upon which he relies in the notice. As the notice in this case is defective in not describing the judgment and naming the parties thereto, it falls within the rule of the cases cited, and the motion to dismiss must prevail.

Appeal dismissed.

*The opinion on the motion to dismiss in *Whiteaker* v. *Vanschoiack* is not reported. It was rendered at the January Term, 1873.

A. B. ELFELT et al., Respondents, v. A. H. and FLORA HINCH, Appellants.

HUSBAND AND WIFE MAY CONTRACT WITH EACH OTHER.—Though Article XV, § 5 of our State Constitution is an innovation upon the common law, it does not abrogate that principle which prevents husband and wife from contracting with each other.

WIFE'S PROPERTY PRIMA FACIE THAT OF THE HUSBAND, WHEN.—Where the wife's separate property is not registered according to the statute, it is *prima facie* the property of the husband rather than of the wife.

FRAUD PRESUMED FROM CIRCUMSTANCES.—Positive and express proof of fraud is not required; it may be deduced from circumstances affording strong presumption.

FRAUDULENT CONVEYANCE—WHAT PRESUMED.—A voluntary conveyance by a husband to his wife will be presumed to be fraudulent as to existing creditors.

PARTIES IN SUIT TO SET ASIDE CONVEYANCE.—Judgment creditors may unite in a suit to set aside such conveyance.

APPEAL from Coos County.

The facts are stated in the opinion of the Court.

W. R. Willis, for Appellants.

W. W. Thayer and Watson & Lane, for Respondents.

By the Court, PRIM, J.:

This was a suit in equity brought by creditors to set aside a deed to a certain parcel of land situate in Coos County, consisting of about one hundred and forty acres. The respondents were merchants doing business in San Francisco, California, and consisted of six different firms, each of which having obtained a separate judgment prior to instituting this suit, joined as plaintiffs in the court below. They allege that A. H. Hinch was indebted to them for goods, wares and merchandise, sold and delivered to him in October, 1869, except Haake & Co., who, it is alleged, sold their goods, etc., to said Hinch on December 21, 1869. At the time the goods were purchased, A. H. Hinch was in possession and claimed to be the owner of a large amount of property, which he traded to one Nasburg on December 3, 1869, for the tract of

land in question, and which was conveyed by said Hinch to Flora Hinch, December 6, 1869. It is sought by this suit to set aside said deed for fraud. The complaint alleges that A. H. colluded with Flora Hinch and executed the deed for the purpose and with the intention of defrauding the respondents out of their debts due from A. H. at the time of the conveyance.

Appellants deny the collusion and fraud, and allege that the conveyance was executed in good faith and for a valuable consideration. It is claimed by them that A. H. was indebted to Flora, at the time of the execution of said deed, in the sum of ten thousand dollars, and that five thousand dollars of said indebtedness was the consideration of the conveyance. If Flora was a *bona fide* creditor of A. H., at the time this conveyance was made to her, there can be no doubt but that he had a right to prefer her as a creditor. This indebtedness, it is claimed, arose out of the sale of a mining claim by A. H., which is asserted to have been the separate property of Flora, and that the property with which he purchased the land in question was a portion of the proceeds of that sale.

In order to determine the fact whether the relation of debtor and creditor existed between these parties at the time the conveyance was made, it will be necessary to look into the evidence bearing upon this point. It appears therefrom that in 1866, A. H. and Flora Hinch were husband and wife, and continued in that relation until May 24, 1869, at which time they were divorced at the suit of the husband. In 1866, and while the relation of husband and wife still existed between them, A. H. owned and was in possession of a mining claim, which he sold to Flora, for the consideration of one hundred dollars. A bill of sale, in the ordinary form, was executed and delivered to her, and placed upon the records of the county. It does not appear that she ever went into the actual possession of the claim, or performed any work upon it. On September 12, 1868, A. H. Hinch, being in the possession of, and claiming to be the owner of the said mining claim, sold it to one John Perschbacker for ten thousand dollars, payable in a

store and goods, etc., and executed a bill of sale for the same in his own name. Soon after this sale, some question being raised as to the interest of Flora in the mining claim, she appeared before a notary public and acknowledged that the bill of sale, which had been made to her by A. H. Hinch, in 1866, for the said mining claim, was "fully satisfied and discharged."

In the decree of divorce, heretofore alluded to, and which was made after the sale of said mining claim to Perschbacker, it was decreed that all the property of Hinch, both real and personal, was discharged from all the rights, claims and equities of Flora Hinch.

It further appears that the property traded by Hinch to Nasburg, for the land in question, was the proceeds of the mining claim sold to Perschbacker.

While our State Constitution has made an innovation upon the common law, in regard to the property and pecuniary rights of married women, it has not abrogated that principle of the common law which declares husband and wife are to be regarded as one person in law, and cannot contract with each other. (*Pitman v. Pitman*, 4 Or. 298.) Article XV, § 5, provides that "the property and pecuniary rights of every married woman, at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband, and laws shall be passed providing for the registration of the wife's separate property." As to where or how Flora obtained the money with which she purchased the mining claim from her husband, the evidence fails to disclose, and it must be presumed to have been the money of the husband, unless it appears that it came to her either by "gift, devise, or inheritance." The Legislature has provided that "a married woman, possessed of or owning any personal property or pecuniary rights, may make out a list under oath that the property and rights therein described belonged to her at the time of her marriage, or that she has acquired the same by bequest or inheritance, or by gift of some person named, other than her husband. And the said list and affidavit shall be recorded in the said register and

shall be *prima facie* evidence of the facts stated therein, and property not so registered shall be deemed *prima facie* to be the property of the husband rather than of the wife." (Mis. L., ch. 35, § 2.)

The fact that Flora Hinch did not have this property registered under the provisions of the statute is of itself and by the statute made *prima facie* evidence that the property was "the property of the husband rather than of the wife." This, taken in connection with the fact that she at no time asserted ownership in the property, but allowed her husband to retain the possession, claiming ownership, and thus obtaining credit upon it, leads us to consider and deem Hinch to have been the owner of it, especially as between her and his creditors. Hinch, in his testimony, says the mining claim was the property of Flora, and that in selling it to Perschbacker, and in trading with the proceeds of the sale, he was acting as her agent; but in this he is contradicted by his own acts and the circumstances of the case. There may have been, as between A. H. and Flora, a meritorious consideration for the deed in question; and under the circumstances surrounding the parties to the deed, it might have been a generous and praiseworthy act on the part of the grantor if the rights of other parties had not been involved; but the creditors, we think, had higher claims upon this property. A party must be just before he undertakes to be generous. If there were no creditors in the case as between the parties, a court of equity would probably protect her in this property. As a matter of law, Flora had no interest in the proceeds of the mining claim that she could have asserted against these respondents in their attempts to subject the property to the payment of their debts. Her right to claim the proceeds of the mining claim as her separate property, if it ever existed, had been lost by her acquiescence in his use and disposition of the property. There being no indebtedness shown to have existed in favor of Flora and against A. H. at the time of the execution of the deed, and of the transactions referred to, it must be treated as a voluntary conveyance without any valuable consideration to support it, and must therefore be

presumed to have been fraudulent as against existing creditors.

It not only appears that the respondents were creditors of Hinch at the time this deed was made, but that he was in possession of, and claiming to be the owner of, the very property traded to Perschbacker for the land in question. It further appears that judgments have been recovered by respondents upon their respective claims, and that executions issued thereon have been returned *nulla bona*. Unless this land can be subjected to the payment of said judgments, the respondents are without remedy and cannot collect their demands.

It is, however, insisted by counsel that fraud is never presumed, but must be proved. While it is true that both at law and in equity fraud cannot be presumed, but must be proved, yet in neither court is positive and express proof of fraud required, but each deduces it from circumstances affording strong presumption. "Courts of equity will act upon circumstances as presumptions of fraud established by presumptive evidence, which courts of law would not always deem sufficient proof to justify a verdict at law." (1 Story Eq. Jur., § 190.)

In the case under consideration the fact that the conveyance was without a valuable consideration to support it, and executed by Hinch at a time when he was largely indebted to respondents, and the further fact that he had no other property out of which their debts could be made, are circumstances from which a court of equity will infer or presume constructive fraud. In *Read v. Livingstone* (3 John. Ch. 500), Chancellor Kent said: "The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement or repel the legal presumption of fraud."

1 Story Equity Jurisprudence (§ 355) says: "Voluntary conveyances are unquestionably protected by the statute in all cases where they do not break in upon the legal rights of creditors; but when they break in upon such rights, and

so far as they have that effect, they are not permitted to avail against those rights. If a man, therefore, who is indebted, conveys property to his wife or children, such a conveyance is, or at least may be, within the statute; for although the consideration is good as between the parties, yet it is not in contemplation of law *bona fide*, for it is inconsistent with the good faith which a debtor owes to his creditors to withdraw his property voluntarily from the satisfaction of their claims, and no man has the right to prefer the claims of affection to those of justice."

Decree affirmed.

S. H. HUMPHREYS, Executor of the Last Will of S. P. TAYLOR, Deceased, Appellant, v. L. I. TAYLOR, Respondent.

EXECUTOR CANNOT MAINTAIN ACTION FOR POSSESSION.—An executor has not such an *estate* in the lands of the testator as to entitle him to maintain an action for the possession thereof under § 313 of the Code. The right of possession of the property of a deceased person, given by law to executors and administrators, is a mere statute power to be exercised by them for the purposes of administration.

WILL—PROVISION GIVING WIFE POSSESSION OF REAL PROPERTY.—A provision in a will that until the land of the testator shall be disposed of by the executor the wife of the testator should have the use thereof, for herself and minor children, is not contrary to law.

TESTATOR'S DIRECTIONS.—All courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true interests and meaning of the testator in all matters brought before them.

APPEAL from Washington County.

The facts are stated in the opinion of the Court.

W. W. Thayer, for Appellant.

Caples & Mulkey, for Respondent.

By the Court, BURNETT, J.:

This is an action to recover the possession of certain real estate situate in Washington County, and described in the complaint in this case.

This action is brought by the plaintiff, Humphreys, in his fiduciary capacity as executor of the last will and testament of S. P. Taylor, deceased, against L. I. Taylor, the widow of said deceased.

The defense principally relied on is that the will under which appellant is acting provides that until the land in question is disposed of, by said executor, the wife of said testator, respondent herein, shall have the use thereof for herself and the minor children of the parties.

There was a question made in the pleadings as to whether the defendant had a dower interest in the land in question or not, but as the court below did not pass upon that question it is not necessary to consider it here. The case was tried before the court without a jury, and the court made the following finding of facts:

1. That S. P. Taylor, named in the pleadings, was, at the time of his decease and during the marriage with the defendant, seized of an estate in fee in the lands described in the complaint.

2. That said S. P. Taylor died on the third day of February, 1873, having before made his last will, which, since his death, has been admitted to probate and duly proven in the County Court of Washington County.

3. That the plaintiff was named in said will as executor thereof, and was appointed such executor by the County Court of Washington County, Oregon, and duly qualified and is acting, and brings this suit in that capacity.

4. That the defendant is the widow of said S. P. Taylor, and in and by the will of said S. P. Taylor it was provided, among other things, that until the land of said Taylor (which is the same land in controversy in this action) shall be disposed of by said executor, the wife of said testator (this defendant) should have the use thereof for herself and the minor children of the parties.

5. That said land has not been disposed of by said executor according to the provisions of said will.

As conclusions of law from these facts the court found:

1. That the plaintiff is not entitled to the possession of the premises described in the complaint.

2. That the defendant is entitled to the possession of the premises described in the complaint until disposition of the same by said executor.

From which ruling and decision plaintiff appeals, and assigns errors on both points. The appeal presents two questions for the consideration of the Court:

1. Can the plaintiff maintain this action under the Code?

2. If so, do the findings of fact show that the appellant is entitled to the possession of the premises in question as against the defendant (respondent)?

Upon the first question it will be necessary to examine § 313 of the Code upon which this action is based, to see whether the appellant has brought himself within its provisions or not. That section reads as follows: "Any person who has a *legal estate* in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law," etc. It cannot be said that an executor has a legal estate in the lands of the testator; if he has he can convey it without an order of the County Court, or incumber it if he desires to. But such a view is entirely at variance with the provisions of our law upon the subject of the property of deceased persons.

The right of possession of the property of the deceased, given to the executors and administrators by § 1088 of our Code, is a mere statute power given them only for the benefit of creditors, and properly to be exercised only as the exigencies of the estate might require. Created only by the statute, it owes its existence to that alone. This would seem to be a proper view of the statute, from the fact that while, under §§ 1135 and 1136 of the probate law, an executor or administrator may, under a proper order of the County Court, institute proceedings to set aside a sale or transfer of any property, real or personal, made by the testator or intestate in his lifetime, with intent to hinder or defraud creditors, yet he can only do so when the assets of the estate in his hands are insufficient to satisfy the funeral charges, expenses of administration, and the claims against the estate.

It is urged, by counsel for appellant, that if executors cannot maintain ejectment to recover the poessession of the lands of the deceased, that § 1088 of the probate law is of no value; but this conclusion does not follow. Sections 1089, 1090, 1091 and 1092, provide, to the effect, that any person having possession of any property belonging to an estate may, upon a proper application of an executor or administrator, be brought into the County Court under a summary proceeding to give a true account thereof; and again, the "Forcible Entry and Detainer Act" gives a remedy, and, whether adequate or not, seems to be more applicable to cases for possession than the act under which this action is brought, and has been followed in some of the other States. (27 Arkansas, 460.)

The second assignment of error covers the principal ground upon which the decision of the court below was based, to wit: That, under the provision of the will, in this case, the defendant is entitled to the possession of the premises described in the complaint, until the same is disposed of by the executor. It is claimed, by counsel for appellant, that the language of § 1088 is broad enough to entitle the executor to the possession of the land in question as against the respondent, notwithstanding the express provision in the will (under which the appellant is acting) that the respondent, widow of the deceased, shall have the use thereof until the same is disposed of by said executor.

Taking § 1088 of the Code alone and the construction contended for by counsel might be correct; but in construing statutes it is our duty to so construe them as to make all the provisions relating to the same subject harmonize, if possible, and give each its due effect, and when we consider that under § 1, p. 788, of the Code on the subject of wills, it is provided that every person of twenty-one years of age, and of sound mind, may dispose of all of his property by will, and that all courts and others concerned in its execution shall have due regard to the directions of the will, and the true interests and meaning of the testator, it is plain that the provision in this will ought to be carried into effect unless in plain violation of law.

The provision that the widow and children of the deceased should have the use of the land in question, until disposed of by the executor, is itself a commendable one and in no wise interfered with the executor in the performance of his duties towards the creditors of the estate, for after disposing of all the personal property belonging to the estate, if there were debts still unpaid, he could, by making a proper showing to the County Court, obtain an order therefrom to sell the land in question, and it was his duty to do so. The will does not undertake to deprive the executor of the power or right to sell the land or even to rent it, but simply provides that until he does dispose of it the widow and children shall have the use of it.

If the plaintiff in this case, acting as executor, had, under a proper order of the County Court of Washington County, sold the premises in question, and this action had been brought by the purchaser at the executor's sale, after obtaining his deed, the case would then be within 20 Cal. 620, referred to by counsel for appellant, and there would be no doubt of his right to recover; or if he had, acting as executor, leased the premises in question, his tenant, I think, under a proper proceeding, could recover the possession thereof from the defendant; but the case at bar is entirely different from either of the cases put, and hence the same rule does not apply.

There is no doubt that under our statute the executor or administrator is entitled to the possession of the property of the deceased for the purposes of administration; such is the general rule. It is also true that a testator cannot dispose of his property by will or otherwise so as to place it beyond the reach of his creditors, or evade the payment of his just debts, for "a man must be just before he is generous."

But as I view this case the provision in the will does not attempt to place the property beyond the control of the executor, nor exempt it from the payment of the debts of the testator, and may be construed in harmony with § 1088 of our Code, and allowed to stand.

Judgment affirmed.

THE SPRINGFIELD MILLING COMPANY, Respondent, v. LANE COUNTY, Appellant.

PUBLIC CORPORATIONS—NOT LIABLE UPON IMPLIED CONTRACTS.—Where work is done upon the streets of a city, liability does not follow from the fact that the streets are thereby improved, and such city thereby benefited. The enjoyment and use of such improvements constitutes no such evidence of acceptance as to create a liability against the corporation.

STATUTE—WHEN PEREMPTORY.—When a public body or officer has been clothed by statute with power to do an act which concerns the public interest, the execution of the power is a duty, and though the phraseology of the statute be permissive, it is nevertheless to be held peremptory.

COUNTY BRIDGES—HOW MUST BE REPAIRED.—Under the act of October 11, 1862, relating to the erection and repairing of county bridges, immediate repairs, called for by any emergency, are left to the discretion of the county judge, and may be done by private contract. All other repairs and the construction of new bridges must be done by contract let to the lowest bidder, unless, through the road supervisor, in the special cases provided for by the act of 1865.

APPEAL from Lane County.

The facts are stated in the opinion of the Court.

Thompson & Fitch, for Appellant.

G. B. Dorris, for Respondent.

By the Court, SHATTUCK, J.:

This is an action at law tried in the court below upon issues of fact before the court, without a jury. The findings of the court below are as follows:

"1. That, at the January term, 1874, of the County Court of Lane County, State of Oregon, said court, in the transaction of county business, made the following order, to wit:

"'*In the Matter of Bridge across Willamette River at or near Springfield.*—At this day, after consideration by the court, it is ordered that A. S. Powers be, and he is hereby appointed superintendent of the construction of a bridge across the Willamette River at or near Springfield, Lane County, Oregon, and is vested with the usual powers pro-

vided by law, subject to the following conditions, to wit: The said A. S. Powers, as such superintendent, is hereby authorized to let the contract for the construction of said bridge, stipulating that the contractors shall receive one-half of the contract price from Lane County, and the other half in subscriptions from citizens, with the express understanding that said Lane County is not to be responsible for the payment or collection of said subscription, nor, in any case, for the payment of any sum greater than one-half of the contract price for constructing said bridge; and A. S. Powers is to receive, for his services as such superintendent, in full satisfaction for the same, one hundred and fifty dollars; the said bridge to be on the plan of Smith's Patent Truss Bridge; the superintendent to be subject to the direction of the County Court.'

"2. That on the 4th day of March, 1874, said Powers entered into a contract on behalf of said Lane County, with the Pacific Bridge Company, to construct the bridge referred to in said order; that by said contract, said Pacific Bridge Company agreed to furnish the material for said bridge, except lumber for the aprons thereof, and construct the same, for which they were to receive, from said Lane County, the sum of five thousand three hundred dollars.

"3. That in August, 1874, said Powers purchased of the plaintiffs, for the defendants, the lumber for which this action is brought, and the same was used in the construction of the aprons to said bridge, with the knowledge and consent of the defendant herein.

"4. That the value of the lumber so purchased of plaintiffs and used by defendant, is $158.44.

"5. That, at the September term, 1874, of said County Court, the plaintiff presented his bill for the lumber above referred to, and said bill was disallowed, except eighty dollars, which the plaintiff refused to accept."

As conclusions of law the court found:

1. That the defendant, by accepting and using the lumber mentioned in the complaint, became liable to the plaintiff for the value thereof.

2. That the plaintiff is entitled to a judgment against the defendant for the sum of $158.44.

The plaintiff had judgment upon these findings and the defendant (Lane County) appealed.

The plaintiffs place their right to recover on the ground that the superintendent Powers made a contract for the lumber with plaintiff which the defendant, by accepting the bridge and offering to pay part of the price of the lumber, ratified and adopted as the contract of the county. This amounts simply to an implied contract arising from alleged benefits received.

The general doctrine unquestionably is, that when one receives the benefit of another's work or property, he is bound to pay for the same, and this doctrine applies as well to corporations as to individuals in cases where there is no restriction imposed by law upon the corporation against making in direct terms a contract like the one sought to be implied; but where there exist legal restrictions which disable a corporation to agree in express terms to pay money, the law will not *imply* any such agreement against the corporation. (*Brady v. The Mayor*, 2 Bosworth, 173; *Zottman v. San Francisco*, 20 Cal. 102-105.)

This rule may sometimes work a hardship upon a contractor, who, without having considered whether the law has been complied with or not, has performed labor or furnished material for a public corporation, and expects compensation therefor, the same as if it had been done or furnished for a private individual. But, nevertheless, the authorities hold that a contractor, no less than the officers of a municipal corporation, when dealing in a matter expressly provided for by law, must see to it that the law is complied with. Where work is done without authority upon the streets of a city, liability does not follow because the streets may be improved thereby or their use continued. Such continued use constitutes no such evidence of acceptance as to create a liability against the corporation. (20 Cal. 107.)

We are of the opinion that the same rules of construction which apply to and control the charters of municipal cor-

porations, and the action of municipal officers, are applicable to counties and should control County Courts in the management of county business.

The question here now presented is whether or not the contract sued on is a matter expressly provided for by law, and, for that reason, subject to the principles and rules just announced. Counsel for the plaintiffs insist that it is not. He contends that the power conferred on the County Court to provide for the construction of bridges and to appropriate money therefor is a general power, and that the provisions of law, relative to the mode of proceeding, are merely directory and in no way restrict or control the discretion of the court in regard to the mode. Here is the gist of this whole case, and upon our construction of the law of this State, in this particular, the rights of the parties to this action depend.

The statutes of this State, relating to this subject, are as follows:

The act of October 11, 1862, § 870, subdivision 4, page 283, General Laws, 1872, provides that "the County Court has authority and power to provide for the erection and repairing, within the county, of public bridges upon any road or highway established by public authority."

The act of 17th October, 1862, designated as § 71, page 737, General Laws, provides that "the County Courts of the several counties in this State be, and they are hereby authorized to apply, in their discretion, any moneys in the county treasury, not otherwise appropriated, toward defraying the expense of the building or repairing bridges on any of the county or State roads within their respective counties."

Section 72, page 737, provides that "the County Court may appoint some suitable person to superintend the letting and building and repairing and receiving the bridge when done. When a bridge is to be built said superintendent shall put up three notices in the county at least twenty days prior to the time of letting such bridge, one of which shall be posted in the neighborhood where the bridge is to be built or repaired, which notice shall state the general

plan of said bridge and statement of the proposed repairs, also the time and place of letting the same, which shall be let to the lowest responsible bidder at public outcry, and when said bridge is completed the superintendent shall give the undertaker a certificate for the same, if in his judgment the bridge has been built or repaired according to contract, and make due report thereof to the County Court, which certificate shall be a voucher to the court to pay the money; *provided, however,* that whenever in the discretion of the county judge an emergency may require it he may authorize repairs without such notice."

The next section in the same act provides for the construction of bridges over streams forming the boundary-line between two counties, and is not quoted here at length, having no immediate bearing upon the question before us.

There is another provision (§ 40, page 29, Pamphlet Laws of 1865), as follows: "When it shall appear to the satisfaction of any County Court in this State, at any regular session thereof, by application of any supervisor in said county to the above-named court, that the construction of a bridge or bridges of ten feet span or more is required to be made on the public highways in his district, the court shall order that as soon as said bridge or bridges shall have been made of good sound timber of proper size, and put together in a good and substantial manner, and covered with sound plank at least two inches thick, and not less than twelve feet long, and well spiked down, shall cause to be paid to the said supervisor the sum equal to the original cost of the plank and spikes so used, which shall be applied in payment of the same out of any money in the county treasury not otherwise appropriated; or for want of money, county orders may be issued in place thereof; and any person subject to perform road labor shall perform the same upon any road in the district which the supervisor may designate in his notice to perform work on the road." This act has not been printed in the body of the compilation of our laws in 1872, but appears in a marginal note with some comments by the compilers. We may remark in passing that until some question is made in a proper mode, concerning the validity of this

act, this Court will treat it as one of the laws in force in this State; and, in any event, we hold the authoritative text of the laws to be the original acts. The functions of the compilers were "to collect these laws," not to write commentaries or deliver judgments.

The above-cited provisions are all the express provisions of the statutes relating to the subject of building and repairing bridges on the highways in this State. The act of 1865 last cited does not appear to be relied upon by plaintiff's counsel, and if it were, we should hold, upon the views we entertain of the general subject, that it would not strengthen the positions which plaintiff assumes. It is an act providing for a class of cases entirely different from the one before us. It provides for the appropriation of money at a regular term of the court to pay for material furnished and laid down upon a public bridge, upon the application and certificate of the road supervisor, an officer bound to faithfulness by the sanction of an oath and the obligations of a bond, which is not this case at all.

The proceeding under consideration must then have been authorized by the acts of 1862, above quoted, or it must fail as being unauthorized. To these acts attention is now directed.

It is to be observed that the agent or superintendent, Powers, not only failed to comply with the requirements of these acts, in respect to letting the contract for this lumber to the lowest bidder, but he also contravened the express conditions of the order appointing him. The order declared that Lane County was not by any act of the superintendent "in any case" to be made responsible for more than one-half of the contract price of constructing the bridge, but this superintendent undertakes to bind the county for the whole price of this lumber. It is suggested that the aprons were not a part of the bridge and not properly within the terms of the provision for making a contract for construction. If this is true, which is not conceded, then Powers was a mere stranger undertaking to buy lumber in the name of Lane County; and because he has laid it down upon the highway, and the public travel is thereby facilitated, he is

seeking to impose upon the county the obligation to pay for it. And if Powers could do this, every man in the county could do likewise and secure for himself, as well as the public, a plank road. The absurdity of such a position is manifest.

The act of Powers in purchasing this lumber, in the manner he did, was clearly unauthorized by any express provision of law or order of the County Court. If, however, we were to rest the matter upon the ordinary rules of principal and agent, this unauthorized act of the superintendent might be considered ratified by the county in allowing the lumber to be laid down in the bridge, and in the continued use of it as a part of the public highway.

The view, however, which we take of the statutes, precludes the application to this case of the ordinary rules of principal and agent, as well as of the rule of implied promise arising from benefits received.

In construing these statutes of 1862, the first point to be settled is the meaning and force of the word "may" in the first clause of § 72 (page 787,) which says that "the County Court may appoint," etc.

There can be no question but that the County Court has been invested with this power of providing for the construction and repair of bridges, and of appointing a superintendent in such a case, for the public good, and that the construction and repair of bridges concerns the public interests. The public are also interested in having the public works done at the lowest price, so they be well done, and surely no one can doubt the wisdom or importance of requiring the superintendent to advertise for bids, and to let the contract, to the lowest responsible bidder at public outcry." This mode of proceeding prevents jobbery and favoritism, and such was the manifest intention of this provision of the statute. This being so, we hold that *may* in this statute means *must*, upon the principle recognized by good authority that, when a public body or officer has been clothed by statute with power to do an act which concerns the public interest, the execution of the power is a duty, and though the phraseology of the statute be permissive, it is nevertheless to be held

peremptory. (Smith's Com. 727-729; Sedgwick Stat. and Const. Law, 438.)

Or, if that doctrine be deemed doubtful as a general rule, we still hold that the true intent of the Legislature, as expressed by this statute, is to provide in all cases of constructing or repairing bridges (when the act of 1865 is not followed) an imperative rule of proceeding for the County Court. The act first contains a general grant of power over the subject; then an authority is given to appoint a superintendent; then it is provided that "when a bridge is to be built" the contract therefor shall be let upon public notice and "public outcry," to the lowest responsible bidder. There is also a proviso allowing the *county judge,* in cases of emergency, to authorize repairs without public notice. Here is provision made for the whole matter. Immediate repairs, called for by any emergency, are left to the discretion of the county judge, and may evidently be done by private contract. All other repairs and the construction of new bridges must be done by contract let to the lowest bidder, unless through the road supervisor, in the special cases provided for by the act of 1865.

This view is confirmed by the consideration that the County Court, in the exercise of the jurisdiction pertaining to county commissioners to transact county business, has only such powers as the statute has given it, including also such implied powers as are necessary to carry into effect the powers expressly granted. And it seems to be the settled doctrine, sanctioned by the cases cited on the argument, that when a statute confers upon an inferior tribunal a power, and, at the same time, prescribes a mode of exercising that power, the *mode* becomes the *measure* of the power, and such mode must be substantially, if not strictly, followed.

Looking at this case from the point of view here presented, the transaction pertaining to this lumber is one outside of any of the modes of proceeding prescribed for the County Court, and, being outside of the mode, is outside of the jurisdiction. The county had no power to make such a contract with the plaintiffs, as is alleged to have been made

by Powers, and, having no power to make it originally, it could not ratify any unauthorized act of Powers in respect to the same matter, and for this reason no implied promise or obligation can be raised and imposed upon the county in the matter.

It follows from these views, that the conclusion of law announced by the court below was incorrect, and the judgment must be reversed.

WILLIAM SELLERS, Respondent, v. THE CITY OF CORVALLIS, Appellant.

APPEAL—MAY BE TAKEN FROM RECORDER.—The recorder of the city of Corvallis is *ex officio* a justice of the peace, and an appeal will lie from his judgments to the Circuit Court.

REVIEW AND APPEAL NOT CONCURRENT REMEDIES.—The writ of review will not lie where the right of appeal exists. The decision of this Court in *Schirott & Groner* v. *Phillippi & Coleman*, overruled so far as it holds that appeal and review are concurrent remedies. The decision of this Court in *Evans* v. *Christian* (4 Ore. 375), affirmed.

APPEAL from Benton County.

On the 27th day of August, 1873, Sellers, the respondent, at the suit of the city of Corvallis, was fined in the sum of twenty-five dollars and costs for the violation of a city ordinance prohibiting the disposal of spirituous or malt liquors, in a tippling-house or bar-room, later in the evening than ten o'clock.

On the 30th day of August, 1873, Sellers sued out a writ of review, in the Circuit Court for Benton County, to set aside and reverse the judgment of the city recorder in imposing said fine. In the Circuit Court, counsel for the city moved to dismiss said writ of review for the reason that "said plaintiff William Sellers had a plain, speedy and adequate remedy by appeal for all the irregularities complained of in said proceeding before the recorder." The Circuit Court overruled said motion, and afterwards rendered a judgment reversing the judgment of the Recorder's Court and adjudging the costs in the proceeding, by writ of

review, against the city of Corvallis, from which judgment and rulings the city appeals to this Court, assigning numerous errors, but relying on none, upon the argument here, except the fourth, which reads: "The respondent's remedy for the matters complained of, was by appeal from the sentence and judgment of the recorder, and not by writ of review."

R. S. Strahan, for Appellant.

In support of the fourth assignment of error the following authorities are cited: Civil Code, § 575; Corvallis Charter, § 8; *Gray et al. v. Schapp,* 4 Cal. 185; *Clary v. Hoagland,* 13 Cal. 173; *People v. Shepard,* 28 Cal. 115; *Fogg v. Parker,* 11 Iowa, 18; *Evans v. Christian,* 4 Or. 375; *The City of Dubuque v. Rebman,* 1 Iowa, 444; *Conbay v. Iowa City,* 2 Iowa, 90; Jus. Code, ch. 11.

F. A. Chenoweth, for Respondent.

1. That no appeal is given by statute from a judgment of the city recorder.

2. Said fine and proceedings before the city recorder were void on their face. (1 Dillon on Munic. Cor., § 368; 8 Va. 591; 3 Or. 487; Jus. Code, ch. 12, § 119.)

3. Appellant waived any supposed error in overruling the motion to dismiss, by proceeding to the trial on the merits.

By the Court, BONHAM, C. J.:

It is claimed by counsel for respondent that there is no express authority anywhere given to appeal from the judgments of the recorder of the city of Corvallis, and that § 8 of the charter of said city does not confer the right, and therefore, the only remedy is by writ of review. If counsel for respondent is correct in this position, then the writ was properly granted in this case.

But we think this position of counsel is untenable. It is declared in § 8 of the charter of the city of Corvallis,

that "the recorder shall have jurisdiction over all violations of city ordinances, and may hold to bail, fine, or commit persons found guilty thereof; and within the city shall have jurisdiction and powers like a justice of the peace, and the law governing justices of the peace shall apply as far as practicable to all his proceedings."

Chapter XI of the General Laws of Oregon, page 477, provides for appeals from justices of the peace in criminal cases and is a part of the laws referred to in § 8 of said city charter, by which the city recorder is to be governed in his proceedings. The right of appeal is an important and valuable right, and we cannot think that the Legislature ever contemplated withholding it from the judgments of the recorder of the city of Corvallis.

The only other question presented in this case is whether the court below had authority to grant the writ of review at the time when it was ordered. The recorder rendered his judgment against Sellers on the 27th day of August, 1873, and three days thereafter the writ of review was issued. Sellers might have appealed from the judgment rendered against him within thirty days from the date of its rendition. This Court held, in *Evans v. Christian* (4 Or. 375), that the writ of review would not lie in a cause so long as the right of appeal existed, and overruled the *dictum* in *Schirott & Groner v. Phillippi & Coleman* (3 Or. 484), that appeal and review were concurrent remedies. We think that the decision of this Court in *Evans v. Christian* was correct, and that it is decisive of this case.

Judgment reversed.

JAMES HURST, Appellant, v. HARRIET E. HAWN, Respondent.

REPEAL OF STATUTE BY IMPLICATION.—When two statutes that are in conflict are enacted by the Legislature upon the same general subject, the last enactment furnishes the rule of action and repeals the prior act by implication, so far as they conflict.

PREFERENCE TO APPLICANT FOR SCHOOL LANDS.—Upon an application to the Board of School Land Commissioners to purchase a part of the thirty-sixth section (school land under the law of 1868, the first

applicant is entitled to preference after the six months have expired in which settlers are required to make application.

DECISION OF SCHOOL LAND COMMISSIONERS IS CONCLUSIVE UPON THE STATE.—The decision of the Board of School Land Commissioners is final so far as the interest of the State is concerned, but does not prevent a party from showing, in a proper proceeding, that a deed made by the board was obtained through fraud or upon false testimony.

APPEAL from Wasco County.

Harriet E. Hawn, the respondent herein, commenced an action at law in the Circuit Court for Wasco County at the November term thereof, 1874, against James Hurst, the appellant, to recover possession of certain real property described in her complaint. After filing an answer in said action, the appellant filed his bill in equity in the nature of a cross-bill to said action, setting up the fact that the land in question was a part of section thirty-six; that it was school land; that he had been in possession of the same since November, 1858; that the said land was surveyed about February, 1860; that about the month of November, 1870, he made an application to the Board of Land Commissioners for the sale of school lands of the State of Oregon to purchase the same; and that about a month prior to the time of his application to purchase said land the respondent herein had made an application to said board to purchase the same land.

It is then averred that respondent's application to the school board was defective and insufficient in this, that said application was not accompanied by the affidavit of the respondent herein, or any one, that she was a settler on said tract of land.

The bill then avers that notwithstanding said defect in respondent's application, and nothwithstanding appellant's application to purchase said land, said Board of Land Commissioners did sell and convey to respondent, about November, 1873, said land. And after an allegation that the action of the Board of School Commissioners was illegal, the bill prays the court to adjudge and decree that the defendant therein (respondent herein) shall convey the land in controversy to the plaintiff in said bill (appellant herein)

on his paying to respondent the sum paid by her to the State of Oregon.

To this bill there was a general demurrer interposed by the defendant therein, which was sustained by a *pro forma* decision in the court below.

Humason & Condon and N. H. Gates, for Appellant.

J. C. Cartwright, for Respondent.

By the Court, BURNETT, J.:

The question presented by this appeal is, which of these parties was legally entitled to purchase the land in question from the Board of School Commissioners? The facts are set out in the bill, and show that the respondent made the first application to the Board of School Commissioners, and if that application was made in accordance with the law in force at that time, then the board did right in making her a deed and in rejecting the subsequent application of the appellant.

In order to ascertain what the law was under which the title to the premises was obtained by Mrs. Hawn (respondent herein) it will be necessary to examine the different statutes that have been enacted upon the subject of the sale of lands belonging to the State.

The law of 1864 provided for the sale of certain State lands to actual settlers, not exceeding a half-section to any one settler, for the price of one dollar and a quarter per acre; but it was provided by § 12 of the same law, "that nothing in this act shall be so construed as to include sections sixteen and thirty-six, or the funds heretofore received from the sale of the same." Then it is clear that the land in question is not within any of the provisions of the act of 1864, and we must next examine the act of 1866, together with that of 1868, to see what the law was at the time these applications were made to purchase the land in question.

The act of 1866 gave the Board of School Land Commissioners authority to sell sections sixteen and thirty-six, and all lands selected in lieu of such sections, in addition to the

lands placed in their charge to sell by the act of 1864. While the act of 1866 was in full force, there is no doubt but that the appellant might have made an application to the Board of Commissioners under § 2, subdivision 1 of that act, and purchased the land in question at one dollar and a quarter per acre. This he failed to do.

The rights extended to settlers of the class to which appellant claims to belong by act of 1866, was materially changed by the act of 1868 in two particulars: First. In regard to the time in which application to purchase should be made; and, second, the price that should be paid.

The first section of the act of 1868 provides that all the school and university lands belonging to this State, shall be offered for sale and sold upon the terms herein provided for and not otherwise, etc. It further provides that settlers shall have the preference in the purchase of all such lands as may be found to be occupied at the time of the passage of that act, or within six months after taking effect of the same; but after the expiration of six months any person shall be entitled to purchase any of such lands in lots not to exceed one hundred and sixty acres not settled upon, in accordance with the provisions of § 3 of that act. The next section provides that the price of all lands shall be that fixed by the county school superintendent of the county where such lands lie.

This act was approved October 28, 1868, and took effect about the 1st of February, 1869. Under this act the appellant had the preference for six months, and might, at any time prior to the 1st day of August, 1869, have made an application to purchase the land in question, but would have then had to pay, not one dollar and a quarter per acre, but the price put upon it by the county school superintendent of Wasco County. No such application was made, and about October, 1870, more than a year after the preference of the appellant had expired, and when the land was in market, and for sale to any one that would make a proper application to the board of commissioners to purchase it, the respondent made such an application, and we think the

board decided correctly in holding that she was entitled to purchase the land, being the first applicant.

It seems to be the object of the law to convert these lands into money, and place the same at interest, so that some benefit may be derived from these grants to the State for the benefit of the school fund, and not allow persons to remain in the possession and use of them an indefinite length of time, paying nothing therefor and preventing their being sold; hence they were required to make an application to purchase within six months after their settlement.

The act of 1868 is an independent act, one object of which was to place in market a class of State lands not before that time offered for sale, and to provide the manner and terms of the sale of all the school and university lands belonging to this State; and when that act took effect, it became the rule of action on that subject, and repealed by implication all prior acts that conflict with it. There was a question raised, in the appellant's brief, as to the effect of § 15, chapter 29, of the act of 1864, which reads as follows:

"The commissioners may make rules for the transaction of business under this chapter, and shall decide all questions about priority of settlement and other disputes between applicants, and their acts and decisions shall be final."

The action of the board is final under this section, so far as the interests of the State are concerned; but when the board has decided a case, and made a deed to one applicant in preference to another, the title is then out of the State, and a party claiming the land under the same law may, by a proper proceeding, show that the deed was obtained illegally, or by fraud or perjury.

THE CANYONVILLE and GALESVILLE ROAD COMPANY, Appellant, v. COUNTY OF DOUGLAS, Respondent.

COUNTY COURT—JURISDICTION OF.—The County Court has not jurisdiction to try questions of title, or rights arising out of the exercise of eminent domain.

IDEM—MAY BE QUESTIONED ON WRIT OF REVIEW.—The jurisdiction and regularity of proceedings in the County Court, in the matter of laying out a road, may be called in question by a writ of review.

JURISDICTION—CANNOT BE QUESTIONED, WHEN.—If jurisdiction is once fully obtained, objection to its exercise cannot be heard.

Per McArthur, J., concurring:

PARTIES TO PROCEEDINGS ON LAYING OUT ROADS.—The petitioners and remonstrators are the parties to the proceeding in laying out county roads, and are the only persons who can question the jurisdiction of the County Court in such proceedings.

WRIT OF REVIEW DOES NOT BRING UP THE EVIDENCE.—The writ of review brings up only the record, not the evidence.

REVIEW ONLY LIES WHEN THE PARTY IS PRECLUDED BY THE ORDER SOUGHT TO BE REVIEWED.—The test of the right to the writ is whether the party seeking is concluded by the determination or judgment of the inferior tribunal.

EQUITY CAN ALONE PROTECT ROAD COMPANY.—A court of equity alone can fully protect the franchise of an incorporated road company.

Per Burnett, J., dissenting:

PROCEEDINGS OF COUNTY COURT IN LAYING OUT ROADS MAY BE QUESTIONED BY ANY PERSON INJURED BY SUCH PROCEEDINGS.—To entitle a party to attack the jurisdiction of a County Court in laying out a county road, it is not necessary that he should be a petitioner or remonstrator. Any person directly injured by the location of a county road has a sufficient standing in court to attack the jurisdiction of the court in the proceeding, and is entitled to a writ of review.

DESCRIPTION OF TERMINI OF ROAD—WHAT INSUFFICIENT.—A petition which describes the termination of a proposed road as "the summit of the Cow Creek Hill, the same being the southern line of Douglas County," is not sufficiently definite.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

C. W. Fitch, District Attorney; J. F. Gazley and W. W. Thayer, for Respondent.

Watson & Lane and W. R. Willis, for Appellant.

By the Court, Prim, J.:

This is an appeal from a judgment dismissing a writ of review, and affirming the action of the County Court of Douglas County, in the matter of laying out and locating a county road. It appears, from the return on said writ, that on December 4, 1873, at the December term of said County Court, a petition was presented, praying for the location of a county road "from a point five miles south of the south line of the city of Rosenburg, from a stake on the northeast corner of school lot, in school district No. 5, in said county, * * * to the summit of Cow Creek Hill, the same being the southern line of Douglas County."

Upon the filing of the petition, viewers and a surveyor were appointed to locate and survey the said road, and they proceeded to view and locate the same, for a portion of the distance, upon the line and route surveyed and adopted by the Canyonville and Galesville Road Company, as its road. This company was a private corporation, organized for the purpose of locating and constructing a toll-road through the canyon, in the southern part of Douglas County. At the January term, 1874, of said County Court, the report of the viewers, together with the surveyor's return of the survey, were received. The road company then appeared, by its attorneys, and imposed the location and establishment of so much of the said county road as occupies the line and route selected and adopted by said company for its toll-road. At the March term, 1874, these objections were overruled, and it was ordered that the said county road be established and opened according to the report and the survey. The notice of appeal contains a great many assignments of error, but the only points upon which appellant appears to rely are: First. That the Circuit Court erred in holding that the County Court could locate a county road upon the line or route already appropriated by appellant for its toll-road, there being no provision made by law for compensation for taking this species of property. Second. That the petition was insufficient to give the County Court

jurisdiction to locate and lay out the road, because it does not sufficiently specify the termini.

It was insisted by counsel for the appellant that when the objections were filed in the County Court, that tribunal should have entertained them and passed upon the questions raised. In cases of this character the remedy is not confined to one tribunal. Much depends upon the particular remedy sought. The County Court has power in the first instance to lay out roads, but must make all the proceedings conform to the statute. In some cases by review, and in others by appeal, the Circuit Court may annul the proceedings in the County Court, or may correct an assessment of damages or the like. The County Court, however, has not jurisdiction to try questions of title, or rights arising out of the exercise of eminent domain. These matters must be tested in a tribunal invested with fuller powers, having wider jurisdiction, one in which can be administered full relief, either by injunction or otherwise. This company had a right to seek in the County Court, and also by this writ of review from the Circuit Court, such remedy as the County Court could grant. It could call in question the jurisdiction of, or the regularity of, the proceedings in the County Court, by remonstrating and reviewing all matters going to the jurisdiction in the Circuit Court. It could not, however, by remonstrating, block the exercise of jurisdiction on the part of the County Court, for if jurisdiction is once fully obtained, objection to its exercise cannot be heard.

The objection urged to the jurisdiction might be heard, if well taken, but in this case it is not well taken. The statute requires that "all applications for laying out or locating county roads shall be by petition, * * * which shall specify the place of beginning, the intermediate points and the place of termination of said road." The petition herein prays for the location of a county road "from a point five miles south of the south line of the city of Rosenburg, from a stake on the northeast corner of school lot in school district No. 5 in said county, * * * to the summit of Cow Creek Hill, the same being the southern

line of Douglas County." Thus it will be seen that it specifies the place of beginning, the intermediate points (which are also mentioned in the petition), and the place of termination of the proposed road. It is not within the rule in *Johns v. Marion County* (4 Or. 46), and is sufficient. The court went to the extreme verge of the law in that case, and we are not inclined to go farther.

The judgment herein should be affirmed.

Mr. Justice Shattuck concurred.

Mr. Chief Justice Bonham dissented.

McArthur, J., concurring:

I am of the opinion that the judgment of the court below should be affirmed; but not, however, for the reasons expressed in the foregoing opinion. The only persons who can, in my judgment, question the jurisdiction of the County Court in the matter of laying out a county road are the petitioners and the remonstrators. They are parties to the proceeding, and a writ of review, which is governed by the same rules as the writ of certiorari—the name only being changed—can only be issued on the petition of one who is a party in the legal sense of the term. (*Burnett v. Douglas County*, 4 Or. 388.)

The remonstrance, as well as the petition, must conform to the statute. Merely filing on objection, even though based upon affidavits, does not make one a party. As this writ only brings up the record of the inferior tribunal, and as the affidavits are in the nature of evidence, I do not see how the court below could, or this Court can, go behind the record and review the facts. (*Schirott v. Phillippi*, 3 Or. 484.) As I view the law the appellant was an intruder in the County Court and had no right to appear as a party to the proceeding before it. (*People v. Overseers*, 44 Barb. 467; *Colden v. Botts*, 12 Wend. 234.) The best test as to the right to a writ of review, laid down in the authorities, is whether the one seeking it is a party in form or substance to the proceeding sought to be reviewed so as to be con-

cluded by the determination therein. (*Starkweather v. Seeley,* 45 Barb. 164.) I am utterly unable to conceive of any order the County Court could have made, in the matter of laying out the county road complained of, which would or could have concluded the appellant. Besides, the writ should not be allowed where the party has any other plain, speedy and adequate remedy.

A court of equity is the only tribunal which can fully protect the franchises of the appellant and afford an adequate remedy against any person injuriously interfering therewith.

Burnett, J., dissenting:

The judgment of the court below should be reversed for the reasons: 1. That the plaintiffs in the writ had a sufficient standing in the County Court as a party to the proceeding in laying out the county road, referred to in the petition for the writ of review, to attack the jurisdiction of the court. It is true they are a corporation claiming the route over which the county road was located as a toll-road, and have tendered an issue, upon the fact of their incorporation and the location of their toll-road over the route in question prior to the time the county road was viewed, that could not perhaps be tried in the County Court, but their allegation that the county road was laid out over their road, and is a direct injury to them, must be taken as true until denied, and places them in the same position as that of an individual alleging that a county road had been laid out over his land, and that the court had exceeded its jurisdiction in laying out the road. It is contended by counsel for respondent that in order to be a "party to a proceeding" for laying out a county road the individual must have signed either the petition or remonstrance, but I do not think this is a correct rule. Any party directly injured by the laying out of a county road has a sufficient standing in court to attack the jurisdiction of the court in the proceeding, and is entitled to a writ of review. (5 Harrington, Del. Rep. 153; see also 5 Sneed, Tenn. 575.)

2. That the termination of the road as described in the

petition is not sufficiently definite under the law as laid down by this Court in the case of *John A. Johns v. Marion County.* In that case the last course and point of termination are described by the words, "thence *southerly* to intersect the county road *near* the foot of the Nevil Hill, near the south line of John A. Johns's land claim."

In the case at bar the termination is described as "the summit of the Cow Creek Hill, the same being the southern line of Douglas County." If the description had stopped without adding "the same being the southern line of Douglas County," I think it would have been sufficiently definite; for, however impractical it might be to run to the summit of a hill, still that would be fixing a definite point; but to run to the southern line of Douglas County is entirely too indefinite to apprise any one of the *place* of termination or serve any purpose as a guide or direction to the viewers appointed by the County Court to view out the road.

JOSEPH SIMON, Respondent, v. A. H. BROWN, as State Treasurer, Appellant.

CENTENNIAL COMMISSION ACT.—Under the Centennial Commission Act, approved October 24, 1872, it is the duty of the State Treasurer to set apart a fund from which to pay all warrants drawn in virtue thereof.

IDEM.—Warrants drawn in virtue of said act cannot be paid out of the funds provided by the Appropriation Act approved October 24, 1874.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

W. H. Effinger, for Appellant.

E. C. Bronaugh, for Respondent.

By the Court, MCARTHUR, J.:

The petition alleges that, on November 7, 1872, the Secretary of State drew a warrant on the State Treasurer in the following form:

"No. 393. CENTENNIAL COMMISSION SUBSTITUTE. $504.

"STATE OF OREGON, SECRETARY'S DEPARTMENT,
"SALEM, November 7, 1872.

"State Treasurer will pay, out of the General Fund, to the order of A. J. Dufur, the sum of five hundred and four dollars.

(Signed) "S. F. CHADWICK,
"Secretary of State."

That on said date the same was presented for payment, and, for want of funds, was not paid, and the then Treasurer indorsed the same as follows:

"Presented and not paid for want of funds, November 7, 1872.

(Signed) "L. FLEISCHNER,
"Treasurer."

That afterwards Dufur indorsed the same for value, and the plaintiff is now the owner and holder thereof.

That the Legislative Assembly, at its eighth biennial session, passed an act, entitled "An Act to provide for the ordinary expenses of the State government, and other general and specific appropriations," by which the said Legislative Assembly did appropriate the sum of $382,157.66, or so much thereof as might be necessary for the several objects in said act mentioned, for two years, commencing from September 14, 1874, to be paid out of any money in the treasury not otherwise appropriated, besides the sum of $7250 appropriated out of specific funds for specific purposes.

That by § 19 of said act it is provided that "no money shall be paid out under this act, except upon warrants drawn by the Secretary of State upon the State Treasury; and all warrants drawn by the Secretary of State upon the Treasurer shall be paid by said Treasurer in the order in which they have been presented and indorsed, 'Presented and not paid for want of funds,' whether the same have been issued before or after the passing of this act."

That by § 20 of said act it is provided that, "owing to the

necessity of maintaining the public credit, this act shall take effect and be in force from and after its approval by the Governor," and that it was approved October 24, 1874.

That there are outstanding warrants drawn by said Secretary of State upon said Treasurer, and presented prior to November 7, 1872, and indorsed, "Presented and not paid for want of funds," to the amount and for the sum of twenty-two hundred dollars ($2200), and not to exceed that sum, and that there is now, in the General Fund, the sum of seven thousand or more dollars ($7000) in United States currency, which was received otherwise than for taxes, the requisite portion of which is applicable to and should be paid out by the Treasurer towards the satisfaction of the warrant aforesaid, with interest from the date of its indorsement by the Treasurer.

That on November 30, 1874, the plaintiff caused the warrant aforesaid to be duly presented and demand made for payment, which was refused by the present Treasurer, A. H. Brown, the defendant.

Then follows a prayer for a writ of mandamus commanding the Treasurer to reduce said currency in the General Fund to coin, and to pay said warrant, with the interest due thereon.

The defendant answers and says:

1. That he refuses to pay said warrant because the same belongs to, and is a part of, the deficient warrants drawn upon the State treasury for which no appropriation was made by the Legislative Assembly, and that he has no authority to pay any warrants presented to him unless authorized by act of said Assembly; and that said warrant is part of an indebtedness for which there has been no appropriation.

2. That the entire amount of outstanding warrants presented and indorsed "Not paid for want of funds," aggregates about $287,459.17, and that warrant No. 393 is of said number, and that none of said warrants are included in, or provided for in the appropriation bill passed October 24, 1874, and therefore he refused to pay the same.

3. That the warrants upon the various funds appropriated

by the said act, and accruing since September 14, 1874, aggregate at this time $78,957.51, and that the same are properly collectible from the Treasurer under and by virtue of said § 19; and that, if he should be required to pay the deficient warrants, he would not have any funds whatever wherewith to pay the current expenses of the State government, or any general or special expenses during the two years succeeding. Then follows a prayer for dismissal, etc.

A demurrer was interposed and sustained to the second and third portions of the answer.

Thereupon the plaintiff filed his reply, denying the first allegation in the answer, and averring that the Legislative Assembly did, by an act approved October 24, 1872, entitled "An Act to provide for paying the expenses of the Commissioner and Commissioner Substitute for the State of Oregon in attending the sittings of the United States Centennial Commission," appropriate the sum of four thousand dollars out of any money in the treasury not otherwise appropriated, to be used for the purposes expressed in the title of the act during the years 1872 and 1876, inclusive, upon which fund said warrant was drawn.

After trial the court below adjudged the writ properly issued and ordered that the said warrant be paid by the Treasurer. From the findings of the court it is apparent that the effect of the order was to cause payment to be made out of the seven thousand dollars of the general fund mentioned in the plaintiff's complaint. There is no question made here upon the ruling of the court below on the defendant's answer, and we pass that matter as unimportant.

It will be observed that the said answer nowhere puts in issue the following allegations of the complaint: 1. That there are outstanding warrants drawn by the Secretary of State upon the Treasurer, and presented prior to November 7, 1872, and indorsed, "Presented and not paid for want of funds," to the amount of twenty-two hundred dollars ($2200) and not to exceed that amount. 2. That there are now in the general fund of the treasury of the State the sum of seven thousand dollars ($7000) or more in currency of the United States, which was received by the Treasurer

otherwise than for taxes, from which fund warrant No. 393 and accumulated interest is payable.

The first section of the act to provide for the payment of the Centennial Commission declares that "there shall be and is hereby set apart from any money in the State treasury not otherwise appropriated, the sum of four thousand dollars, to be used in defraying the expenses of the commissioner," etc.; and in the second section it is provided, after the bills of the commissioner are audited, the Secretary of State shall draw his warrant for the amounts audited, and that the Treasurer shall pay the same from the fund to be set apart in virtue of the first section; "Provided, that the aggregate amount paid in any one year shall not exceed one thousand dollars." (Laws 1872, 103.)

Thus it will be seen that the warrant in suit is to be paid out of a fund to be set apart by the Treasurer from any moneys not otherwise appropriated. Assuming that there are in the treasury the seven thousand and odd dollars belonging to the general fund as alleged in the complaint and not denied in the answer, and assuming further that there are warrants upon the general fund registered prior to this one, aggregating in amount twenty-two hundred dollars, it follows that there must be some forty-eight hundred dollars ($4800) in said general fund which it does not appear have been "otherwise appropriated," and from which the fund may be created out of which the law authorizes the centennial warrants to be paid.

We are of opinion that this warrant cannot legally be paid out of any of the funds provided for by the act of October 24, 1874. The very terms used in the first section of said act show that the Legislative Assembly specifically appropriated, for the objects enumerated in subsequent sections, certain definite sums of money to be paid out of any money not otherwise appropriated, during the two years succeeding September 14, 1874. Section 19 provides that "no money shall be paid out under this act except upon warrants drawn by the Secretary of State upon the State Treasurer. And all warrants drawn by the Secretary of State upon the treasury shall be paid by the said Treasurer in the

order in which they have been presented and indorsed, 'Presented and not paid for want of funds,' whether the same have been issued before or after the passage of this act."

It is contended that this section should be so construed as to authorize the State Treasurer to pay warrants which have been issued long prior to the second Monday in September, 1874, under the other acts of the Legislative Assembly and for other purposes than those mentioned in the other sections of that act. The question therefore is, can such an enlarged construction be given to § 19? If so, the entire character of the act is changed, and from an act providing for the ordinary expenses of the State government accruing during the two years succeeding the second Monday of September, 1874, and the other and general and specific appropriations enumerated therein, it will become an act to provide for certain extraordinary expenses incurred prior to that date, for which payment is neither generally nor specifically provided by the act. In construing this act it is the duty of the Court to ascertain, if possible, the intention of the Legislature, and in so doing the preamble and the general purview or body of the act are to be taken into consideration, and it is the duty of the Court to put a reasonable construction upon all its sections and clauses, in order to accomplish its obvious purposes and in order that all its provisions may, if possible, stand. Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." (*Griswold v. National Insurance Co.*, 3 Cowen, 96.)

The obvious purpose of the act under consideration is to provide the necessary funds to defray the expenses of the State government for two years succeeding September 14, 1874, for it does not appear that it was passed in pursuance of Art. IX, § 6 of the State Constitution, but on the contrary it was passed in virtue of Art. IX, § 3 of the Constitution and of § 58, p. 760 of the General Laws.

If we look to the mere words of § 19 there is an apparent inconsistency between it and other sections of the act, but when viewed in the light of the preamble and the other sections, that inconsistency disappears, and the said section may with much reason be taken to mean that no money shall be paid out under the act except upon warrants drawn by the Secretary of State upon the State Treasurer, and all warrants drawn by the Secretary upon the Treasurer in virtue of this act shall be paid by said Treasurer in the order in which they have been presented and indorsed, "Presented and not paid for want of funds," whether the same have been issued before or after the passage of the act. It must be borne in mind that this act was approved October 24, 1874. Also that §§ 5 and 9 provide, among other things, for the payment of certain deficiencies in the Mute School fund and Penitentiary fund. Therefore the words, "whether the same have issued before the passage of this act," are intended to embrace such warrants as represent the deficiencies in the funds just mentioned. There is no refence whatever in the act to the Centennial Commission fund, and hence the act and no section thereof can properly be held to govern the payment of the warrants drawn thereon.

We therefore are of opinion that the warrant for the recovery of which this proceeding was instituted should be paid out of the fund first alluded to (the $7000), and the Treasurer should set apart the fund in accordance with the provisions of the act approved October 24, 1872, commonly called the Centennial Commission Act.

Judgment affirmed.

ADKINS, RUSSEL et al., Appellants, v. HAMAN C. LEWIS, Respondent.

MORTGAGEE IN POSSESSION MAY RECOVER FOR REPAIRS.—A mortgagee in possession is entitled to an allowance for necessary repairs in his account of rents and profits.

EQUITY—VALIDITY OF A MORTGAGOR'S TITLE CANNOT BE QUESTIONED, WHEN.—A grantee, in a deed absolute on its face, but intended as a mortgage, who has conveyed the mortgaged premises to a *bona fide* purchaser, will not be permitted, in an action brought by the mortgagor to recover the value of the property conveyed, to show that the mortgagor's title was invalid, and that the legal title had been bought in by such purchaser.

APPEAL from Benton County.

This was a suit in equity for an accounting and settlement for rents and profits received by respondent as a mortgagee in possession, and to compel a reconveyance of the mortgaged premises.

The appellants, Adkins and wife and William J. Russel, being the owners of a one-half interest in two hundred and twenty acres of land, mortgaged the same to respondent, to secure, as the complaint alleged, the payment of $634.54, loaned by respondent to appellant William J. Russel. The mortgage was in the form of a deed absolute on its face. At the date of its execution the legal title was in Russel. Adkins and wife joined in the mortgage on account of some real or supposed title held by them in the premises, the character of which does not appear.

The remaining one undivided half interest in the two hundred and twenty acre tract was owned by one Wood. At the date of the mortgage Wood and the appellants were in possession of the mortgaged premises as equal tenants in common, and they so continued for about one year afterwards, when the respondent Lewis bought Wood's interest, and entered into possession. The complaint alleges that at the time of such entry respondent ordered appellants off the premises, that they surrendered their possession to him, and that he has remained in such possession ever since, and that while in such possession he sold a portion

of the tract to one Williams, who became a *bona fide* purchaser of the same.

The answer of respondent admits that the conveyance in question was to secure the payment of the sum of money mentioned in the complaint; denies, however, that it was only for that purpose, but alleges that said mortgage was executed in part to indemnify respondent against a contingent liability as an obligor upon a certain bond executed by one of appellants; and it denies that respondent took possession, or has used or occupied the premises in question, except as the owner of the undivided one-half interest bought of Wood. It is further claimed by respondent that appellants' title to that part of the mortgaged premises conveyed by respondent to Williams was invalid, and that the legal title had been bought in by Williams.

The court below decreed a reconveyance of the mortgaged premises—except that part of the same conveyed to Williams—to appellants, upon payment by them to respondent of $1130.64, from which decree this appeal is taken.

R. S. Strahan and John Kelsay, for Appellants.

W. W. Thayer and F. A. Chenoweth, for Respondent.

By the Court, SHATTUCK, J.:

Several questions have been discussed upon the argument which, upon the view we take of the case, it is unnecessary to decide.

The first question to settle is, what was the nature of Lewis's use and occupation of the land conveyed to him by the deed in question? If he held as tenant in common with Russel, he is not liable to account in this suit for rents and profits; but he is so liable if his possession was as Russel's mortgagee. It appears from the evidence that Wood and Russel before, and for about a year after the execution of this deed by Russel and Adkins to Lewis, had been in possession together, as equal tenants in common, Wood owning an undivided half, and joining with Russel in cultivating the land, and sharing with him the crops. In November,

1870, more than a year after his deed from Russel, Lewis bought out Wood and took a deed from him of his undivided half, and then entered into possession and ordered Russel off the premises claiming that he had bought out *"all the heirs,"* etc., and declaring his purpose to hold sole possession. Russel surrendered to him the possession, and Lewis has used and occupied as sole claimant since that time, taking all the rents and profits. Upon these facts Lewis cannot be allowed to say that he claimed and used this land solely by virtue of his deed from Wood, and merely as tenant in common. He evidently referred his right as well to the deed from Russel as to the deed from Wood, and although a tenant in common he should in justice account, as mortgagee, for half the rents and profits.

The next question is his claim for repairs and improvements. Lewis, while in possession, appears to have built new fences and made general repairs. There is no question about the right of a mortgagee in possession, to an allowance for necessary repairs, to be allowed in stating his account of rents and profits. If these fences, so built by Lewis, can be classed as necessary repairs, he should be allowed for them. The evidence shows that the new fences inclosed and protected an exposed portion of the cultivated field, and contributed to the security and preservation of the whole crop. I think they should be regarded as necessary repairs, and Lewis should be allowed one-half of the amount expended by him, as well for the new fences as in general repairs.

The next question and the one most controverted is the amount for which Lewis should be charged on account of the parcel of land sold to Martin Williams. Shall he be held to account for simply what he received from Williams, or shall he be charged with what the land might have brought with its reasonable value? This must be determined by the character which he is held to sustain as grantee under the absolute deed. By reason of the parol defeasance he was a mortgagee beyond question, and by his own admissions in the pleadings he took the deed and held the land merely as security. By the absolute deed he had been

invested by Russel with a power of absolute control over the land, and as far as strangers could be supposed to know, he had full power to dispose of the land at pleasure. A sale by him to a *bona fide* purchaser would deprive Russel of any remedy by way of redemption and prevent him, on payment of the mortgage debt, from being restored to his former position. Now, as far as this evidence discloses the facts, Williams was a *bona fide* purchaser and Russel has no longer any right to redeem this parcel. It further appears that Russel, being advised of Lewis's purpose to sell this parcel, objected and requested Lewis to keep this tract subject to his right to redeem. But Lewis told him to "stand aside," he was going to make something out of this land. Under these circumstances Lewis is bound to account as a trustee—should be required as mortgagee to restore the pledge intact, or account for the value. The charge against him then on this account is not merely the one hundred dollars, which he alleges was all he received from Williams, but must be the reasonable value of the tract. He claims, however, that the title was imperfect and that Williams held a permanent claim. It is true the evidence shows that the deed under which Russel held this parcel, was imperfect and conveyed no legal title, and that Williams had, for one hundred dollars, bought in the claim of Russel's vendors. But there is no evidence that Russel could not have procured for his own benefit a confirmation of his title upon as easy terms as Williams had got it, nor does it appear that Lewis could not have procured this support of his mortgagor's title for the same amount that Williams paid for it. It is not a justification for Lewis, to say that Russel had no good title to this tract. Imperfection of the title did not justify his placing it beyond Russel's power to get the title confirmed. Equity required him to restore the land, without regard to the condition of the title, in no worse condition than he received it, so far as his own acts could affect it. Had Lewis bought in the outstanding title and got the land partitioned in confirmation and in support of Russel's title, it would be just and according to the general practice in equity to allow him for the expense of so doing, especially if

Russel's title had been assailed or questioned by the holder of the outstanding claim. Inasmuch as Martin Williams has done this, and we can estimate the cost of it, it is reasonable that Lewis should be allowed for it, as if he had done it himself, and the amount for which he should be charged on account of this item should be the price for which Williams sold the land, less what he paid the Kennedys for the outstanding title, and what would be a reasonable allowance for partition.

In accordance with these views, the decree of the court below should be modified.

J. W. LADD and S. G. REED, Respondents, v. HARVEY HIGLEY, Appellant.

EXECUTION ON DORMANT JUDGMENT—PROCEEDING TO OBTAIN.—A proceeding under § 292 of the Code to obtain leave to issue an execution on a dormant judgment, is in the nature of a separate proceeding. The judgment-roll in such proceeding is prepared and filed in the same manner as a judgment.

BILL OF EXCEPTIONS—EVIDENCE MUST BE INCORPORATED IN.—Upon a trial of an issue of fact in such a proceeding, the Court will not look into the evidence upon which the fact was found in the court below, unless the same is incorporated in a statement or bill of exceptions, and exception properly taken to its admissibility when offered in the court below.

RECITALS IN A JUDGMENT.—Where there is a recital in the judgment of due service upon a defendant, nothing short of a clear contradiction in the judgment-roll will affect the recital.

APPEAL from Yamhill County.

On the 6th day of May, 1862, the respondents obtained a judgment by default, in the Circuit Court of the State of Oregon for Yamhill County, against the appellant, Harvey Higley, for the sum of $577.66 and costs of suit to be taxed. At the April term, 1874, of said court, said respondents filed in said court, under § 292 of the Code, a motion for the allowance of an order for leave to issue an execution on said judgment; the appellant filed an answer to the motion; proper steps were taken to bring the matter to issue; a jury trial was waived, and, by consent of the parties, the case

was tried by the court, and judgment rendered in favor of the respondents, granting them leave to issue an execution on said judgment; from which decision appellant appeals and brings the case into this Court.

T. B. Handley, for Appellant.

Wm. Strong and F. R. Strong, for Respondents.

By the Court, BURNETT, J.:

The principal point relied on by appellant's counsel to reverse the judgment of the court below is, that the judgment of 1862 is void, for the reasons:

1. That there was no summons or notice issued in that action, such as the law required.

2. That the proof of the service of the notice, in that case, was not sufficient to give the court jurisdiction of the person of Higley; and

3. That the complaint in said cause did not state facts sufficient to constitute a cause of action.

The first question presented is, whether the judgment-roll, in the cause in which judgment was rendered in 1862, is before this Court for inspection or not.

It appears that the court below found the facts upon which the judgment appealed from is based, upon testimony that was admitted without objection; which findings are to the effect that the respondents did, on the 6th day of May, 1862, obtain a judgment in that court in their favor and against the appellant for the sum of $597.26; that said judgment was duly entered; that said sum of $597.26, and interest thereon at ten per cent. per annum from that date, is now due and unpaid, and that no execution upon said judgment has ever been issued. As the appellant claims that the judgment, upon which the above facts are found, is void, he should have objected to its admission in evidence, and excepted to the ruling of the court in admitting it, and, by his bill of exceptions, brought the question properly before this Court.

There is no bill of exceptions nor statement, and we are

to presume that the evidence was competent and properly admitted. It is, however, claimed by counsel for the appellant that the judgment-roll in the cause of 1862 is a part of the roll of this proceeding in 1874, and was properly made a part of the transcript. But this view is not sustained by the provisions of the code, in relation to proceedings of this kind. These provisions, after providing for the filing of the motion, service of summons and making up the issue and trial, which is very similar in all respects to an action, then provide that "the order shall specify the amount for which the execution is to issue, or the particular property, possession of which is to be delivered; it shall be entered in the journal and docketed as a judgment, and a roll thereafter prepared and filed, or a final record made of the proceedings, as the case may be, in the same manner as a judgment." (Civil Code, § 292.)

The case of *Hunsaker v. Coffin* (2 Or. 107), is cited by counsel for appellant, and relied on to sustain his position. It does not appear in that case how the trial was had in the court below, and no question was raised as to the right of the appellate court to look into the judgment-roll in the original cause; but admitting that the judgment-roll of the judgment of May 6, 1862, is properly before this Court for examination, that judgment could only be declared void if, upon an inspection of the whole record, it appears either that the court had not jurisdiction of the person of the defendant therein, or that the complaint did not state facts sufficient to constitute a cause of action.

Upon the first point, the objection that the notice was not sufficient is not well taken. The notice is in substantial compliance with the laws of 1859, which were then in force, and is sufficient. The proof of service is the certificate of the sheriff of Yamhill County, to the effect that the complaint and notice were served on the defendant personally in Yamhill County, Oregon, on the 14th day of March, 1862, by delivering to him copies of the same.

It is claimed by appellant's counsel that this proof of service is insufficient in this, that it does not appear that the sheriff made the service. The presumption is that of-

ficial duty has been *regularly* performed (Code, § 766); and when there is a certificate in due form signed by an officer showing service, as there is in this case, it is the duty of the Court to presume that the officer did his whole duty, and made the service, rather than that some other person made the service, and that the officer violated the law in certifying to it. Again, there is a recital in the judgment entry in the judgment of 1862, to the effect that Higley had been duly served in Yamhill County, Oregon, with the complaint and notice in that case, more than ten days before the term of court at which the judgment was rendered, and nothing short of a clear contradiction in the roll will affect this recital.

As to the third objection, we think the complaint in the action in 1862 is good, as upon an account stated, and though it might be more specific, and no doubt would have been made so upon a proper motion, it would be going too far to hold that it is a nullity, and would not support a judgment by default.

It is further objected that the judgment appealed from in this case contained the words "renewed and revived," but these words do not give the order for leave to issue an execution any greater effect than the statute gives it. It is to the statute the parties must look to find what effect such an order has upon the dormant judgment.

Judgment affirmed.

W. W. CHAPMAN, Appellant, v. JAMES H. WILBUR, Respondent.

AMENDING DECREE—MOTION TOO LATE, WHEN.—A party comes too late who applies seventeen months after entry of a decree, for leave to amend the same without showing excuse for the delay.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

J. G. Chapman, for the motion.

Moreland & Atwater, contra.

By the Court, BONHAM, C. J.:

This was a suit to set aside a conveyance of real estate in the City of Portland, which was determined by this Court at the July term, 1873, by dismissing plaintiff's cause generally, for want of merits.

On the 6th day of August, 1873, a motion for a rehearing was filed by appellant, and after due consideration of the same by the Court, was overruled. In January, 1875, this motion was filed asking leave to correct the decree of this Court, made in August, 1873, so as to show that the cause was dismissed without prejudice.

In support of the motion there is no accompanying affidavit or other showing by which this Court can determine that the decree, dismissing plaintiff's cause, was not correct, as entered of record by the clerk. But counsel suggests, on the argument, that it is within the recollection of some members of this Court, who sat in this cause at the time that the same was dismissed, in August, 1873, that when the decision of the Court was orally announced it was ordered that the cause be dismissed *without prejudice,* and that the clerk in entering the decree inadvertently omitted those words.

On the other hand, opposing counsel claim that, after the signing of the record and the adjournment of the term, a judgment or decree cannot be amended except in cases where there is something in the record, or at least something which is *quasi* of record, by which the error complained of is indicated. And it is furthermore urged that, in no event could the relief sought by this motion be granted, on account of the laches of the appellant in making his application therefor.

It appears, from the record, that the decree of this Court, dismissing appellant's cause, was entered of record on August 5, 1873; that, on the following day, a motion for rehearing was filed, which was overruled by the Court, and that a mandate was sent to the court below, and that near seventeen months have been allowed to elapse since the

entry of the decree complained of, before any steps were taken to correct or amend the same.

We are clearly of the opinion that, in the absence of any showing of a valid excuse for such unreasonable delay, this motion should be denied, on the ground of laches in the moving party.

It is the duty of attorneys to see that the journal entries are correctly made, in causes in which they are interested; and if, for any reason, they should fail to do so, the earliest practicable opportunity should be made available for the purpose of securing any desired correction. It would be an unwise practice to allow the final judgments and decrees of courts to be modified or amended in any material respect, except upon the prompt action of the parties interested, and for good and sufficient reasons.

Motion denied.

A. A. FINK, Respondent, v. CANYON ROAD COMPANY, Appellant.

CORPORATIONS—TENDENCY OF DECISIONS CONCERNING.—The tendency of modern decisions is to assimilate the actions, rights, duties and liabilities of private corporations to those of individuals and of commercial partnerships.

PRESUMPTIONS IN FAVOR OF CORPORATIONS.—In the absence of proof, courts cannot disregard as illegal or unauthorized the dealings and acts of private corporations which, on their face, or according to their apparent import, are within their charters or articles.

IBID.—Artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes honesty rather than wrong to the conduct of men.

ACTS OF AGENTS.—Corporations are bound by their simple contracts and by other acts of their officers and agents performed in the discharge of their ordinary duties.

FINDINGS BY THE COURT.—Where the cause is tried by the court without the intervention of a jury, the findings must be sufficient to sustain the judgment, and must cover all the material issues.

APPEAL from Douglas County.

The complaint alleges that the Canyon Road Company is a private corporation; that on November 9, 1868, it was indebted to one Rose in the sum of fifty dollars coin, and by

its secretary, duly authorized thereto, drew its draft or order in writing, directed to its treasurer in favor of said Rose, or bearer, for fifty dollars; that said draft or order was duly delivered to Rose, who for a value, afterwards transferred and delivered it to Fink, who is now the owner and holder thereof; that said draft was duly presented to said treasurer and by him indorsed, "Not paid for want of funds," and that there is now due and payable from said company to said Fink the sum of fifty dollars and interest from the date of presentment.

A second cause of action upon another draft of the same character and amount is similarly stated.

The defendant denied the indebtedness, the authority of its secretary to draw the draft; denied that it was transferred for value, or that Fink was owner and holder, or that any sum was due or payable thereon. The answer also alleges that the order was issued without authority or consent of the company out of its regular course of business, "and without consideration to it;" that it was received by Fink after its maturity and with notice and knowledge of the facts pleaded.

Similar answer is made to the second cause of action.

The reply denies all the new matter set up in the answer.

By consent of the parties in open court a jury was waived, and the cause was tried by the court. After hearing proofs and argument, the court below found as follows:

1. That the defendant was and is a private corporation, duly incorporated under the laws of the State of Oregon.

2. That they incorporated for the purpose of constructing and maintaining a toll-road through the canyon in Douglas County, Oregon.

3. That on the 9th day of November, 1868, said corporation issued and delivered to one Aaron Rose a warrant or order, of which the following is a copy:

No. 581.] "ROSEBURG, OREGON, Nov. 9, 1868. [$50.

To the Treasurer of the Canyon Road Company:

Pay to Aaron Rose, or bearer, fifty (coin) dollars, for expenses attending meeting. By order of Board of Directors.

WM. R. WILLIS,
"President C. R. C.

"I certify that the above is correct.

"S. F. CHADWICK,
"Secretary C. R. C."

4. That on the 21st day of May, 1869, defendant issued another order, copy of the above, except dates.

5. That on the back of each of said orders is the following indorsement:

"Presented and not paid for want of funds.

"SOL. ABRAHAM,
"Treasurer C. R. C."

6. That the plaintiff herein became the owner and holder of said warrants or orders, for value, prior to the commencement of this action.

Upon these findings of fact the court below entered judgment in favor of Fink and against said company for one hundred and fourteen dollars and fifty cents in coin.

From this judgment an appeal was taken and numerous errors are alleged.

Watson & Lane and William R. Willis, for Appellant, claim:

1. That the facts found by the court are not sufficient to entitle the plaintiff to a judgment. (*Clark v. Des Moines*, 6 Am. L. R. 146 and note; Abb. Dig. Law of Cor., pp. 283, 288, §§ 60, 101.)

2. That the court should have passed upon all the issues, and not having done so the judgment should be reversed. (5 Bos. 658, 663; 6 Id. 668; 61 Pa. 352; 10 Wis. 418; Code, §§ 216, 217.)

3. A party dealing with the officers of a corporation is bound to know what authority they have. (*Adrian v. Roome*, 52 Barb. 399, 410, 411; *McCullough v. Moss*, 5 Denio, 567.)

J. F. Gazley and W. W. Thayer, for Respondent, claim:

1. That the answer tenders no issue except as to the negotiation of the drafts to respondent.

2. That the drafts were in legal effect the promissory notes of the company, and were obligatory upon it. (15 N. Y. 337; Ang. & Ames on Cor., p. 254, § 268.)

3. That the court passed upon all the material issues.

By the Court, MCARTHUR, J.:

The instruments declared on are orders by the company on itself—mere directions to its treasurer to pay the amounts indicated to the bearer. In legal effect they are the promissory notes of the company. (*Fairchild v. O. C. & R. R. Co.,* 15 N. Y. 337.)

We cannot adopt the views of appellant's counsel and decide the issues of instruments of this character, by the company, *ultra vires,* because in issuing them the company exercised incidental powers which are within, or rather grow out of the general powers of corporations of this class. The doctrine of *Clark v. Des Moines* (6 Am. L. R.), which is, that in case of a municipal corporation a person taking its warrants is bound at his peril to ascertain the nature and extent of the power of the officers of the corporation, cannot apply herein to the extent claimed by appellant's counsel, for the reason that this is not a municipal corporation. The law applicable to municipal corporations is, in many respects, different from that governing private corporations. Private corporations act through their agents, as do municipal corporations, but the tendency of modern decisions is to assimilate the actions, rights, duties and liabilities of private corporations to those of individual and of commercial partnership. (*Conro v. Port Henry Iron Co.,* 12 Barb. 64.)

Courts cannot disregard as illegal or unauthorized the dealings and the acts of private corporations which, on their face, or according to their apparent import, are within their charter of articles. In the absence of proof there is no legal presumption that the law has been violated. On

the contrary, artificial bodies, like natural persons, are entitled to the benefit of the rule which imports honesty rather than wrong to the conduct of men. (*Chautauqua Co. Bank v. Risley*, 19 N. Y. 381.)

In *Safford v. Wyckoff* (4 Hill, 442), the action was against a banking association upon a draft or bill of exchange. Chancellor Walworth, while dissenting upon another ground, said: "Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show for what the particular security was given, if there is nothing on the face of the instrument itself to create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose rather than for one which was unauthorized and illegal."

Corporations are certainly bound by their simple contracts, and by other acts of their officers and agents made and performed in the discharge of their ordinary duties; and the courts have carried this doctrine so far as to hold that they may take notice of the general nature of the duties of a cashier in and about a banking office, and, without evidence of usage or express authority, hold him authorized to do all incidental acts necessary to the performance of those general duties. (*Watson v. Bennett et al.*, 12 Barb. 196.) This case is cited more to show the tendency of modern decisions than from any present applicability. It presses close upon the very verge of the law, and further we think the courts ought not to go. In Angell & Ames on Corporations (p. 292), the law is well stated to be, that unless the act of incorporation expressly prescribe the contrary, the duly authorized agents of corporations, as of natural persons, may, within the scope of their authority, bind them by simple as well as by sealed contracts; and that, too, in both cases, whether authorized by deed or vote; and from their acts or conduct, as well as from the acts or conduct of the agents of natural persons, implications may be made, either for or against their constituents. These general rules are applicable alike to those corporations formed under geneal incorporation laws and those created by legislative charter.

In *Fister v. La Rue* (15 Barb. 323), the analogies to be drawn from which are applicable to the case in hand, the plaintiff brought her action in a justice's court against the trustee of a school district. She was employed by one of the trustees only, after consulting the others separately and obtaining their permission to teach the district school for six weeks. All three of the trustees sent children to school, as did the district generally. The defense was a denial of the services and payment. The plaintiff had a verdict. An appeal was prosecuted to the County Court, in pursuance of a statute of the State of New York, and the judgment of the justice was reversed for the following, among other reasons, that it did not appear, from the justice's return, that the defendants had employed the plaintiff to teach, at a legal meeting of all their numbers for that purpose, or at a meeting of a majority of the defendants after notice to all. This, the Supreme Court held to be erroneous, and held further that no such proof was necessary in a case like this, where the action was brought upon an executed contract to recover for services rendered under it. It is well settled, at least in this country, that where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to agreement. Having availed itself of the services, and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract. In the same case it is well said that the law raises the same presumptions against corporations, in such cases, as against natural persons.

In this case, we think the road company is estopped to deny the regularity, as well as the legality of its acts in issuing the orders declared on. They were drawn by the secretary, signed by the president and indorsed by the treasurer. To lay down a principle which would permit

these officers now to deny their own solemn act, and shield themselves behind the doctrine of *ultra vires*, would be substantially investing them with power at their own pleasure to avoid the consequences of their own acts, and at the same time render all who have performed any sort of labor or service for them, and received orders of this kind, remediless. If no reliance is to be placed upon, and no credit given to, the drafts or orders of a private corporation, which are *prima facie* regularly executed, and issued in pursuance of a power directly conferred, or of a clearly incidental and necessary power, attested by the signatures of their officers, upon whom the control of their affairs is devolved by law, upon what can reliance be placed? (37 Cal. 598.)

"This is one of the most direct, formal and solemn assurances that can possibly be given. It is one of the legally appointed modes in which a large class of private corporations deal with the world and establish credit. When a draft or order of this kind finds its way into the market, and is purchased by a stranger, he, and the commercial world generally, has little opportunity or means of ascertaining the circumstances under which it was drawn or issued. No opportunity is afforded a stranger to examine the books, papers and proceedings of a private corporation, for they are private property. Whenever the corporation acts, it is through its agents, and if their formal assurances and solemn signatures are not reliable, then none of their acts can be depended on, and those dealing with them are absolutely without adequate protection. The rule stated, not only rests upon principle and authority, but is founded upon common honesty and solid sense."

In *McCullough v. Moss* (5 Denio, 577), it is said that the right of a corporation to make a promissory note for a debt incurred in the course of its business, although not expressly authorized to contract in that form, appears to be conceded in our courts, citing 1 Cow. 513, and 9 Paige, 470. As this case was cited and relied upon by appellant's counsel, I have examined it with great care, and am unable to discover that the opinions of the different Senators war-

rant the conclusions of the reporter, as expressed in the syllabus, save the one just set forth.

The following analysis of the case made by Willard, J., and forming part of the opinion of the court in *Moss v. McCullough* (7 Barb. 284), shows what was really decided, and the consequences of the decision: "Gardiner, the Lieutenant-Governor, expressed the opinion—(1.) That the circuit judge erred in refusing to submit to the jury the question, whether a part of the consideration of the note did not accrue before the defendant became a stockholder, and that for such refusal the judgment should be reversed and a new trial awarded. (2.) He intimates that the stockholder is a guarantor for the company, and that the action should be brought in the name of the original party to the note, and that this liability was not negotiable. (3.) His third objection to the ruling of the circuit judge is substantially like the first, viz., that there was evidence to show that a part of the damages which were included in the note accrued before the defendant became a stockholder. (4.) He inclined to the opinion that an entire agreement could not be divided.

"If the judgment of the Supreme Court was reversed, for the first or third reasons assigned by Gardiner, Lieutenant-Governor, the court below should not have nonsuited the plaintiff, but have submitted the question of fact to the jury. And if the judgment was reversed for the second reason, it should have been final, and no *venire de novo* should have been awarded.

"The opinion of Mr. Senator Lott decides:

"1. That the plaintiff did not show on the trial that the note in question was executed by the authority of the corporation.

"2. That the evidence of its subsequent ratification was insufficient.

"3. That the note was not obligatory upon the company, because it was not given in the legitimate course of their business. They had no right to buy a farm, a school house, or threshing-machine, etc.

"4. That the question whether a part of the consideration

of the note accrued prior to the defendant's becoming a stockholder, should have been submitted to the jury.

"A reversal of the judgment for the first, second or fourth reason would not have concluded the judge trying the cause, unless the testimony was the same as on a former trial. But the testimony on the last trial was much stronger for the plaintiff than on the preceding trial, and should, I think, have carried the cause to the jury on the principles contained in Senator Lott's first, second and fourth reasons. A reversal for the third reason should have been final, because, if true, it showed that the plaintiff had no cause of action.

"Mr. Senator Putnam, in his opinion, repudiates the notion of guarantee put forth in the opinion of Lieutenant-Governor Gardiner. He thinks:

"1. The plaintiff, in the first place, had not shown any authority in the officers of the company to give the note.

"2. That the defendant was not liable, because he was not a stockholder at the time this suit was commenced.

"3. That the consideration of the note was illegal, as it was given in part for the property which had no connection with the business of the corporation.

"If the judgment was reversed for the first objection, there should have been a new trial; and if the testimony, as to the authority to give the note, was materially strengthened, the cause should have been submitted to the jury. If it was reversed for the last two objections, it should have been final.

"Mr. Senator Barlow went for an affirmance of the judgment, thus concurring in substance with the Supreme Court. He also expressed the opinion that the judgment against the company finally settled every question as to the validity of the note, and that the defendant could not go back of that judgment and take issue upon the liability of the company; thus concurring with Chief Justice Spencer, in *Slee v. Bloom* (20 John. 669). Seven other senators concurred with him.

"The fact that a *venire de novo* was awarded, affords decisive evidence that a majority of the court did not concur

with the Lieutenant-Governor, Gardiner, on his second point, nor with Mr. Lott in his third, nor with Mr. Putnam in his last two. We have no means of determining upon which of the other reasons it was reversed. We must presume that it was reversed for a reason which the court thought could or might be obviated on a further trial, or they would not have awarded a *venire de noro.*"

So much for the case relied upon by counsel for appellant. Mr. Justice Willard's analysis of it shows how utterly worthless it is as an authority to guide this Court to a correct conclusion in the case in hand.

The point decided in *Adriance v. Rome* (52 Barb. 399), was that the superintendent of a manufacturing company, whose actual authority was "to have charge of the manufacturing department of the works, audit bills for materials and labor, and to appoint and discharge foreman and workmen," had no authority to make a loan of money in the name of the company, and execute a contract in its name, agreed to sell and deliver to the lender a specified quantity of iron in consideration thereof. Gilbert, J., who rendered the opinion, had no doubt a corporation might be bound by the acts of a general agent, in the same manner as private individuals, and persons dealing in good faith with such agents are not presumed to know the private instructions which may have been given him by his principal. After declaring that that principle would not aid the plaintiffs, he proceeded to lay down the law as applicable to the very question raised in the case before him, which was as above stated. I find nothing in the case sustaining the appellants.

Where a cause is tried by the court without the intervention of a jury, there must be findings of fact sufficient to sustain the judgment. All the material issues should be passed upon. It is needless to cite authorities upon points so obviously clear and so thoroughly settled. In the case now under consideration, we think the court below did not proceed to render its judgment in disregard of these principles of law. The denial of indebtedness is the denial of a mere conclusion of law in this action. The company was

estopped to deny the authority of its secretary to draw the drafts. The third finding of the court covers the allegations in the answer that the order was issued without the authority or consent of the appellant, and out of its regular course of business. The allegation that these drafts were "without consideration to it" (the company) is not sufficiently pleaded and does not tender an issue. (19 Cal. 147; 19 Abb. Pr. 97; 2 Estee Pl. 757.)

All the other material issues are covered by the other findings.

Judgment affirmed.

JAMES P. CAMPBELL, Appellant, v. JAMES W. BRIDWELL, Respondent.

FENCE LAW.—The common law rule, that every man is required to keep his cattle within his own close, under the penalty of answering in damages for all injuries arising from their running at large, is not in force in this State.

TRESPASS BY STOCK—COMPLAINT IN ACTION FOR.—The complaint, in an action for trespass of cattle, must set forth facts showing an inclosure built in substantial compliance with the statute.

APPEAL from Polk County.

The facts are stated in the opinion of the Court.

J. L. Collins, for Appellant.

N. L. Butler, for Respondent.

By the Court, BURNETT, J.:

This is an action of trespass, brought by the appellant in the Circuit Court for Polk County, for injuries to his growing crops by the stock of the respondent. There is no allegation in the complaint that the crops of appellant are inclosed, or that the appellant has his land inclosed by any kind of fence. There was a general demurrer interposed to the complaint in the court below by the respondent, which was sustained by the court, from which judgment

sustaining said demurrer the case is brought into this Court by appeal.

The only question presented in the argument for the consideration of the court is whether under our statute a person can maintain an action of trespass for injury to grass, herbage, or growing crops, by the cattle of another, without alleging that the premises upon which the trespass is alleged to have been committed were inclosed by a lawful fence.

The statute, page 579, § 1, provides: "That all fields and inclosures shall be inclosed with a fence sufficiently close, composed of posts and rails, posts and palings, posts and planks, palisades, or rails alone, laid up in the manner commonly called a worm fence, or turf with a ditch on either side, or wall of rock or stone four and a half feet high." The next section provides how all such fences shall be constructed and their height.

Section 4, on the same page, provides that "If any horse, cattle, or stock, break into any inclosure, the fence being of the height and sufficiency aforesaid; or if any hog, shoat or pig shall break into the same, the owner of such animal shall, for the first trespass, make reparation to the party injured for the true value of the damages he shall sustain; and for every trespass thereafter, double damages, to be recovered with costs before a justice of the peace, or any court of record having cognizance of the same, demanded by the party injured. For the third offense from any of the animals aforesaid breaking into such inclosures, the party injured may take up such animals and keep the same at the expense of the owner. All animals so taken and kept in accordance with the provisions of this section, shall be held as surety for the expenses of keeping; *provided,* that the owner may at any time pay charges and take such animal away."

The next section is as follows: "Upon the complaint of the party injured to any justice of the peace of the county, such justice shall issue his order, without delay, to three disinterested householders of the neighborhood, nowise related to the parties, reciting the complaint and requiring them to view the fence where the trespass is complained of

and take a memorandum of the same, and the testimony in such cases shall be good evidence on the trial touching the lawfulness of the fence."

It was admitted on the argument of the case that unless the common law on this subject prevailed in this State the *plaintiff* had no right of action.

It is the opinion of the Court that the common law rule, that every man is required to keep his cattle within his own close, under the penalty of answering in damages for all injuries arising from their running at large, is not in force in this State. The statute of 1870 is directly in conflict with and repugnant to that rule. The courts of Iowa and Illinois have taken the same view of this question. (*Wagner v. Bliss,* 3 Iowa, 396; *Heath v. Coltenback,* 5 Iowa, 490; *Seely v. Peters,* 5 Gilman (Ill.) 130.)

The fence law of this State has repealed the common law on this subject (if it ever prevailed here,) and substituted on one side the obligation to inclose with a sufficient fence, and on the other the liability to pay damages, double damages, etc., and also to a seizure of the stock, *damage feasant,* and a complaint must set forth an inclosure built in substantial compliance with this law, or there can be no trespass of cattle established.

Judgment affirmed.

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*WM. H. MUSGROVE, Appellant, v. RUTH M. BONSER et al., Respondents.

UNRECORDED DEED—TITLE CONVEYED BY, WHERE THERE IS NOTICE.—An unrecorded deed has the effect to carry the legal title as against all persons having actual notice of its existence. The protection of the statutes in relation to recording deeds only applies in favor of parties who have acted in good faith.

RECORDED DEED—WHEN TAKEN WITH NOTICE OF PRIOR CONVEYANCE.—A conveyance, though duly recorded, passes no title whatever when taken with a knowledge of the existence of an unrecorded deed.

ACTUAL NOTICE—DEED NOT ENTITLED TO RECORD MAY OPERATE AS.—A deed, though not entitled to record, but which has been recorded, while it does not operate as constructive notice, may operate as actual notice. The rule as to notice in *Bohlman* v. *Coffin et al.* (4 Or. 313), affirmed.

*See 20 Am. Rep. 737.

PRIOR EQUITIES—WHERE PURCHASER HAS NOTICE OF.—If one has notice of the equities of prior purchasers before he pays the purchase-price of land, and yet makes payment, he cannot claim the rights of a *bona fide* purchaser.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Dolph, Bronaugh, Dolph and Simon, for Appellant.

B. Killin and R. Williams, for Respondents.

By the Court, PRIM, J.:

This was a suit in equity, brought in the Circuit Court of Multnomah County by Musgrove against respondents, to restrain them from cutting cordwood and removing it from the lands described in the complaint, situate on Oak Island, Multnomah County, Oregon. The appellant and one of the respondents, Ruth M. Bonser, each claim to own the land in controversy by virtue of several deeds of conveyance from the common grantors, M. L. Armstrong and wife. On February 15, 1873, Armstrong and wife executed a deed of conveyance of the land in dispute to Musgrove, which was duly recorded in the county clerk's office of Multnomah County on February 25, 1873, and on December 4, 1860, Armstrong and wife, for a valuable consideration, executed a deed of conveyance for the same land to John Bonser, while in Washington Territory. This deed was placed on the records in the county clerk's office of Multnomah County on December 24, 1860, but without authority of law; because the acknowledgment of the execution thereof had been taken before a notary public of Washington Territory, and because it was deposited for record without first having the certificate of a clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment had been taken, as required by the statute of Oregon then in force. (Statutes 1854, p. 520, § 12.)

On January 19, 1866, John Bonser conveyed by deed the

land in controversy to Ruth M. Bonser (then Ruth M. Dow) for a valuable consideration, which was duly acknowledged and recorded in the county clerk's office.

As has been stated, the deed of 1860 from Armstrong and wife to John Bonser was acknowledged before a notary public of Washington Territory, where the deed was executed; said acknowledgment being in the following words:

"TERRITORY OF WASHINGTON,
"COUNTY OF CLARK.

"On this 4th day of December, A. D. 1860, before me——, a notary public in and for said county, personally appeared M. L. Armstrong and Martha Jane, his wife, * * * to me well known to be the persons named in the within deed, and after the same was read and explained by me to them they each acknowledged to me that —— signed and executed the within deed."

The first point made by counsel for appellant is, that the certificate of acknowledgment appended to the Bonser deed is fatally defective and is not evidence of its execution without further proof. It will be noticed that the notary, instead of certifying that Armstrong and wife were known to him to be the makers of the deed, certifies that they were known to him to be the persons named in the written deed, and that "they acknowledged to him that —— signed and executed the within deed." The omission of the pronoun *they* before the word "signed" was evidently a clerical mistake; and while the certificate is somewhat defective, yet we think it substantially contains all the requisites of the statute then and there (Washington Territory) in force. We think it may be inferred from this certificate that Armstrong and wife were the makers of the deed; that they were known to the notary personally, and that they acknowledged to him its execution. This deed was not, however, duly recorded in the county of Multnomah, in this State, where the land is situate. The statutes of 1854, p. 520, § 12, require that where a deed is executed outside of this State, unless the acknowledgment is taken before a commissioner appointed by the Governor for that purpose, it shall have

attached thereto a certificate of the clerk or other proper certifying officer of a court of record, under the seal of his office, that the person taking the acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that the signature of such officer he believes to be genuine, and that the deed is executed and acknowledged according to the laws of said State or Territory.

This deed not having this certificate attached thereto, though copied by the clerk upon the record, was not entitled to be there. It being to all intents and purposes an unrecorded deed at the time appellant took his conveyance from Armstrong and wife, it did not operate as constructive notice to appellant. The only effect of such deed was to carry the legal title as against all persons having actual notice of its existence.

By our statute every deed not recorded, as required by law, is void, as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first recorded. It seems to be well settled, in this country, "both in law and equity, that our recording acts only apply in favor of parties who have acted in good faith," and it is therefore generally held that a conveyance, duly recorded, passes no title whatever, when taken with a knowledge of the existence of a prior unrecorded deed. (2 Ld. Cases in Equity, 183; 9 John. 163; 4 Mass. 637.)

This brings us to the question made in the pleadings, as to whether appellant purchased the land in controversy with a knowledge of the existence of the prior unrecorded deed of Bonser. This is a question of fact to be determined from the testimony.

On looking into the testimony we find that, prior to taking his deed, Musgrove had procured his attorney to examine the records of Multnomah County, and had been informed by him that there was a deed on record for the same land from Armstrong and wife to John Bonser, executed on January 20, 1860, but that it was not entitled to be on the record. It also appears that, in a conversation with Mrs. Armstrong, he was informed by her that she and her husband had conveyed this land to John Bonser. Notwith-

standing he was in possession of all this information prior to taking the deed, he made no inquiry of Bonser and wife as to their rights, though they were his near neighbors. Armstrong and Musgrove were brothers-in-law; John Bonser was the father of Mrs. Armstrong, and all the parties were in the habit of visiting each other. From all the facts developed in this case, we have reached the conclusion that they were sufficient to charge appellant with notice of the prior existing conveyance of respondent, that at least they were sufficient to put him upon inquiry. "It is not necessary, to constitute notice, that it should be in the shape of a distinct and formal communication, and it will be implied in all cases where a party is shown to have such means of informing himself as to justify the conclusion that he might and ought to have availed himself of them." (*Barnes v. McChristie,* 3 Pa. 67; *Bohlman v. Coffin,* 4 Or. 313.)

The general doctrine is, that whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate as notice. (2 Ld. Cas. Eq. 160; 7 Conn., 324; 2 Paige, 202.)

Hastings v. Cutter (4 Foster, 481) was a case where the deed had been registered, although it had not been executed according to the statute, and it was held that while the "registration as such" did not operate as *constructive* notice of the conveyance, it might operate as actual notice. The court said: "But if by means of that registration of the defective deed the defendants had actual notice of the plaintiff's title, they are charged with the notice as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act on."

In order to enable Musgrove to claim precedence as a *bona fide* purchaser it must appear, not only that he had no notice of the prior unrecorded deed of Bonser, when the land was purchased from Armstrong and wife, but also at

the time the purchase-money was paid; for if the purchase-money was paid after such knowledge he could not claim the rights of a *bona fide* purchaser. It is not enough that the deed should express a consideration, but it must be actually paid to enable one to claim the protection of a *bona fide* purchaser. (3 Wash. on Real Pr. 299; 6 Mich. 133; 12 Id. 339.)

In this suit it appears from the testimony of Musgrove himself that he never has paid anything for this land. He testifies that he was to pay for it by giving Armstrong's minor son $1000 worth of cattle; that the cattle were east of the mountains, and were to be counted out and delivered from a large band of cattle at some future time, and that they never have been delivered. Thus it will be seen that the consideration still remains unpaid, unless payment has been made since the testimony was taken.

Another question presented is in relation to the possession of Mrs. Bonser. From the facts set forth in the depositions, we have reached the conclusion that her possession was not of that unequivocal character as that standing alone it would operate to charge Musgrove with full notice, but taken in connection with the facts already referred to in relation to the deed, we think the conclusion we have reached is strengthened and fortified.

It follows from the view above expressed, that the decree should be affirmed.

THE DOUGLAS COUNTY ROAD CO., Respondent, v. SOLOMON ABRAHAM et al., Appellants.

HIGHWAY—DEDICATION—Under the principles of the common law, a road or highway may be established by dedication and user. There is nothing in the road laws of Oregon rendering these principles inapplicable.

CHANGE IN LINE OF ROAD OF NO EFFECT.—A slight change in the thread of the road will not operate to defeat the rights of the public.

CORPORATIONS CANNOT APPROPRIATE HIGHWAY.—No corporation has the legal right to appropriate a highway, established by dedication and user, without, in the first place attempting to make an agreement with the County Court in relation thereto.

THE COUNTY COURT SPEAKS THROUGH ITS JOURNAL.—The County Court or Board of County Commissioners can speak only through the journal.

Per Shattuck and Prim, JJ., dissenting:

An Agreement with the County Court may acquire Force and Validity, though it should not Appear upon the Record.—An agreement signed by the county judge and one commissioner, and left with the clerk to file, must be deemed the agreement or act of the court from the time when it might have been entered of record.

Appeal from Douglas County.

The decree appealed from perpetually enjoins the appellants from erecting or maintaining the toll-gate described in the complaint, or obstructing or interfering with the road claimed by respondent. The amended complaint alleges that plaintiff was, at the time of the grievances complained of, a private corporation, duly incorporated for the purpose of constructing and maintaining a toll-road on the line described, and that the road is surveyed and the map of the survey filed in the office of the secretary of the corporation.

That said route extends along and upon a public highway long before duly established as a public highway. That on or about January 26, 1874, plaintiff commenced constructing its road, and that the County Court of Douglas County, at its April term, 1874, entered into an agreement with plaintiff authorizing plaintiff to use and occupy said highway.

That it is one of the conditions of said agreement that plaintiff may use all bridges along the line of the road as far as they can be made available. That plaintiff is engaged in building its road, but that defendants have unlawfully entered upon said highway and erected and maintain a toll-gate upon one of the bridges upon it, and that they assume to charge and collect tolls for travel upon said road. That the highway is thereby obstructed, and plaintiff is hindered and prevented and is unable to repair the bridge or to prosecute its business.

Each of these allegations is denied in the answer; those concerning the incorporation of respondent, and its alleged agreement with the County Court, for want of knowledge or information sufficient to form a belief.

The answer then alleges, as a separate defense, that the Canyonville and Galesville Road Company is a private corporation, duly incorporated for the purpose of constructing and maintaining a toll-road over the route described in the complaint. That it was, at the times described in the complaint, the owner of a franchise to construct and maintain a toll-road along the route at the places described in the complaint, and to maintain its toll-gate, and to collect the tolls for travel on the road; and that all acts done by defendants in and about the road and toll-gate, were rightfully done by them as agents and servants of that corporation. It alleges that the line and route was surveyed and adopted by the Canyonville and Galesville Road Company as the definite location of its road before its attempted location as a county road.

The reply denies each allegation of new matter in the answer, and alleges that, at the time of the incorporation of the Canyonville and Galesville Road Company, the line and route of its survey, and definite location, was occupied and used by the Canyon Road Company, another corporation, which was afterwards dissolved.

The other material facts are stated in the opinion of the Court.

William R. Willis and Watson & Lane, for Appellants.

J. F. Gazley and W. W. Thayer, for Respondent.

By the Court, MCARTHUR, J.:

This suit was instituted by the Douglas County Road Company against Solomon Abraham and others, to enjoin them from erecting and maintaining the toll-gate described in the complaint, and from obstructing and interfering with the road claimed by said company. The decree of the court below was based upon the following findings of fact:

1. That the road described in the complaint has been used by the public continuously twenty-five years, and is situate in Douglas County.

2. That the plaintiff is a private corporation, and incor-

porated under the general incorporation laws on the 20th day of December, 1873.

3. That the plaintiff, on the 10th of April, 1874, entered into a contract with the County Court of Douglas County for the appropriation and occupation of said road.

4. That the defendants have obstructed said road by erecting a toll-gate thereon.

The statement accompanying the transcript sets out very fully the testimony offered by the parties in the court below, and has been very carefully examined into by this Court. All the questions of law arising herein have also been fully considered. The case was fully presented and thoroughly argued. Notwithstanding all these facts, we have been unable to arrive at a unanimous conclusion.

Upon the first point a majority of the Court have reached the conclusion that the road in suit has been used continuously for twenty-five years by the public. From this finding arises the question whether in this State a public highway can be thus established.

That a highway may derive its existence from the dedication of the land over which it passes, is a principle too firmly fixed in our jurisprudence to be now questioned or shaken. As was said in *Carter & Mason v. City of Portland* (4 Or. 339), the dedication may be by grant or rest in parol. Furthermore, it may be manifested by acts inconsistent with any other inference. Where there can be no direct proof of acts of dedication, proof of actual public use, general, uninterrupted, continuing for a length of time, will be sufficient to raise a presumption of a dedication, and where the length of time of such use by the public has been greater than the period prescribed by the Statute of Limitations for the recovery of real property, that will be regarded as sufficient evidence of the existence of a highway independently of any supposed dedication. (Washburn on Easements and Servitudes, ch. 1, § 5, and cases there cited; *Oustott v. Murray*, 22 Iowa, 457; *Ewell v. Greenwood*, 26 Id. 377; *Daniels v. The People*, 21 Ill. 442; *Lewiston v. Proctor*, 27 Ill. 417.) The value and applicability of the cases cited arise from the fact that in them the law is laid

down independently of the statutes existing in Iowa and Illinois upon the subject of highways and county roads.

The result of the authorities, therefore, is that a road or highway may be established by dedication. Washburn, in the work, and in the section above cited, after referring to cases from various States, declares this to be the settled doctrine of the common law of this country generally. There is nothing in the road laws of Oregon which, in my opinion, renders the application of these principles of the common law to highways in this State at all improper, and in my judgment there is no force whatever in the proposition that as the laws of this State provide for the establishment of county roads in a certain prescribed manner, therefore roads cannot be acquired in any other manner. In order to exclude the application of the principles of the common law there must be something in the statute expressly or by necessary and reasonable implication declaring or indicating their inapplicability. After a careful review of the statutes, I am of opinion that they contain no expression or implication against the doctrine which sanctions the establishment of highways by dedication and public user.

I am also of opinion that a slight change in the thread of the road will not operate to defeat the rights of the public, and the same length of user will not be required to constitute prescription or dedication as to the portions changed. (11 Met. 421; 7 John. 106; 2 Washb. on Real Prop. 175; 19 Pick. 405; 13 Wisc. 663.)

No corporation has the power or legal right to appropriate a highway by user without in the first place attempting to make an agreement with the County Court in accordance with the provisions of the Miscellaneous Laws, page 530, § 26.

Upon the second point I am of opinion that the testimony establishes that the Douglas County Road Company was duly organized on December 20, 1873. The fourth point found by the court below is also fully warranted by the testimony.

I cannot, however, reach the conclusion that the road

company entered into a contract with Douglas County for the occupation and appropriation of the road in controversy. The testimony submitted tended to show that the county judge and one commissioner executed the instrument relied on, and that it was filed in the county clerk's office. It was not, however, as it should have been to make it available as evidence, entered in the journal. In order to prove a contract with the county it should have been so entered. The County Court or Board of County Commissioners can speak only through the journal. (8 Ind. 504; 6 Cal. 541; 7 Ind. 6.)

Had this suit been between the road company and the county it might have been otherwise, for as between those parties equity would consider that done which should have been done. When, however, a party claims the benefit of a contract with the county in a suit with a third person and a stranger to the contract, it must be shown that the contract was duly made and entered in the journal. Conceding, for the sake of illustration, that the plaintiff has proved the alleged contract, the case then stands in a somewhat similar position of a judgment rendered and not entered of record. In such case the judgment must *first* be entered upon the record before it is admissible as evidence in other courts. (Freeman on Judgments, § 38.)

Decree reversed.

Mr. Chief Justice BONHAM and Mr. Justice BURNETT concurred.

SHATTUCK, J., dissenting:

The decree of the court below should, in our opinion, be affirmed; and our opinion is grounded on the following considerations: The road in question was, at the time the plaintiffs undertook to deal with the authorities of Douglas County concerning it, a "public road" or highway, within the meaning of the statutes relating to the powers and jurisdiction of the County Courts and those relating to the subject of roads and private corporations. It was such public road by user for a period of more than twenty-two years. The public have traveled it and made a thoroughfare and

highway of it continuously, as the evidence shows, since 1849; the Government of the United States spent large sums of money upon it; the Territorial Legislature adopted it as a Territorial road; the State statute of 1860 declared all territorial roads (and this of course was included), county roads; the county of Douglas, in 1862, exercised control over it as a county road. Upon these facts, we think it could not have been deemed, April 6, 1874, anything less than a public road.

The plaintiffs, as a duly organized corporation, undertook, April, 1874, to agree with the County Court of Douglas County concerning the extent, terms and conditions upon which the road should be appropriated by the corporation. An agreement in writing was made, which we think is valid and binding. The objection that it was not entered in the journal of the County Commissioners' proceedings, or some order concerning it recorded, is technical merely, and not substantial. The contract is in due form; purports to be done in term time, before two members of the County Commissioners' Court. It is authenticated by the official signatures of the county judge and one of the county commissioners, and of the county clerk, and is on file with the clerk of the County Court, and a duplicate, under the seal of the county clerk, is in the hands of the plaintiffs. Were it found entered in the journal of the County Court, as of the day of its date, it is conceded that it would be unobjectionable.

We cannot conceive that the mere ministerial act of entering it, which might have been done by the clerk at any time after the term without an order, or at any subsequent time by an order of the court or judge, could add to its force or validity; and we think, that whenever it might have been, or may be, entered in the book, it must be deemed the agreement or act of the court at the time it was signed by the judge and commissioner, and left with the clerk and filed. (28 Cal. 335 and 416.)

The defendants, whether as private individuals or as representatives of another corporation, were intruders and wrongdoers. As individuals, they clearly have no right;

and as no turnpike road company can lawfully put gates across the public roads without an agreement with the County Court, the defendants can claim nothing as representatives of such company, and the injunction was properly issued.

Mr. Justice PRIM concurred in the dissenting opinion.

G. W. MOORE, Respondent, v. W. H. PACKWOOD and J. W. VIRTUE, Appellants.

SUPREME COURT—REGULAR TERM MAY BE APPOINTED.—A term of the Supreme Court, appointed by an order of the court, entered in the journal thereof in term time, is a regular term within the meaning of the statute governing appeals.

APPEAL from Baker County.

On May 23, 1874, a judgment was rendered in the Circuit Court for Baker County in favor of respondent, and against appellants, for money. On May —, 1874, an appeal was taken from such judgment to this Court, but no transcript was filed here by the second day of the August Term, 1874. At that time, respondent, by his counsel, produced a certified copy of the notice of appeal, undertaking and judgment, and moved for an affirmance of the judgment, and for ten per cent. damages thereon, upon the ground that no transcript had been filed here by appellants within the time required by law.

S. Ellsworth, for Appellants.

Knight & Lord and L. O. Sterns, for Respondent.

By the Court, PRIM, J.:

Section 531 of the Code provides that, "upon the appeal being perfected, the appellant must, by the second day of the next regular term of the appellate court thereafter, file with the clerk of such court the transcript of the cause." It is further provided, that if the transcript is not filed as

above provided, "the appeal is to be deemed abandoned;" and by subdivision 4 of the same section, it is provided that, "if the appeal be abandoned, * * * thereafter the judgment or decree, so far as it is for the recovery of money, may be enforced against the sureties in the undertaking."

This motion is resisted by appellants upon the ground that the August term of this Court was not the "next regular term" thereof, because it was a term appointed by the court instead of a term appointed by the Legislative Assembly. In other words, it is claimed that the Legislature had no authority, under the Constitution of this State, to authorize the Court to appoint or fix the time when a term of this Court should be held. As a great many judgments have been rendered already, at terms appointed in this manner, the question presented becomes a very important one, and it should be finally settled by a decision of this Court.

Article VII, § 7, of the Constitution of this State provides that "the terms of the Supreme Court shall be appointed by law." In pursuance of this provision, in 1872 the Legislature passed an act providing that "a term of the Supreme Court shall be held at the seat of government on the second Monday in December, annually, and at such other times as the said Court may appoint, by an order entered in the journal in term time. But it is claimed that so much of this section as authorizes this Court to designate the time when "such other terms shall be held" is unconstitutional and void, upon the ground that the Legislature cannot delegate legislative power to the Court. It is insisted that the people having delegated to the Legislative Assembly all the legislative powers at the seat of government, limited and controlled only by the Federal and State Constitutions, that it could not delegate any of these powers to another tribunal.

In the case of *People of Illinois v. Reynolds* (reported in 5 Gilman, part 1), the constitutionality of a law similar to the one under consideration was sustained by the court—where the Legislature passed a law providing for the divis-

ion of a county, to take effect on a majority of the votes being cast for such division. The case was thoroughly and ably argued at bar and it is a well-considered case.

Caton, J., in announcing the opinion of the court, said: "If the saying be true that the Legislature cannot delegate its powers, it is only in its most general sense. We may well admit that the Legislature cannot delegate its general legislative authority, still it may authorize many things to be done by others which it might properly do itself. All power possessed by the Legislature is delegated to it by the people, and yet few will be found to insist that whatever the Legislature may do, it shall do, or else it shall go undone. To establish such a principle in a large State would be almost to destroy the government. The Legislature may grant ferry licenses or it may lay out roads and specify their metes and bounds, and yet who will doubt that it may delegate this power to others, either by general or special laws? So, also, it may pass all the laws requisite for the government of a particular city or township, or school district, and who will doubt the propriety of its authorizing this to be done by the people within the limits of the city, town or district, by their local representatives, or even directly. This is making laws, and laws, too, of as binding efficacy as if passed directly by the Legislature. They are dependent upon the Legislature for their vitality and force. We see, then, that while the Legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself. Without this, legislation would become oppressive and yet imbecile. Local laws almost universally call into action, to a greater or less extent, the agency and discretion either of the people or individuals, to accomplish in detail what is authorized or required in general terms. The object to be accomplished, or the thing permitted, may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object or doing the thing understandingly."

In the law under consideration the Legislature has pro-

vided the time when one term of the Supreme Court shall be held, and in the same act has provided the mode by which the time may be fixed when other terms shall be held, leaving it to the Court to name such other times as may best meet the exegencies of the business. Thus the Legislature, in providing the mode by which the time may be fixed, has to all intents and purposes fixed the term itself—merely leaving the Court to designate the day upon which it shall commence. (8 Cal. 381.)

The judgment should be affirmed, with ten per cent. damages.

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*SUSAN WHITLEY, Sole Executrix of the Estate of A. H. WHITLEY, Deceased, Appellant, v. D. H. MURPHY, Clerk of Marion County, L. S. SCOTT, Sheriff of Marion County, S. T. BURCH, Sheriff of Polk County, N. B. HUMPHREY, District Attorney Third Judicial District, and STATE OF OREGON, Respondents.

APPEAL—EFFECT OF, IN CRIMINAL CASES.—An appeal in a criminal case does not vacate the judgment appealed from in the court below.

IDEM—WHEN DEATH OF DEFENDANT ABATES.—When an appeal in a criminal case *abates* by the death of the prisoner, the judgment in the court below is left in full force for the costs and disbursements of the action.

JUDGMENT IN CRIMINAL ACTION.—A judgment in a criminal action, so far as it requires the payment of money, whether the same be a fine or costs and disbursements of the action, or both, may be enforced as a judgment in a civil action.

LIEN OF STATE UPON PROPERTY OF FELON.—In all cases of the commission of a felony the State has a lien from the time of such commission upon all the property of the defendant, for the purpose of satisfying any judgment which may be given against him for the costs and disbursements in the proceedings against him for such crime.

TAXATION OF COSTS—RELIEF AGAINST, WHEN FRAUDULENT.—Upon a proper showing the party injured is entitled to relief from the illegal and fraudulent taxation by a county clerk of the costs and disbursements in a criminal case.

APPEAL from Marion County.

This is a suit in equity to enjoin the collection of costs

* See 20 Am. Rep. 741.

and disbursements in the case of the State of Oregon against said A. H. Whitley, deceased.

The complaint shows that the said Susan Whitley is the sole executrix of the estate of A. H. Whitley, deceased. That said A. H. Whitley died on the 6th day of October, 1873. That on the 17th of October, 1873, appellant was duly appointed sole executrix of the estate and immediately qualified and entered upon the discharge of her trust and is still acting as such. That in November, 1872, the said A. H. Whitley was defendant in a criminal action, prosecuted by the State of Oregon, in the county of Polk, against him for an assault with intent to kill, committed against the person of Tilmon Glaze; that afterwards the case was transferred to the county of Marion for trial and was tried at the June term, 1873.

That the trial resulted in the conviction of Whitley of an assault with intent to kill said Glaze; that judgment was rendered upon the conviction that said Whitley be imprisoned in the penitentiary for one year and pay the costs and disbursements of the action.

That an appeal was duly taken by Whitley to the Supreme Court and the certificate of Judge Bonham obtained that there was probable cause for said appeal.

That on the 6th day of October, 1873, the said Whitley was shot and killed; that afterwards, on the 21st day of January, 1874, the said Supreme Court, without notice to the executrix, and without bringing her into court, or by a suggestion of the death of said Whitley being made of record, and without the substitution of plaintiff as the legal representative of his estate, adjudged "that said appeal do abate;" that this court sent its mandate to that effect to the court below; that the court did not abate the action or make any other judgment in the cause, except to abate the appeal.

That the court did not make any order regarding the costs in the case.

Then follows a general allegation that the costs were illegally taxed, and that an execution was issued on the judgment of conviction against Whitley for the costs and disbursements of the trial, amounting to $1870.50, which was

levied upon Whitley's property, and closing with a prayer for an injunction against the defendants.

To this complaint defendants, by their counsel, interposed a demurrer containing fourteen specifications as grounds of demurrer.

The court below sustained the demurrer and dismissed the cause, from which ruling upon said demurrer plaintiff appeals and brings the case into this Court.

E. C. Bronaugh, P. C. Sullivan and G. W. Lawson, for Appellant.

John Kelsay and J. J. Whitney, District Attorney, for Respondents.

By the Court, BURNETT, J.:

In this case, the principal question presented is, whether the appeal in a criminal case vacates the judgment entered in the court below, or simply suspends its operation?

The criminal Code (page 371, § 237), provides that "an appeal from a judgment on a conviction stays the execution of the judgment, upon filing, with the notice of appeal, a certificate of the judge of the court in which the conviction was had, or of a judge of the Supreme Court, that in his opinion there is probable cause for the appeal, but not otherwise." That is to say, if a defendant in a criminal action can get that kind of a certificate from the judge, he would be relieved from the effects of the judgment against him during the pendency of the appeal, otherwise the judgment would be enforced against him, notwithstanding his appeal; hence the appeal does not even suspend the judgment, much less vacate it; and a prisoner might be incarcerated in the penitentiary under a judgment of the Circuit Court while his appeal from that judgment would be undergoing judicial investigation in this Court, and if the judgment under which he was imprisoned should be affirmed, there would be no ground for saying that there were two judgments against him. Taking into view the different provisions of the statute, it would seem very clear that an

appeal in a criminal case does not vacate the judgment, nor suspend its operation, except in those cases where the certificate of the judge is obtained of probable cause, and this view appears to be sustained by all of the authorities, except the case in 64 N. C. Rep. (p. 599). In the case in 12 Maryland (p. 322), cited by appellant's counsel, the court says: "The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. If this were so, there would be no use in taking the appeal or suing out a writ of error. To be sure, this does not operate to stay the execution of the sentence, if the State chooses to proceed on the judgment; but when decided in favor of the accused, the reversal will operate as far as possible for his relief."

That would be just the result under our statute in cases where no certificate was obtained from the judge, or probable cause, and it does not appear that the Maryland statute had any provision like ours for staying the execution of the judgment during the appeal.

The case in 64 N. C., before referred to, holds that an appeal in a criminal case in that State vacates the judgment appealed from. Whether the statute under which that decision was made is like the statute of this State, or not, does not appear, and it is fair to presume that it was different from the Maryland statute and different from ours, or no such decision would have been made.

If, then, the execution of the judgment in this case in the Circuit Court was merely suspended by the appeal, together with the certificate of the judge, whenever that appeal abated it left the judgment in the court below in full force. When the judgment was rendered against Whitley that he be imprisoned in the penitentiary for one year, and pay the costs and disbursements of the action, it devolved upon him to procure a reversal of that judgment if he expected to escape the sentence inflicted by it, or save his property from the payment of the costs and disbursements adjudged against him. That he had taken steps to get it reversed does not signify; his dying as completely satisfied the sentence of the law as if he had lived and

served out his time in the penitentiary; but it did not satisfy the judgment for costs and disbursements any more than his serving out his time in the penitentiary would have done.

It is claimed by counsel for appellant that, admitting that the execution of the judgment against Whitley was only suspended by the appeal and certificate of the judge, yet the death of Whitley, preventing the judgment from being carried into effect, so far as it inflicted punishment upon the person of the defendant, the costs and disbursements of the action cannot now be collected from Whitley's property, as they were the mere incidents to the judgment of conviction; or, in other words, that you cannot enforce part of the judgment, without enforcing the whole of it. But this position is not tenable. The statute, in the first place, provides that the State shall have a lien against the property of the defendant for costs and disbursements in cases of a felony, from the time of the commission of the offense. (Criminal Code, § 763.)

Again, it is provided that a judgment that the defendant pay costs and disbursements shall be docketed as a judgment in a civil action, and enforced in the same manner. (Criminal Code, §§ 211, 212.)

That portion of the judgment inflicting imprisonment would have to be enforced as provided by § 214 of the Criminal Code, which is by delivering the body of the defendant, together with a copy of the judgment, to the keeper of the prison; thus showing that the judgment is carried into effect by two separate and independent kinds of process, and the failure to enforce one part of the judgment no more invalidates the other than the enforcement of one part satisfies the other. Suppose that Whitley, instead of taking an appeal, had left the country, it would hardly be contended that his property would not be liable for the costs and disbursements of the criminal action, independent of the liability of his bondsman. Or, suppose that he had served out his time in the penitentiary under the sentence inflicted by the judgment; that would satisfy that part of

the judgment, but it would still stand as to the costs and disbursements, and be a lien on all of his property.

It is claimed by appellant's counsel that the execution was not issued in pursuance of subdivision 2, of § 273 of the Code; but in looking into the complaint it appears that no issue is tendered upon that point, and as there is no copy of the execution annexed to the complaint we are bound to presume that it was issued in accordance with the law. (Civil Code, § 766, Subd. 15.)

It is further claimed by the appellant, that the amount of costs and disbursements taxed against the defendant in the case of the State of Oregon against Whitley is incorrect and a part of it should not be paid, and that if Whitley's property is liable still, his representatives are entitled to contest the correctness of the amount taxed. It is no doubt correct that if these costs and disbursements are illegally and fraudulently taxed, the appellant has a right to have that taxation corrected.

The only provisions of the statute relating to the taxation of costs in criminal cases are found on page 315, § 1043 of the Civil Code, and page 606, §§ 20 and 21 of the General Laws. There is no provision for an appeal from the clerk's taxation of costs and disbursements in criminal cases, and the only relief a party would have would be under the former practice, to apply to the court by a motion to correct the taxation made by the clerk. Admitting that a party might have a remedy in that way, he is not bound to take that course, and if Whitley was now living and an execution had been levied upon his property to pay these costs and disbursements, he would have a right to come into court and show that a fraud had been practiced on him in the taxation of the costs. But the allegations of the fraud in this kind of a case must be the same that they would be in any other. Where a court of equity is called on to interfere in case of fraud, a bill for relief on the ground of fraud must be specific in stating the facts which constitute the fraud; it is not sufficient to charge fraud in general terms. (*Kent v. Snyder*, 30 Cal. 666; *Castle v. Bader*, 23 Cal. 75; *Moore v. Green*, 29 How. Pr. 69.)

In this case the allegations in the bill are too general. There are no specific facts alleged upon which issue could be taken and evidence introduced to show in what respect the taxation of the costs and disbursements was illegal and fraudulent.

Judgment affirmed and complaint dismissed without prejudice.

THOMAS J. BUFORD, Respondent, v. THE NEW YORK LIFE INSURANCE COMPANY, Appellant.

CONTRACT OF INSURANCE—WARRANTY.—A warranty in insurance is part of the contract, evidenced by the policy, and is a binding agreement that the facts stated are strictly true.

IDEM—REPRESENTATIONS BY APPLICANT NOT A PART OF THE CONTRACT.—A representation is a statement in regard to a material fact made by the applicant for insurance to the insurer, with reference to a proposed contract of insurance. They are not part of the contract, but merely collateral to it. It is sufficient if representations be substantially true, while warrants must be strictly complied with.

PLEADING WARRANTIES.—Warranties are conditions precedent and their truth must be pleaded by the assured, upon whom the burden of proving them rests.

REPRESENTATIONS—FALSITY OF, MATTER OF DEFENSE.—The falsity of representation is matter of defense to be pleaded and proved by the insurer.

APPEAL from Marion County.

The complaint alleges that a policy of insurance was issued by the New York Life Insurance Company to Thomas J. Buford, on the life of his brother, Albert C. Buford; that all the conditions of the contract concerning it have been performed on the part of respondent and the said Albert C. Buford.

The answer admits the issuance of the policy for the consideration and in pursuance of the application named in the complaint, and sets out in full some of the questions and answers contained in said application, and alleges that said questions and the answers thereto are warranties, and that the answers to the questions, so set forth, are untrue, and the policy thereon void.

The questions and answers set out are as follows:

13. Has the party (meaning the said Albert C. Buford) ever been seriously ill? If so, with what complaint, and who was his medical attendant? (State the name and residence.) Answer. No.

14. Is the said party (meaning the said Albert C. Buford) now in good health? Answer. Yes.

23. Has any proposal to insure the life of said party (meaning the said Albert C. Buford) ever been declined? If, so, by what company? Answer. No.

24. Has any proposal or application to insure the life of said party (meaning the said Albert C. Buford) ever been made to any company or agent upon which a policy has not been issued? If so, state particulars. Answer. No.

25. Has any physician given an unfavorable opinion upon the life of the said party (meaning the said Albert C. Buford) with reference to life insurance? If so, state particulars. Answer. No.

35. Is the party aware that any untrue or fraudulent answer to the above questions, referring to the questions in said application, and including those hereinbefore set forth, or any suppression of facts in regard to the party's health, will vitiate the policy and forfeit all payments made thereon? Answer. Yes.

And with a full knowledge and understanding of the effect of said questions and answers last aforesaid, the said plaintiff made the following declaration, agreement and warranty: "I do hereby declare that the age of Albert C. Buford above named, does not now exceed twenty-four years; that he is now in good health, and does ordinarily enjoy good health, and in the above proposals I have not withheld any material circumstances or information touching the past or present state of health or habits of life of said person with which the trustees of the New York Life Insurance Company ought to be made acquainted. And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company, the truthfulness of which statements I do hereby

warrant, and if any of them are in any respect untrue, the policy which may be issued hereon shall be void."

The replication denies that the questions contained in said application were or are warranties, or that the answers to the questions specified in said answer were or are untrue, or that said policy was or is void.

The facts are stated in the opinion of the Court.

Mallory & Shaw, for Appellants.

The answers to the questions contained in the application for a policy of insurance, when made a part of the policy, are warranties, and must be strictly and literally true. To be substantially true is not sufficient. (*Vose v. The Eagle Life & Health Ins. Co.,* 6 Cush. 42; *Kelsey v. The Universal Life Ins. Co.,* 35 Conn. 225; *Miles v. Connecticut Mutual Life Ins. Co.,* 3 Gray, 580; *Campbell v. New England Mutual Life Ins. Co.,* 98 Mass. 389 and 403; *Frost v. Saratoga Mutual Ins. Co.,* 5 Denio, 154, 155; *McDonald v. Law Union Co.,* England, Court of Q. B., cited from November number Insurance Review, p. 98; The Insurance Chronicle of New York, May number, 1874, p. 308, citing from the London Review of April 25, *McDonald v. The Law Union Fire & Life Ins. Co.,* 6 Amer. R. 657; 30 Iowa, 119; 10 Amer. R. 176-7; 12 Iowa, 382-3; 6 Wend. 494, note "a;" 7 Wend. 80; 5 Hill, 193; 2 Denio, 75; 6 Cow. 673; 13 Conn. 544.)

Thayer & Williams, for Respondent.

The answers were not warranties, because contained in the application which was made a part of the policy; they might be statements or representations only, though incorporated into and forming a part of the policy. If they are warranties, it is because they are made so by the agreement, and not because they constituted a part of it. (*Miller v. T. B. M. I. Co.,* 31 Iowa, 227; *Price v. P. M. L. I. Co.,* 17 Me. 497; 3 Kent Com. 281; 2 Pars. on Con. 431; 1 Phillips on Ins., §§ 871, 893; *Campbell v. N. E. M. L. I. Co.,* 98 Mass. 381.)

It does not require a literal fulfillment of a warranty, but

a substantial compliance with its terms; the answers must be reasonably and substantially true, within the intent and meaning of the parties, and this of necessity leaves some element of materiality to enter into the consideration of the jury. The language of the warranty must be limited by them within the scope and object of the contract. (13 Wallace, 222; 41 Georgia, 338; 5 Am. R. 535, S. C., *Price v. P. M. L. I. Co.*, 17 Minn. 497 S. C.; 10 Am. R. 166; 2 Pars. on Contracts, 466, 471; *L. F. I. Co. v. McCulloch*, 21 Ohio St. 176; *Calt v. T. P. F. I. Co.*, 54 N. Y. 595; *Williams v. T. F. F. I. Co.*, 54 N. Y. 569; *Wells v. T. C. M. L. I. Co.*, 48 N. Y. 34.)

The court is not bound to give instructions, though requested to do so, which are embraced within the general charge. (*Railway Company v. Whittore's Adm.*, 13 Wallace, 270, 290; *Patterson v. Konutz*, 63 Penn. St. 246; *Fay v. O'Neill*, 36 N. Y. 11; *Taber v. Cooper*, 7 Wallace, 566; *Price v. Alexander*, 2 Green's Iowa, 435; *Conway v. Duan*, 45 Cal. 608.)

The instructions should be based upon the whole case. The practice of singling out in instructions specific acts, and asking the court to say, as matter of law, that if such acts are established there can be no recovery, is not permissible. (*Mayers v. Pacific R. R. Co.*, 45 Missouri, 137; *First Nat. Bank v. Currie*, 44 Missouri, 91; *Mutual Benefit Life Ins. Co. v. French* (Cincinnati), 321; *Stoey v. Cobbs*, 36 Ill. 349; *McCartney v. McMullin*, 38 Ill, 240; *Finn et al. v. St. L. P. S. et al.*, 39 Mo. 67.)

By the Court, PRIM, J.:

The respondent recovered a judgment in the court below in the sum of $2666, and costs and disbursements, from which appellant has appealed to this Court.

At the trial in the court below, the appellant asked the court to instruct the jury as follows:

1. That the answers by the plaintiff to the printed questions contained in the application to the insurance company for a policy of insurance, when such application is made a

part of the policy, are warranties, and must be true as stated, or the policy will be void.

2. If the jury shall find from the evidence that in the plaintiff's application for the policy upon which this action was based, the following question was contained: "23. Has a proposal to insure the life of the said party ever been declined? If so, by what company?" and shall find that the answer to said interrogatory was "No," and shall find that a proposal to insure the life of said Albert C. Buford had been declined by another company prior to the time of making said answer, then the policy which was issued on said application was void.

3. If the jury find, from the evidence, that among the interrogatories in the application of the plaintiff, upon which the policy of insurance upon which this action is based issued, there was the following question, to wit: "24. Has any proposal to insure the life of said party ever been made to any company or agent upon which a policy has not been issued? if so, state particulars;" and, if the jury find that a proposal or application to insure the life of the said Albert C. Buford had been made to another company or agent, upon which a policy had not been issued before the application was made to defendant for the policy on which this action is brought, and that said proposal had been made, and a policy had not been issued by such other company, then said answer is not true, and the policy issued on said application is void.

4. If the jury find, from the evidence, that in said application the following question was contained, to wit: "25. Has any physician given an unfavorable opinion upon the life of the party, with reference to life insurance? if so, state particulars;" and, if they find that the answer to said question was "No," and if they find that a physician had given an unfavorable opinion upon the life of the said party, with reference to life insurance, which fact, and the particulars thereof, were not stated in said answer, then said answer was untrue, and the policy issued upon said application was and is void.

These instructions were all refused by the court below, to

which ruling appellant excepted and assigns in this Court s error.

Instruction No. 1 we think was erroneous and properly re-used.

The court was asked in that instruction to submit to the ury the question whether the application for the policy of nsurance had been made a part of the policy by the agree-nent of the parties. That was a matter with which the jury ad nothing to do. Both the application and policy were in vriting, and it was not only the province but the duty of he court to examine those papers and construe them, and hen instruct the jury whether the statements contained in he application and the declaration subjoined thereto were varranties or representations, and how they were to be con-idered by the jury.

A warranty in insurance is defined "to be a part of the ontract evidenced by the policy, and a binding agreement hat the facts stated are strictly true." (1 Phillips on In-urance, 754-756; Flanders on Insurance, 204-205.)

A representation in insurance is defined by the authori-ies to be "a statement in regard to a material fact made by he applicant for insurance to the insurer, with reference to proposed contract of insurance. As representations simply, hey are not a part of the contract of insurance," but merely ollateral to it. (1 Phillips on Insurance, § 524; 17 Minn. 04.)

It is held by the authorities generally that "it is sufficient f representations be substantially true, while a warranty nust be strictly complied with."

In 12 Cushing (416), Chief Justice Shaw, in illustrating he distinction between a warranty and representation, said: 'The difference is most essential. If any statement of fact, owever unimportant it may have been regarded by both par-ies to the contract, is a warranty, and if it happens to be ntrue, it avoids the policy. If it be construed as a rep-esentation and is untrue, it does not avoid the contract, if ot willful, or if not material." (31 Iowa, 227; 98 Mass. 87; 17 Minn. 504; 1 Phillips on Insurance, 534.)

A false warranty avoids a policy, while a false representa-

tion does not, unless it relates to something material in fact or made so by the contract of the parties. Warranties are conditions precedent, and their truth must be pleaded by the assured, upon whom the burden of proving the same rests, "whereas the falsity of representations is matter of defense to be pleaded and proved by the insurer." (17 Minn. 505; 98 Mass. 381.)

The declaration subjoined to the application for the policy of insurance issued in this case contains the following agreement: "And I do hereby agree that the statement and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company, the truthfulness of which statements I do hereby warrant, and if the same, or any of them, are in any respect untrue, the policy which may be issued hereon shall be void."

The policy issued by said company contains the following provision: "In consideration of the statements and representations submitted to its officers at the home office, and contained in the written application for this policy, and in the declaration thereto subjoined (all of which statements and representations have been and are hereby warranted by the applicant to be true, and are by the parties hereto referred to and made a part of the contract), upon the faith of which statements and representations this policy issued." The policy contains the further provision that "if any of the statements or representations herein above in the first paragraph of this policy referred to, shall be found in any respect untrue, then and in every such case this policy shall be null and void."

Thus it will be seen that the statements and representations, contained in the application of plaintiff for a policy of insurance, were made warranties by the express agreement of the parties.

Instructions numbered two, three and four, which the defendant requested the court to give, we think were improperly refused.

But it is insisted by respondent that instruction number two is incorrect in two important particulars. 1. Because

the evidence shows clearly that no company had ever declined a proposal to insure the life of Albert C. Buford; that there was no conflict in the testimony on that point. 2. That it permitted the jury to find "that if a proposal to insure the life of Buford had been declined by another company," the policy was void.

In answer to the first proposition we say that the instruction was pertinent, if there was any testimony tending to show that a proposal to insure the life of said party had been declined by another company. Whether the evidence was sufficient to establish the fact, was a question to be submitted to, and passed upon, by the jury and not by the court. As to the second objection, we think it was proper to instruct the jury that the policy was void, if they found from the evidence, that a proposal to insure the life of Albert C. Buford had been *declined* by another company prior to the time of making said answer. But it is further claimed, by respondent, that these instructions were substantially embraced in the general instructions given by the court, and therefore it was not error to refuse the special instructions asked. This proposition is correct, if true in fact; but, on looking into the general instructions given by the court, so far as reported in the bill of exceptions, we think they fail to cover the instructions asked and refused. The court instructed the jury as follows: "That insurance companies have a right to propose such questions to applicants for policies, as are contained in said application, and it is the duty of the person making the application to answer truly; that the company have a right to know whether a person applying for a policy has ever been rejected by another company, or whether any physician has ever given an unfavorable opinion upon the life of a person, with reference to life insurance, and to know all the circumstances concerning the same. Such inquiries are material and should be truly answered." While the instructions given by the court were correct thus far, yet they fail to cover fully the instructions asked by appellant in this: the jury was told that insurance companies had a right to ask such questions of persons making applications for policies of

insurance; that such questions were material, and should be truly answered by such applicants; but failed to inform them that if such questions were not answered truthfully, it would avoid the policy.

It appears, however, that the court instructed the jury, in connection with what is quoted above, as follows: "That any false answer, to be a breach of warranty of the assured, must be in reference to some matter that is a material inquiry, and of its materiality the jury may determine under the instructions of the court; and if they believe from the evidence, that the company, the defendant in this action, would have issued the policy if the answers to the interrogatories were untrue in some immaterial respects, the same as they would have done if the answers had been strictly and literally true, that then the plaintiff might recover.

"That the court knew no reason why any different rule should obtain, in regard to a policy of insurance, than was applicable to a warranty in the case of the sale of a horse. That, to make such a warranty affect the validity of the sale, it must be in reference to some material matter which the other contracting party, by the rules of fair dealing, would have the right to expect the warranting party to truly disclose."

By an examination of these instructions it will be seen that the court, instead of instructing the jury, that if they found, from the evidence, that the answers to the interrogatories contained in the application were untrue, that then the policy was void, did instruct that they might find for the plaintiff, if they believed that the company would have issued the policy, notwithstanding the answers to said interrogatories were untrue in some immaterial respects.

It follows, from the views herein expressed, that the judgment must be reversed, and the cause remanded to the court below for a new trial.

W. C. CLARK and JAMES CHAMBERS, Appellants, v. J. R. BAYLEY, Respondent.

HOMESTEAD—EXEMPT FROM LIABILITY FOR DEBTS CONTRACTED PRIOR TO ISSUING OF PATENT.—When a party having availed himself of the benefits of the first section of the Homestead Act of Congress, May 20, 1862, and taken a homestead under the first and second sections of that act, afterwards, before the expiration of five years' residence, commutes under the eighth section of that act, and obtains patent by the payment of money: *Held*, that the land so acquired is a *homestead* and exempt from liability for debts contracted prior to the issuing of the patent.

TRUST—HOMESTEAD CANNOT BE HELD IN.—The entry of a homestead under the act of Congress of 1862, by one in trust for another, is forbidden by law, and a court of equity will not decree that any such trust can be implied.

APPEAL from Benton County.

This was originally an action of ejectment, instituted by the respondent Bayley against the appellants Clark and Chambers, to recover about fifty-three acres of land situated in Benton County, Oregon. The appellants filed an answer to the complaint in ejectment, and at the same time filed a complaint in equity in the nature of a cross-bill, under § 377 of the Civil Code, praying that they be declared the equitable owners of the premises in question, and that respondent Bayley be enjoined from prosecuting his action of ejectment.

On the 19th of January, 1872, one Thorn made due application at the Oregon City land office to acquire the said land under the homestead laws of the United States. Thereafter he perfected his title to said tract as a homestead, and on the 10th day of December, 1872, patent issued to him therefor in due form. On the 16th of September, 1873, Thorn and wife conveyed the homestead tract to the respondent Bayley.

The cross-complaint alleges that prior to April 21, 1873, one Simpson purchased of Thorn an equitable interest in eleven-twelfths of the land in question; that Thorn continued to hold said eleven-twelfths as the trustee of Simpson; that about April, 1873, the said premises were sold on execution issued upon judgments recovered against Thorn

and Simpson respectively, which judgments were rendered on December 16, 1872, and that at such execution sale appellant Clark purchased the interest of Simpson in said land and appellant Chambers that of Thorn; that these sales were confirmed and sheriff's deeds duly executed to the respective appellants; that appellants took possession and now hold the same under the execution sales; that Bayley knew of appellants' rights when he purchased of Thorn, and that such purchase was fraudulent; that Thorn stood by when the execution sales were made and neither objected thereto nor asserted any claim to the land as a homestead.

The decree of the court below was in favor of Bayley.

F. A. Chenoweth and R. P. Boise, for Appellants.

A homestead may be mortgaged. (33 Iowa, 374.) A homestead right is a personal privilege, and if the holder abandons such right the homestead may be sold on execution. (26 Barb. 374; 14 Wall. 463.)

The tract in dispute was the partnership property of Thorn and Simpson, and therefore cannot be a homestead.

R. S. Strahan, John Kelsay and W. W. Thayer, for Respondent.

The rule of *caveat emptor* applies in all its rigor to judicial sales of real property. (Rorer on Judicial Sales, 459.)

The land in dispute was a homestead and not subject to levy and sale on execution for any debt existing before patent issued. (14 Iowa, 569; 38 Cal. 300; Homestead Act, Rev. Stats. U. S., p. 423; § 2296; *Miller v. Little,* 47 Cal. 348; *Hubbel v. Canady,* 58 Ill. 425; *Green v. Marks,* 25 Ill. 221; *Pulliman v. Sewell,* 40 Ga. 73; Rorer on Judicial Sales, §§ 1109, 1110, 1122, 1127, 1134; 3 Wall. 335.)

By the Court, SHATTUCK, J.:

Two questions are presented for examination and decision in this case:

First. Did Clark and Chambers acquire any title to the premises in controversy by virtue of the sales upon execu-

tion and the sheriff's deeds described in the agreed statement of facts?

Second. Are the appellants (Clark and Chambers) entitled, upon the admitted facts, to equitable relief?

It should be stated, before considering these questions, that one of the grounds of equity set up in the complaint, that is, the alleged fraud of the respondent in taking the deed of the property in controversy with an intent to cover it up and prevent the creditors of Simpson and Thorn from applying it in satisfaction of their debts, is virtually abandoned by the agreed statement of facts, and that branch of the case is not before us.

It is also to be borne in mind that the appellants claim this property by virtue of sales upon execution *as real property*, and that no question as to whether the mill, by reason of the agreements between Simpson and Thorn, could be treated as personal property, and the possession of it as such recovered by Simpson or his vendee is involved in this case. The appellants claim to represent Simpson's interest only through the judgments and execution sales recited in the agreed statement.

As to the first question above stated, the validity of the judgments and the regularity of the proceedings concerning the sale upon the execution, are admitted; and if the sheriff's sales did not pass the title which Thorn had to the property to the appellants, it was because the property was not subject to such sale, and was not affected by the lien of the judgments, which respondent claims was the case. This claim of exemption is based upon the fact that the land was acquired by Thorn under the act of Congress entitled "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and that the debts which were the basis of appellant's judgments were contracted before the issue of patent.

The admitted facts show that Thorn applied for this land and filed in the land office the requisite affidavit according to the provisions of § 2 of the act, in January, 1872, and, in December, 1872, perfected his title and received a patent by paying the minimum price under the provisions of § 8 of

said act. The counsel for the appellants contend that, by so acquiring his land (by payment of money instead of by continued residence and labor for five years), Thorn became a pre-emptioner, and that his claim is to be regarded as a pre-emption and not as a homestead. Counsel for the respondent on the other hand, contend that this land is none the less a homestead because paid for with money, than it would be if the consideration had been labor and continued residence for five years, as required by the second section. No decision of any court upon this point has been cited by either side, and we are to determine the matter upon our own construction of the act, and upon such authority as the Land Department of the Government has furnished.

Upon principle, we hold that land acquired as this was should be deemed to have been acquired under the Homestead Act, notwithstanding the provisions of the eighth section are, that patent shall be issued in such case "as in other cases provided by law, on making proof of settlement and cultivation, as provided by existing laws granting preemption rights." These provisions of the eighth section simply prescribe a mode of commuting the homestead, and are appointed as the mode of administering the act in favor of those who have availed themselves of the benefits of the first section, by complying with the requirements of the second section, and wish to pay money instead of time and labor for their land. The title has its inception and its consummation under and according to the provisions of the act. The mere payment of money, under the eighth section, ought not to be treated as an abandonment of the intention to make a homestead claim, unless the law expressly gives that effect to it.

Counsel for the appellants, in support of their view of this question, cite the instructions of the Commissioner of the General Land Office to the registers and receivers, in a circular concerning the homestead law, dated October 20, 1862, and found on page 248 of Lester's Land Laws, etc. This instruction is as follows:

"In a case where full payment is proposed to be made by a party, under the eighth section, he must first make

proof of settlement and cultivation, as required by existing pre-emption laws and instructions; whereupon you will require his homestead duplicate receipt to be surrendered, and will admit the pre-emption as a new and original entry, and issue pre-emption certificate and receipt as in ordinary pre-emption cases."

But this same instruction requires the register and receiver to make proper notes on the certificate and receipt so as to preserve in the record the evidence of the change. This instruction is claimed to have the force of a ruling and decision by the Land Department, and to warrant the conclusion that a title begun under the second section, and consummated under the eighth section, is a pre-emption, and not a homestead.

Upon further examination of the decisions of the Land Department on the subject of homesteads in the years 1866, 1867, and 1868, of which extracts are found on pages 266 and 267 of Lester's Land Laws, it appears that this subject has been directly brought before the department, and distinctly ruled upon. In a case of an entry presented, wherein a homestead had been made and then commuted under the eighth section, and the point was submitted whether the setler could make another entry under the Homestead Act (the sixth section prohibiting more than one grant to the same individual under the act), the ruling of the commissioner was that he could not, and it was expressly decided that "when a party acquires title under any of the provisions of this act, his privilege is thereby exhausted." And, again, when the question was whether a person who has availed himself of the benefits of the homestead, and commuted under the eighth section, could thereafter take a pre-emption (he never having had the benefit of the latter statute), it was held that the proceedings had by the claimant under the eighth section merely consummated his homestead right as the law allows, the payment being a legal substitution for the continuous labor which the law would otherwise exact at the hands of the settler. And on this subject the commission further says that "a claim of this character is not a pre-emption, but a homestead, and

will be no bar to the same party acquiring a pre-emption right."

We hold, then, that the land in controversy was a homestead acquired by Thorn under the act of 1862.

It is claimed, however, by appellants' counsel that though land be acquired under this homestead law, yet it is not subject to the exemption from liability for debts, provided by the act, if it has been acquired under the eighth section. The position of counsel is that the exemption prevails only when the title is acquired by the continuous labor exacted by the second section. The phraseology of the section providing for the exemption does not furnish any grounds for this construction. The fourth section declares: "That no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." If our position — that land entered under the second section, and commuted under the eighth section, is a homestead, and that it must be held to have been acquired under the provisions of the act in question—be a correct one, then surely the fourth section must apply to this land; for the words of the section are general, "No lands acquired under the provisions of this act," etc., and do not admit of any such exception as counsel claim. The intention of Congress to exempt such lands as the tract in controversy, we think, is clear, and ought not by any attempted construction to be defeated.

Counsel further claim that the benefits of the exemption provided by the fourth section may be waived, and must be deemed waived whenever the homestead donee removes from the land, and ceases to use it for a residence and home. This question we do not consider, for there is no evidence before us that Thorn had left this land, or ceased to reside upon it as a homestead when the levy and sale upon execution were made.

It is also claimed that Thorn waived his rights as a homestead claimant and submitted to a transfer of the title by the execution sale because he did not forbid the sale and give notice of his claim under the act above referred to. No authority for this position is cited, except cases under

statutes providing for the exemption of personal property, and cases where a debtor, after a levy on his real estate, is allowed to select and have admeasured to him a homestead of specified extent and value, which is not this case, and no such ruling ought to prevail here.

It is also claimed that the sale and conveyance to Bayley was an abandonment of the exemption, and that the appellants' deeds, though not effectual to convey to them an immediate right of possession at the time of their execution, became operative and took effect when Thorn attempted to sell to Bayley. This position can be sustained only on the assumption that the exemption from liability for debts operates merely to suspend the ordinary effect of a forced sale upon execution; in other words, it assumes that the lien of judgments operates on these homestead claims, notwithstanding the exemption, no less than upon other lands of the debtor, and that a sale upon execution will carry the fee to the purchaser incumbered only by the right of the debtor to continually occupy as a homestead, and the moment the debtor by any means ceases to occupy as a homestead, the title and right of possession become absolute in the execution purchaser; or in case no sale has taken place under the judgments, the lien will give a preference to the judgment creditor over a voluntary vendee of the debtor. The authorities cited by counsel in support of this view are under statutes entirely different in terms from this Homestead Act; they have arisen where statutes of exemption have been strictly construed, and the terms of exemption have been limited to "*sales* upon execution," or "*forced sales* upon execution or final process from a court."

In these cases the ruling has been that the terms employed did not exempt the property from being bound and charged by a judgment, but from *sale* on execution only while the exemption should continue in force—that is to say, so long as the debtor should occupy the land as a home; and consequently, whenever he should attempt to sell to another, the judgment creditor might seize it in satisfaction of his debt.

This construction of the State Homestead Acts logically

results in making "the homestead of the unfortunate debtor his prison," and in compelling him to confine his energies to that particular locality for all his life, or forego the advantages of the statute. The terms of this act of Congress are of broader meaning, and evince a more liberal intent. "No lands acquired under the provisions of this act shall, *in any event*, become liable to the *satisfaction of any debt* or debts, contracted prior to the issuing of the patent therefor." These terms cannot be rendered effective, in their full scope and meaning, unless the homestead claimant should be deemed to hold his homestead absolutely free from all the direct and indirect consequences, of his indebtedness contracted prior to issue of patent, and consequently have a power of disposition thereof free from the charge or lien of judgments based upon such indebtedness.

Furthermore, the existence of a lien where there is no power of sale, is denied by many of the authorities cited upon the argument. (Rorer on Judicial Sales, § 1109, and cases cited.)

In California it has been held, under this Homestead Act, that a homestead claimant who, pending his proceedings in acquiring title, contracted a debt upon patent issued, upon which judgment was rendered against him after patent, could sell his homestead to a third party and convey to his vendee a good title notwithstanding the judgment. (47 Cal. 349.)

Our conclusion then is, that the appellants did not acquire any legal title to the premises in controversy by the judgments and execution sales mentioned in the statement of facts; that Thorn could and did convey the land to Bayley by the deed of 16th September, 1873, free and discharged from any lien or incumbrance created by the judgments and execution sales recovered and had by appellants.

The other branch of appellants' case relates to their equitable claims. The principal facts upon which equitable relief is claimed are these: Simpson and Thorn, in 1871, formed a copartnership for the purpose of building a steam sawmill and manufacturing lumber for the San Francisco market, in which business Simpson's interest was to be eleven-

twelfths and Thorn's one-twelfth, the capital to be furnished in the same proportions. Under this arrangement they proceeded as partners to erect the mill on the public lands of the United States, agreeing with one another that they would regard the mill as personal property and not as affixed to the realty. After their partnership had gone on for about a year, the mill being in the meantime built upon land to which neither had any title, Thorn took steps to obtain the patent under the Homestead Act, as above recited, and did obtain it, as above stated. No other or new arrangement was made between Simpson and Thorn after patent issued, and the patnership continued till March, 1873, and no settlement of the business of the concern has been had. Thorn was notified of the execution sales and did not forbid said sales nor expressly claim the land as exempt. Upon these facts appellants claim that Thorn would be estopped to claim a homestead exemption in this land, and that the legal title which he acquired should be decreed to be held in trust for the benefit of Simpson or his representatives.

The counsel for the appellants, abandoning the question of actual fraud alleged in their complaint, seem to base their rights to relief against Bayley upon an assumption which is not very clear, but we consider it as we understand it. It is this: That Bayley having taken the deed of September, 1873, from Thorn, with notice, stands in Thorn's place as to the legal title, and that the appellants, by their executions against Simpson & Thorn, and against Simpson alone, and the sales thereunder of the same land, have put themselves in Simpson's place, and, representing his partnership interest, claim an equity against Bayley to be enforced upon this land.

Now, so far as any estoppel is claimed by reason of Thorn's knowledge and evidence, we do not find anything approaching to an estoppel of any kind. The land was Thorn's homestead. The record of his title, of which the purchasers were bound to take notice, declared the fact, and Thorn was not called upon to say anything about it, and he did not say anything about it. It does not appear that the purchasers relied on anything Thorn said or did,

or were misled in any respect by his speech or silence. In such case there is no estoppel.

The other aspect of this equitable claim seems to be taken from the position that Simpson & Thorn and this land are in the situation of parties dealing about property concerning which there are no statutory provisions or public policy that limit the right of disposal and contract.

The argument in this case has proceeded upon the assumption that this case is like one when A. & B., as partners, build a mill on the land of C., and A. afterwards acquires the legal title to the land in his own name from C., there being no limitation by law upon A.'s power to take in *trust* for another. In such case A. would probably be decreed in equity to have taken the legal title for the use of the partnership whether such had been the express agreement with his copartner or not. But in the case before us, this land was public land, and title could be obtained only from the Government. According to the laws under which the Government would dispose of it, the partnership of Simpson & Thorn could not take title to it, and in the capacity of partners they were trespassers. Thorn could not take it in trust for Simpson or for the partneship, for the laws under which alone it could be disposed of had expressly forbidden such a transaction. If Thorn had agreed with Simpson before patent issued that the homestead title should be obtained for the benefit of the copartnership, then he must have committed perjury in obtaining the title, for the second section of the act required him to swear that the land was taken for his own use exclusively, and not directly or indirectly for the benefit of another, and heavy fines and imprisonment are the penalty of false swearing in such a case. Contracts in violation of such provisions of law are void, and are never enforced. (5 Minn. 199; 19 Wallace, 646.)

If Thorn could not lawfully have made, in express terms, a contract of this kind, none will be implied, and equity will not decree any relief in such a case. Furthermore, it may be said Simpson's claim against Thorn, by virtue of the partnership, seems to have originated before patent for

the land issued, if not before any settlement at all had been made by Thorn, and might properly be regarded in the light of a debt contracted before the issue of patent—as to which the land was exempt from liability.

It follows from these views that the judgment and decree below must be affirmed.

SAMUEL A. HOWE, Appellant, v. THOMAS PATTERSON et ux., Respondents.

APPEALS IN EQUITY—MUST BE TRIED ANEW.—A suit in equity which has been fully tried in the Circuit Court and a decree therein rendered, must, if appealed, be tried anew upon the transcript and the evidence.

IDEM—TESTIMONY MUST ACCOMPANY THE TRANSCRIPT.—As the findings of fact and conclusions of law by the court below are not conclusive in a suit in equity, if appealed, this Court must look into the testimony and reach its own conclusions of fact as well as of law. Findings of fact by the court below in suits in equity are not conclusive in the appellate court.

APPEAL from Columbia County.

The facts are stated in the opinion of the Court.

Wm. Strong and T. N. Strong, for Appellant.

B. Killin and H. T. Bingham, for Respondents.

By the Court, PRIM, J.:

This was a suit in equity brought by appellant against respondents to foreclose a mortgage upon certain real property described in the complaint, which was in the possession of and claimed by the respondents at the commencement of the suit.

It is alleged in the complaint that the mortgage was duly executed to appellant by Wm. T. Gillihan and wife to secure the payment of two promissory notes. That after the execution of said mortgage it was delivered by appellant to the County Clerk of Columbia County for record, and was recorded by him on page 204, in Book E of the record of deeds of said county. That several months after the execution of the mortgage, the mortgagors conveyed the same property to Eugene Semple and wife, by deed, which

was duly acknowledged and recorded, and that said Semple and wife, by their deed duly executed and acknowleged, conveyed the same to Patterson and wife, and this deed was also duly recorded.

The respondents answered denying all the allegations of the complaint, and setting up that they were subsequent purchasers in good faith for a valuable consideration, without notice either actual or constructive.

This cause having been heard in the court below upon the pleadings and evidence, the bill was dismissed, and it was ordered and decreed that the appellant pay the costs, from which order and decree he has appealed to this Court. It comes up to be "tried anew" upon the transcript, without any evidence accompanying it.

On examination, it appears that the decree contains certain conclusion of fact found by the judge, upon which he based certain conclusions of law, which counsel for appellant claims were erroneous, and can be reviewed here without any statement of the evidence. They undertake to base their assignments of error upon the conclusions of law, based upon the conclusions of fact found and set out in the decree. These, they claim, are all matters in writing and on file, and error can be assigned without any previous exception having been taken. To sustain this position they cite the Code, § 216, which provides that "upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. * * * The decision shall state the facts found and conclusions of law separately. Such decision shall be entered in the journal, and judgment entered thereon accordingly." Section 217 provides that "the order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict," etc. They also refer to § 230 of the Code, which provides that "no exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court."

By a examination of these provisions of the statute, it

will be seen that they relate wholly to trials in actions at law, and have no reference whatever to proceedings in equity.

The Civil Code (§ 533), provides that "upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon the transcript; but upon an appeal from a decree given in any court, the suit shall be tried anew upon the transcript and evidence accompanying it." This evidently means that it shall be tried over again on the facts as well as the law, and this cannot be done in the absence of the testimony. Under the law in force at the time this decree was rendered, and also at the time this appeal was taken, the only mode provided for bringing up the evidence in a chancery cause appealed, was by the statement provided for in § 526 of the Code.

It is insisted, by appellant's counsel, that the judge, on the hearing of this cause in the court below, having found certain conclusions of fact, and having inserted them in his decree, they are conclusive upon the parties on appeal. To this propostion we cannot assent. An appeal from a judgment, in an action at law, as provided for in our code, is in the nature of a writ of error at common law, because it expressly provides that "a judgment can only be reviewed as to questions of law appearing upon the transcript." Thus it will be seen that on appeals in actions at law, issues of fact cannot be reviewed by this Court. But, as it is provided that, on an appeal from a decree in a suit in equity, "the same shall be tried anew upon the transcript and evidence," it is obvious that where testimony was taken in the court below it must be brought here so this Court may try the cause anew, as well upon the facts as upon the law. An appeal is a process of civil law origin, and removes the cause entirely, subjecting the fact as well as the law to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law. (3 Dall. 328.)

This view is decisive of the case, and renders it unnecessary to pass upon other very important questions so ably argued by the counsel of the respective parties.

The decree should be affirmed.

D. A. RICHARDS, Respondent, v. C. O. FANNING, F. M. CROCKETT, and A. W. NYE, Appellants.

ERROR CANNOT BE ASSIGNED WHEN DEMURRER IS WAIVED.—Where a demurrer is waived by the filing of an answer no errors can be assigned in the appellate court, upon the judgment of the Circuit Court overruling the demurrer.

INSTRUCTION—RELEVANCY OF, NOT PRESUMED.—Where an instruction is refused, the correctness or incorrectness of which depends on circumstances not disclosed in the record, its applicability will not be presumed. The party complaining must show its relevancy affirmatively. This Court will not presume a state of facts in order to find error, but every presumption will be made in favor of the ruling of the court below.

IDEM—BILL OF EXCEPTIONS MUST SHOW WHAT EVIDENCE.—In order to enable this Court to determine whether instructions asked for and refused are correct, there must be a proper bill of exceptions, embodying sufficient of the evidence, or a statement that some evidence had been given, upon the points upon which instructions are asked, in order to show whether they were applicable to the case.

APPEAL from Umatilla County.

The facts are stated in the opinion of the Court.

J. H. Reed and R. P. Boise, for Appellants.

Lucian Evarts and Thayer & Williams, for Respondent.

By the Court, BURNETT, J.:

This is an action of replevin brought by the respondent in the Circuit Court for Umatilla County to recover the possession of certain personal property described in the complaint, and consisting of one wagon, one horse, set of harness, mowing machine and one sulky, and for fifty dollars damages for the detention of the same.

The complaint alleges that the respondent is the owner of the property above described, and that on the 10th day of September, 1872, in Umatilla County, Oregon, the defendants wrongfully took said goods and chattels from the possession of the plaintiff. Afterward the respondent filed a supplemental complaint alleging some additional facts, upon which he increased his claim for damages from fifty dollars to two thousand dollars.

Defendants answered denying the allegations of the complaint, and set up that at the time mentioned in the complaint, F. M. Crockett, one of the defendants, was clerk of Umatilla County, and S. W. Nye, another defendant, was sheriff; and further, that prior to that time, the defendant Fanning and the plaintiff had entered into an agreement to submit some matters of difference that existed between them to one Augustus Hill, who should make a decision in writing, which was to be entered as a judgment of the court; that such decision was made and entered, by which he found that the plaintiff herein, Richards, was indebted to Fanning, one of the defendants herein, in the sum of four hundred and eighty dollars; that it was in pursuance of and by virtue of an execution on said decision that the defendant Nye seized the property in question. Then follows an allegation that said decisions and the proceedings connected therewith had not been set aside by any judgment of the court.

The plaintiff, in his reply, denies that he entered into the agreement set up in the answer; denies that Hill made the decision between the parties as set up in the answer, and denies that any judgment was entered against Fanning, or that any execution, regular on its face, was issued, or that the property in question was seized or sold by virtue of any such execution.

The case was tried by a jury, and a verdict returned for the respondent, upon which he had judgment, and the appellant brings the case into this Court. The errors assigned by the appellant in his notice of appeal are as follows:

1. Error in the court in overruling the demurrer to the supplemental complaint, filed May 2, 1873.

2. In overruling the demurrer to the amended supplemental complaint, filed May 30, 1873.

3. In overruling the demurrer to the second amended supplemental complaint, filed October 31, 1873.

4. The court erred in refusing the second, third, fourth, sixth, seventh and eighth instructions, asked for by defendant; and then follows a copy of the instructions asked for and refused by the court below.

It is a sufficient answer to the first and second assignments of error, to say that the court sustained the demurrers referred to therein. As to the third assignment, the appellants, by answering, waived the objections raised by their demurrer, and cannot be heard upon them now.

The principal question arises in respect to the instructions asked for by the appellant in the court below, which were refused. It is claimed, by counsel for respondents, that the exceptions to the ruling of the court below, are not sufficiently definite to bring the errors complained of before this Court for review, and we think in that he is correct.

The bill of exceptions, after reciting that issue had been joined between the parties, and a jury impaneled to try the cause, further states, "And, upon the trial of the issue, the defendants, by their counsel, to maintain and support the said issues on their part, requested the court to instruct the jury as follows:" Following this is a list of instructions, eight in number, and then follows this language: "And the said court then and there gave to the jury the above instructions, numbered 1 and 5, and refused and failed to give to the jury the instructions above numbered 2, 3, 4, 6, 7, and 8, and each and all of them; and the said jury, after retiring a short time for deliberation, returned into court and then and there gave their verdict," etc. To which refusal of the court, to give the instructions mentioned, the defendant, C. O. Fanning, at the time excepted. It does not appear whether the exceptions were taken before the verdict was returned or not. This is hardly more than a general exception, and if any one of the instructions was incorrect, this mode of excepting would be insufficient. (34 N. Y. 247; 18 Ind. 184.)

In 43 N. Y., 558, it is said: "The attention of the court should be drawn to each instruction, and each should be the subject of a specific ruling by the judge, and a specific exception by the party." But, conceding the exceptions to be sufficient to bring the ruling of the court below, on each request, before this Court, there is no evidence in the bill of exceptions to show whether the instructions asked for were pertinent to the case or not. All the material issues,

tendered in the pleadings, are controverted, and the bill of exceptions ought to show what the evidence was, on the points upon which instructions were asked, or that some evidence on said points had been given, so that the court can see whether the instructions asked for were applicable to the case made by the evidence or not, and the court should refuse to instruct the jury on abstract questions of law. (2 Cal. 39; 9 Cal. 353.)

Whether an instruction, giving the general rule without qualification, be proper or not, depends upon the facts in proof. (15 Cal. 476.)

In a case of *Hannan v. Hale* (7 Iowa, 153), the court, in passing upon a similar question, uses the following language: "A third objection relates to the instructions asked by the defendants, and refused. As to the correctness of these instructions, in a case to which they would be applicable, we intimate no opinion. They were all refused by the court, and we can conceive of a state of case in which this refusal would be proper. No part of the testimony is before us, nor anything to show that the instructions, as asked, were applicable to the case as it stood upon the proof. Under such circumstances, we cannot say that the court below erred in refusing them."

It was claimed by counsel for the appellant that if the sheriff could justify under the process he held, that would be a complete defense for the other defendants, but the allegation of his having a legal process is denied in the pleadings, and there is no evidence to show how the property was taken. The declaration is replevin in the *cepit*; defense *non cepit*.

The jury found against the defendant Fanning alone, and it must be presumed that the evidence warranted the verdict. If the bill of exceptions had shown that there was evidence given on the trial tending to show that Fanning was induced to take the property in question, by the acts and representations of Richards, then the fourth instruction would be correct; but we cannot presume that any such testimony was given in the absence of anything in the bill of exceptions showing that such testimony was given, or of

any statement of the evidence as required by the statute. Where an instruction is refused, the correctness or incorrectness of which depends on circumstances not disclosed in the record, its applicability will not be presumed. The party complaining must show its relevancy affirmatively. (1 Iowa, 456; 5 Id. 271; 3 Id. 463.)

The bill of exceptions does not disclose any error which would justify this Court in reversing the judgment of the court below. It is therefore affirmed.

S. H. OLIVER, Appellant, v. JAMES HARVEY, Respondent.

NOTICE OF APPEAL—PARTIES CANNOT WAIVE, SO AS TO GIVE JURISDICTION.—The service and filing the notice of appeal is indispensable in order to give this Court jurisdiction. A waiver of the filing by the stipulation of the parties is not the equivalent of the filing of the notice. Consent, though it may waive error, cannot confer jurisdiction.

APPEAL from Benton County.

This is a motion interposed by respondent's counsel to dismiss the appeal, for the reason that the notice is defective and insufficient. The notice is as follows:

"In the Supreme Court of the State of Oregon.

S. H. OLIVER, Plaintiff and Appellant,
v.
JAMES HARVEY, Defendant and Respondent.

"To James Harvey, or his attorneys of record:

"You will please take notice that the above-named S. H. Oliver appeals from the judgment of the Circuit Court of said county, rendered at the November term thereof for the year 1873, against this appellant for costs, and in favor of the said James Harvey, respondent herein, to the Supreme Court of the State of Oregon."

There is also a stipulation, signed by the counsel for the respective parties, continuing this cause from the last August term of this Court until this term.

R. S. Strahan, for the motion.

F. A. Chenoweth, contra.

By the Court, PRIM, J.:

The notice of appeal, as has often been decided by this Court, should describe the judgment appealed from with sufficient certainty to enable all the parties interested in the matter to know definitely what judgment is appealed from. The judgment in this notice is described as having been rendered in the Circuit Court of "said county." No county had been mentioned and previously referred to, and from the caption it could only be gathered that the paper referred to some proceeding in the Supreme Court. We think it too indefinite, and cannot extend the jurisdiction of this Court over the respondent.

It was argued by counsel that the general appearance and stipulation mentioned in the statement gave this Court jurisdiction, notwithstanding the defect in the notice of appeal, To this proposition we cannot assent. By the Court, § 525, "a judgment or decree may be reviewed as prescribed in this title, and not otherwise."

Section 527 provides that "an appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise. The appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon with the clerk where the judgment or decree is entered." This is the only mode prescribed in which an appeal can be taken to the Supreme Court. The *service* and *filing* the *notice* of appeal is indispensable in order to enable the appellate court to obtain jurisdiction of the cause. A waiver of the filing by the stipulation of the parties is not the equivalent of the filing of the notice; for consent, though it may waive error, cannot confer jurisdiction.

This view is fully sustained in *Bonds v. Hickman* (29 Cal. 460). That was a case where the parties undertook by stipulation to waive the filing and service of the notice un-

der a statute exactly like ours. We are therefore of opinion that the motion should be granted.

Appeal dismissed.

THE CITY OF PORTLAND, Respondent, v. CHAS. T. KAMM, Minor, by WM. S. LADD, Guardian ad litem, Appellant.

APPEAL CAN ONLY BE TAKEN FROM THE WHOLE JUDGMENT, IN WHAT CASES.—Where an appeal is taken to the Circuit Court from a judgment of the City Council in the assessment of damages and benefits, under the act of December 19, 1865, entitled "An Act to authorize the city of Portland to open, lay out and widen streets and alleys, and to appropriate private property therefor," such appeal cannot be taken from a part of the judgment; but must be taken from the whole thereof, and the trial in the appellate court must be *de novo*.

VERDICT—MUST STATE THE SUM OF DAMAGES AND BENEFITS SEPARATELY.—In actions brought under the act of December 19, 1865, to authorize the city of Portland to lay out streets, etc., a verdict which finds generally is insufficient. The verdict must state the sum of the benefits and of the damages separately, or at least show the sum of the difference between them.

JUROR—TAXPAYER NOT COMPETENT, IN WHAT CLASS OF CASES.—In an action to recover damages brought under the act of December 19, 1865, to authorize the city of Portland to lay out streets, etc., a taxpayer within the said city of Portland is not competent as a juror when challenged for implied bias.

APPEAL from Multnomah County.

This cause originated in a proceeding by the Common Council of the city of Portland for the extension of West Main street upon the premises of defendant Kamm.

The proceeding was instituted under the provisions of an act of the Legislative Assembly, approved December 19, 1865, entitled "An Act to authorize the city of Portland to open, lay out and widen streets and alleys, and to appropriate private property therefor."

Under the provisions of § 3 of said act three viewers were appointed to assess the damages and benefits resulting to adjacent landholders on the line of the proposed extension of said street, and were directed to report how much

less valuable, if any, such lands would be by reason of such location of said street.

Said viewers reported to said Common Council that the damages to defendant's lands caused by the location of said street thereon amounted to the sum of one thousand seven hundred dollars in gold coin, and that the resulting benefits to the remaining portion of defendant's land adjacent to said proposed street was one thousand seven hundred dollars in gold coin. The report of said viewers was approved by the Common Council of said city, and defendant, being dissatisfied with the assessment of benefits charged against him by the report of said viewers, appealed therefrom to the Circuit Court for Multnomah County.

Upon the trial of the cause on appeal by said Circuit Court, the jury returned a verdict in the following words:

"We, the jury in the above-entitled cause, find for the plaintiff.

"J. W. MURRAY.

"June 10, 1874." "Foreman.

Thereupon defendant filed his motion for a new trial, which, after argument, was overruled by the court, and defendant appeals to this Court.

A statement of the errors relied upon in the appeal is contained in the opinion of the Court.

Northup & Gilbert, for Appellant.

A. C. Gibbs, for Respondent.

By the Court, BONHAM, C. J.:

The act of December 19, 1865, referred to in the statement of the facts in this case, authorizes the Common Council of the city of Portland "to open, lay out, establish and widen streets and alleys, and to appropriate private property for that purpose." (Sec. 1, p. 50, Portland Charter.)

Section two of said act provides for a survey by the city surveyor of the line of the street or alley proposed to be

located or widened, and requires him to report a plat and description thereof to the Common Council.

Section three of said act authorizes the Common Council to appoint three disinterested viewers to assess damages and benefits resulting to the owners of real estate contiguous to said proposed street.

Section four provides the manner of proceeding by said viewers, and requires then "to assess and determine how much less valuable, if any, such lands * * * will be rendered by the laying out, establishing or widening of such street or alley," through or over the same. It also provides for assessing the benefits accruing to the owners of land fronting on said proposed street, but not passed over or occupied by the same; which benefits it is declared shall be a lien or charge upon the land of the owners thereof so benefited. This section also provides for the payment of the benefits assessed to landholders whose lands front on such proposed street, into a fund to be applied to the payment of damages for lands occupied by such street.

Section five provides that the Common Council may set aside the report of such viewers if such council is not satisfied with their assessment of damages and benefits.

Section six makes it the duty of the Common Council, if no appeal be taken within the time allowed, or if an appeal be taken from the assessment of damages or benefits, then after the same shall have been determined, to make an appropriation to pay all damages and costs that may have been awarded, and to order warrants to issue for the same, payable out of the fund to be provided therefor; and declares that, "as soon thereafter as the full amount of such appropriation shall be in the city treasury, subject to such warrants, and the amounts respectively assessed shall be tendered to the parties entitled to the same, such property shall be deemed appropriated for the purposes of such street or alley, and not otherwise."

Section seven of said act gives, in express terms, the right of appeal by any person dissatisfied with the assessment of benefits and damages, to the Circuit Court for Multnomah County.

Section eight provides the time and manner of taking the appeal.

Section nine provides that such appeal to the Circuit Court shall be heard and determined as an action at law; that the jury shall view the premises and assess and determine by their verdict how much less valuable, if any, each lot or part thereof, with the improvements, may be rendered by the location or widening of such street or alley; and such jury is also required to assess and determine the value of the resulting benefits to lands fronting on such proposed street, when the same has been appealed from; but the jury shall not reassess any damages or benefits unappealed from.

Section ten provides that if the appellants, or any of them, fail to recover greater damages or a more favorable assessment as to benefits than was allowed by the viewers, judgment shall be rendered against such appellant for the costs of appeal and for the amount of benefits assessed by such jury against such appellants, and that judgment shall also be rendered against the city for the amount of damages allowed to such appellant where the question of damages is involved in the appeal.

The foregoing are all the provisions of the act of December, 1865, which it is necessary to consider with reference to the questions involved in this appeal. While the phraseology of the act is certainly subject to criticism on account of the obscurity in which its terms and requirements are involved, yet we think a careful examination of the same will disclose the intention of the law-maker in its enactment.

Counsel for appellant in this case claims that where the viewers appointed by the Common Council assess damages and benefits to the same person, as was done in defendant's case, such defendant is authorized by the act referred to (§ 9, p. 56, of Portland Charter), to appeal from the one and allow the other to stand. Hence appellant in this case gave notice to respondent that he appealed from the assessment of *benefits* only, and he therefore insists that the only question for the jury in the appellate court to determine was whether the assessment against appellant of $1700, as benefits, should stand as the true value of benefits, and that the assess-

ment in appellant's favor, by said viewers, of $1700 as damages, should not be considered or disturbed by the jury in the appellate court. We think that this construction of the act referred to is not warranted by the language of § 9, which is relied upon in support of that view. In that section it is declared that no benfits or damages not appealed from shall be reassessed by the jury in the appellate court.

This language, we think, refers only to persons owning lands abutting on or occupied by the proposed street for or against whom benefits or damages, or both, have been assessed by the viewers, but which persons have not appealed at all from such assessment. Subdivision 3, of § 536, page 222, of the Civil Code, declares that "upon an appeal to the Circuit Court the manner of proceeding thereafter is the same as if the action or suit had been commenced in said court." In such case the decision and determination of the court below is vacated or merged in the judgment of the appellate court, and it is to this judgment that the parties must look for the determination of their rights in controversy. We think that in this case the trial in the appellate court should be had *de novo*, as upon appeal from a justice's court.

In an appeal to the Supreme Court from a judgment in an action at law the appellant may appeal from the judgment, or some *specified* part thereof (Civ. Code, § 527), but in a proceeding like this the appellant cannot appeal from a part of the judgment of the municipal authorities and allow the remainder thereof to stand. He must appeal from the *whole* thereof, and in the appellate court the *whole* case must be tried anew on substantially the same issues as in the court below. The Circuit Court, then, did not err in instructing the jury that in considering of their verdict they must take into consideration both the question of damages and benefits.

Appellant claims by his third assignment of error that the verdict of the jury is contrary to law, because it is not therein determined how much less valuable, if any, defendant's land would be rendered by the extension of "West Main street," as proposed, nor did said jury by their verdict determine the

amount of benefits which would result to defendant by reason of the extension and opening of said street, nor the amount of such benefits in excess of the damages.

The verdict of the jury, as has been observed, is in these words: "We, the jury in the above-entitled cause, find for the plaintiff."

This verdict is indefinite and insufficient, for the reason that it does not determine the matters at issue between the parties. It does not inform us how much the defendant was damaged, nor how much he was benefited by the extension of said street.

A verdict, although informal, is sufficient when it informs the court what judgment ought to be rendered in the case. And it is claimed by counsel for respondent that the verdict in this case shows that the jury either intended to affirm the judgment of the viewers, that the benefits and damages each amounted to the sum of $1700; or at least that they intended to find that the damages were fully and evenly offset by the benefits. But this will not do. The jury must furnish to the parties and the court a definite and tangible conclusion of the issues as adjudged by them from the evidence; and must state the sum of the benefits, and of the damages, separately, or at least show the sum of the difference between them. If it could be claimed that a verdict in favor of the plaintiffs operates as an affirmance of the assessment of the viewers, leaving it to stand undisturbed, then the verdict in this case might be held sufficient. But, by the appeal and trial anew in the Circuit Court, the decision of the viewers has been annulled and set aside, while the jury in the Circuit Court undertake to find generally in favor of the plaintiff and against the defendant, without making such findings as would respond to the issues in the cause, or enable the court to render judgment. We think that the court below erred in receiving the verdict of the jury, and entering judgment thereon against the defendant for costs.

We think, also, that the court below erred in permitting J. B. Kellogg, a resident and taxpayer in the city of Portland, to sit as a juror in this case, when challenged by de-

fendant for implied bias, under the provisions of subdivision 4 of § 184 of the Code.

Counsel for respondent claims that Kellogg does not come within the rule of *Garrison v. The City of Portland* (2 Or. 128), for the reason that the city of Portland, in the matter of the extension of "West Main street," had provided a fund from the assessment of benefits to adjacent land-owners equal to the total amount of damages assessed. And while it is true that by a somewhat remarkable coincidence, the viewers appointed by the city of Portland to assess the benefits and damages resulting to adjacent landowners on the line of said proposed street found that the aggregate sum of damages was $6000, and the total benefits $6000, yet this would not have relieved Kellogg, as a taxpayer in the city of Portland, from his liability as such to be called upon to contribute, if the jury had found in favor of the defendant that his damages exceeded his benefits. The act of December 19, 1865, does not contemplate or provide that a fund shall be raised by the assessment of benefits adequate to the payment of all damages which may be allowed to land-owners on the line of a proposed new street or alley, and if it did, it would certainly be a very peculiar and, in many cases, a very inequitable provision.

In the case above cited (*Garrison v. The City of Portland*), the plaintiff sued the city to recover for injuries sustained by falling into a pit or unfinished cistern which had been left open without any light or guards to warn pedestrians of the danger.

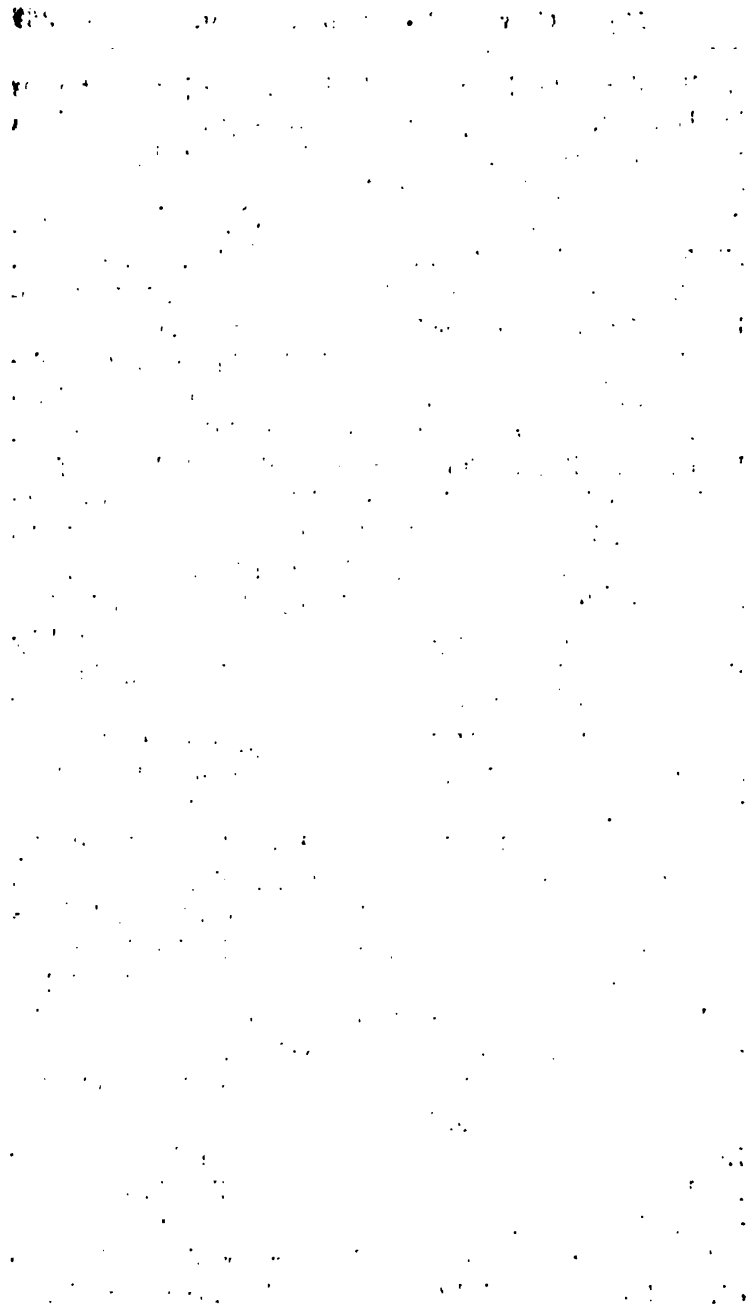
In passing upon the question of the competency of a juror, who was a resident and taxpayer of the city, to sit in the trial of said cause, the Court say: "The Code (§ 184, Subd. 4) leaves the question of what is a disqualifying interest to the common-law rule, and it must therefore be interpreted in the light of adjudicated cases. The theory of a trial by jury is that the jurors shall stand absolutely indifferent between the parties litigant; that they shall be as free from interest or prejudice as it is possible for humanity to be. The authorities are numerous and uniform to the effect that an interest in the event of the suit, though

small and remote, disqualifies the juror. The jurors set aside by the court, being taxpayers, were directly responsible for a ratable proportion of whatever verdict might be rendered against the city. The ruling of the court below was in conformity with the current of authorities and right." (*Wood v. Stoddard,* 2 John. 194; *Russell v. Hamilton,* 2 Scammon, 56; *Bailey v. The Town of Trumbull,* 31 Conn. 581; 2 Graham & Waterman on New Trials, p. 240, *et seq.*)

Of course it might be suggested, that in prosecutions for fines and forfeitures, every tax payer in the State might have a remote pecuniary interest in the event of the action, which, by a strict adherence to the rule, would exclude him from sitting as a juror in such case; and in cases where a county is a party, it might be claimed that all taxpayers of the county would be disqualified, and that such ruling would necessarily result in great inconvenience. To these objections we answer that we only pass upon the question presented by the transcript in this case. In this case jurors might have been obtained outside of the corporate limits of the city of Portland and within Multnomah County, against whom the objection of interest in the event of the action could not have been urged.

While it is true that the common law rule touching the incompetency of witnesses, on account of having an interest in the event of the action or suit, has been almost entirely overthrown by our statute, yet the rule disqualifying jurors, for the same reason, we think, has with unquestionable wisdom and propriety been suffered by our law-makers to remain intact. It is certainly a great safeguard and protection to our boasted right of trial by jury, in both criminal and civil cases, that jurors should be secured, as free as it is possible in the nature of things for them to be, from both actual or implied bias in the event of the suit, as well as in relation to the parties litigant.

The judgment of the court below is reversed, and the cause directed to be remanded to the court below for a new trial.



JULY TERM, 1875.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

JULY TERM, 1875.

THE DOUGLAS COUNTY ROAD COMPANY, Appellant, v. THE COUNTY OF DOUGLAS, THE COUNTY COURT OF DOUGLAS COUNTY, and THE CANYONVILLE AND GALESVILLE ROAD COMPANY, Respondents.

RECORDS OF COUNTY COURTS—SUPERVISORY CONTROL OVER BY THE CIRCUIT COURT, HOW EXERCISED.—The failure of the proper officer of an inferior court to record the proceedings of such court, can only be remedied by proceedings to complete the record. The supervisory control exercised by the Circuit Court in such cases, as a general rule, is by mandamus the writ of review, or on appeal.

APPEAL from Douglas County.

The facts are stated in the opinion of the Court.

W. W. Thayer and E. C. Bronaugh, for Appellant.

J. F. Watson and W. R. Willis, for Respondents.

By the Court, SHATTUCK, J.:

This suit, coming before the Court upon complaint and demurrer, presents the same question decided by this Court at

the December Term, 1874, in the case of *The Douglas County Road Company v. Abrahams et al.*,—whether the alleged contract or agreement between the County Court of Douglas County, and the Douglas County Road Company, of date April 10, 1874, is enforceable, or can be made available in the form and condition in which the record of the County Court of Douglas County, relating to the matter, has been left—and, though all the members of the Court, in that case, did not concur in the decision and opinion given, yet that decision must stand as the decision of the Court, and, so far as the two cases are similar, must control this case.

There are added, however, in this case, allegations concerning the proceedings in the County Court of Douglas County, upon which the Circuit Court was asked to exercise a supervisory control over the County Court by injunction, and by decree, in the nature of specific performance. It is not pretended that if the appellant's contract had been duly recorded, and a record of its authorization duly made in the County Court, the proceeding for injunction against the rival company (the Galesville and Canyonville Road Company), might not be sustained, no valid defense on other grounds being made; and it was more than intimated by this Court, in the case above alluded to, at the December Term, 1874, that the proper remedy for the party, if there was any at all, was some proceeding to have the record of the County Court completed.

This cannot be done by injunction, or suit in equity. The supervisory control exercised by the Circuit Court, as a general rule, is to be exercised by mandamus, the writ of review, or an appeal; and this case furnishes no exception to this general rule.

We think the decree of the Circuit Court should be affirmed.

*STATE OF OREGON ex rel. J. W. CHURCH, Appellant, v. M. DUSTIN, Respondent.

PLEADING—COMPLAINT IN ACTIONS TO TRY THE RIGHT TO AN OFFICE.—A complaint is insufficient in law, in a proceeding under § 354 of the Civil Code, to have an officer adjudged disqualified or ineligible to hold an office, under the laws of this State, on account of having promised to reward a voter, unless it appears affirmatively that such promise, if performed, would inure to the benefit of such voter.

IDEM—WHAT WILL CONSTITUTE AN OFFER OF A REWARD.—A promise by a candidate for the office of county judge, made to the voters of his county, prior to his election, that he will, if elected, pay into the county treasury two hundred dollars per annum of his salary as judge, is not an offer to reward a voter, under § 7, Art. 2, of our State Constitution, unless it also appears that the voters influenced by such offer were taxpayers in such county, or would in some way be benefited by the performance of such offer.

APPEAL from Grant County.

This is a proceeding under § 354 of the Civil Code, for the purpose of having the respondent adjudged ineligible to hold the office of county judge of Grant County, and to have him ousted therefrom.

It is alleged in the complaint, in substance, that at the June election, 1874, the relator, the respondent, and Eli Lester were candidates for county judge of Grant County; that the respondent received two hundred and seventy-six votes; the relator, two hundred and seventeen; and Lester, one hundred and six; that at such election the respondent induced seventy voters to vote for him, upon the promise that, if he was elected to the office of county judge, he would pay two hundred dollars per annum out of his salary (eight hundred dollars), into the county treasury of Grant County; that the respondent received a certificate of election, and thereafter usurped the office, etc.

The respondent demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered in favor of respondent for his costs, from which judgment this appeal is taken.

B. Whitten, for Appellant.

*See 20 Am. Rep. 746.

M. Dustin, in person, for Respondent.

By the Court, BONHAM, C. J.:

Section 354 of the Civil Code, under which this proceeding was instituted, declares that "an action at law may be maintained in the name of the State, upon the information of the prosecuting attorney, or upon the relation of a private party, against the person offending, in the following cases:

"1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation, either public or private, created or formed by or under the authority of this State."

It is not claimed in this case that the respondent either bribed or offered to bribe, or reward directly, any one of the seventy voters named in the complaint; but it is claimed that a promise to reward a third person, whether it be a natural or artificial person, would be within the spirit of the law, and would embrace the mischief which it is intended to obviate.

Our criminal Code (§ 627) makes it a felony to pay or promise to pay any valuable consideration, or thing whatever, to influence a voter to vote for or against a particular person, at any legally authorized election in this State, and denounces the act as bribing or offering to bribe a voter.

Section 7 of Art. 2 of our State Constitution declares that "every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward to procure his election."

It is claimed by respondent that the complaint, in any view of the case, fails to show that respondent comes either within the purview of § 627 of the Criminal Code, or § 7 of Art. 2 of our State Constitution, hereinbefore referred to, for the reason that it does not appear from the complaint that any one of the seventy voters, therein referred to and named, was a taxpayer in Grant County.

It is not charged that the respondent has actually paid

into the treasury of Grant County any part of his salary as county judge, under the promise made to the seventy voters referred to, but it is only charged that he promised to do so, in order to secure their votes.

What is meant by the term "reward," as used in the Constitution, and in § 627 of the laws referred to? Burrill defines a reward to mean "compensation or remuneration for services; a sum of money paid or taken for doing or forbearing to do some act.

The payment of stipulated sums of money into the county treasury of Grant County, by the respondent, would inure to the benefit of the resident property-holders and taxpayers of that county, by reducing *pro tanto* the rates necessary to be levied by the county authorities to maintain its corporate government and other expenses incidental thereto. But unless it appears from the complaint that the seventy voters, or some of them, at least, were taxpayers, we hardly think it could be claimed that they would have been compensated, or remunerated, for casting their votes for respondent, if he had performed his agreement to pay two hundred dollars per annum of his salary into the county treasury. If the promise *executed* would not have operated as a reward, the same promise *unexecuted* would not operate as a promise to reward.

It might be very plausibly argued, it is true, that, as a matter of fact, probably some of the seventy voters named in the complaint of the relator were at the time taxpayers in Grant County, and, for that reason, would have been at least indirectly benefited by the payment of money into the county treasury. But that will not do. In the construction of pleadings, under a statute or constitutional provision, penal in its character, there is no authority for indulging in presumptions or probabilities of this nature.

It was also urged, upon the argument of this cause by respondent, that the charge made against him in the complaint that he had promised the seventy voters of Grant County therein named, to pay two hundred dollars per annum of his salary as county judge into the county treasury in case of his election, would not, in any event, be a

promise "to reward a voter" within the meaning of § 7, Art. 2, of our Constitution, or within the meaning of § 627 of the Criminal Code. In answer to this, counsel for appellant cites the case of *The State of Wisconsin ex rel. Newell v. Purdy* (Feb. number Am. Law Reg. 90).

In order to constitute the rewarding or the bribing of a voter by a candidate for office, we do not think it essential that the candidate should pay the price agreed upon for such vote directly into the hands of the voter in question; but the same results would follow the payment of the purchase-price to a third person, or to an association or community of persons, if so made by the direction of the voter, and for his use and benefit. A payment, under such circumstances, would be made to the agent of the voter, and in contemplation of law, would be a payment to him.

It is doubtless true, in some instances, in cases like this, that an offer made by a candidate to discharge the duties of the office which he seeks for less than the salary fixed by law, is made in good faith and for the purpose of promoting retrenchment and reform in the administration of public affairs. Such may have been the motives which actuated the respondent in this case; but of that we cannot speak, because the merits of the case are not before us in that respect. Yet we are clearly of the opinion that the general tendency of the practice, by candidates for office, in offering, directly or indirectly, any pecuniary consideration whatsoever to secure the votes of electors, is demoralizing in its effects, and contravenes well-established principles of public policy; although the act may, in many cases, fall short of bribery under the criminal law. And, in this connection, we desire to quote from and give full sanction to the earnest and logical opinion of Mr. Justice Lyon, in the case of *The State of Wisconsin v. Purdy,* above cited.

In this case, Newell, the relator, published a card, addressed to the voters of Vernon County, offering himself as a candidate for the office of County Judge of said county, and pledging himself, if elected, to discharge the duties of the office for seven hundred dollars, the lawful salary being one thousand dollars per annum. The defendant Purdy,

who was at the time the acting incumbent of the office in question, refused to surrender the office to Newell, for the reason, as alleged in his answer, that one hundred of the voters and taxpayers of said Vernon County, who had intended to vote for him (Purdy) for said office of county judge, were, by the corrupt and unlawful promise of Newell, induced to change their minds and to cast their votes for said Newell for said office. In deciding the case, Mr. Justice Lyon said:

"It was argued by the learned Attorney-General, that the proposition made by the relator to the voters of Vernon County, was merely a protest against high salaries; and, being in the direction of reform and economy in public expenditures, should rather be commended than censured.

"Promises, made to the people by candidates for public office, that, if elected, they will practice a rigid economy in the expenditures of their several departments, are unobjectionable; and, if the successful candidate fulfills his pledge in that behalf, he is entitled to commendation. In such case, the candidate only promises to perform a legal and a moral duty. For example, should a candidate for Governor promise that, if elected, he would discharge all persons employed by the State whose services are not needed, or, that he would prevent all unnecessary expenditure of public funds, so far as he may have power to do so, this is only a promise that, if elected, he will, in those respects, faithfully perform the duties of his office. In other words, it is a promise that he will not violate his official oath. But, should such candidate propose to the voters and taxpayers of the State, that, if they will elect him to the office of Governor, he will serve the State therein gratuitously, or for one-half the salary allowed by the Constitution, and pay the rent of an executive office, and the expenses of fuel, stationery, and other incidentals pertaining thereto, out of his own pocket, his proposition has an entirely different aspect. In the one case, the candidate promises that, if he is elected, he will regard his official oath, and faithfully and honestly discharge his official duty; while, in the other case, he proposes to buy the office with promises to pay therefor in

personal services, or money, or both. The one tends to economy and true reform, but the tendency of the other is to introduce into elections a most mischievous element, very nearly allied to bribery—an element which never has been tolerated (and never can be, with safety) by any free government. But, we are told that propositions similar to that of the relator, are very frequently made by candidates for public offices. We have seen no case in the books, and none is within the recollection of any member of this Court, before the present case was brought to our notice, where a candidate for an important judicial office has offered to donate money or official services to the public, as a consideration for his election. We must be permitted, therefore, to doubt whether such transactions are of frequent occurrence. On the contrary, we think they are not sustained by an enlightened public sentiment, and that they occur very rarely. If the course pursued by the relator should receive judicial sanction, it is more than probable that all those public offices which are deemed desirable, would, in time, become the objects of pecuniary bids, or offers; and, in many cases, would be bestowed upon the highest bidders, without much regard to their fitness for the positions thus purchased by them. At least, such would be the inevitable tendency. The evils of such a condition are of very grave import and we are warned by the wisdom and experience of centuries to avoid them.

"When our elections to fill public offices cease to express the free, intelligent, and unbiased judgment and choice of the electors, when they shall be controlled or materially influenced by pecuniary offers made by the candidates, whether to the electors or to the municipality (which is but the aggregation of the electors), a most vital condition of free government will be disregarded. The tendency might be, in such cases, to banish from the public service all who will not pay for the privilege of being employed therein, and to fill it with less scrupulous, and, therefore, less trustworthy and less deserving men. Elections by the people might thus cease to express the free and unbiased judgment and will of the people, but might be controlled by merce-

nary considerations, either public or private, or both, and would thus speedily and justly fall into public contempt.

So far as we are advised, no judicial tribunal has given any countenance whatever to any practice or act which tends in that direction, but the courts have steadily held that popular elections must be kept free from any taint of corruption, and from all improper or unlawful influences whatever. * * * We would not hold that a man may buy a public office, especially a most important and responsible judicial office, just as he would buy a horse at auction; that is, by offering to pay more for it than any other person is willing to pay. We can never give the sanction of this Court to a doctrine so pernicious."

The views of the Supreme Court of the State of Wisconsin are so forcibly and pointedly expressed on the subject under review in this case, that we could not refrain from quoting thus extensively from the opinion of the court as there rendered.

It was furthermore claimed by respondent in this case, that if the complaint herein should be held sufficient to require him to answer thereto, it would then charge him with the crime of attempting to bribe a voter, as defined by § 627 of the Criminal Code, and that judgment of conviction upon a trial by indictment, must precede a trial and judgment of ouster under the proceedings instituted by the relator in this case. Upon this point we do not deem it necessary to pass for the purposes of this case, inasmuch as we hold that the complaint is defective in not showing that any of the seventy voters named, were taxpayers in Grant County; or that they, or any of them, would be beneficially interested by the payment into the county treasury of the two hundred dollars per annum, which respondent is charged by the relator with having promised said seventy voters to so pay, as an inducement to them to vote for him for the office of county judge.

Judgment affirmed.

D. A. RICHARDS, Appellant, v. A. W. NYE, Respondent.

SHERIFF—DUTY OF, IN LEVYING UNDER EXECUTION.—A sheriff has no right to be wiser than his process. What he is in due form commanded to do, he is to do, and will be protected in doing. He cannot refuse to return or execute process, and thus drive the parties to legal proceedings to determine the legality of the judgment under which the execution issued.

IDEM—CONDITIONAL PAYMENT BY DEBTOR.—When a sheriff receives money from a judgment debtor, and agrees with such debtor to apply it on the execution, provided such execution be just and legal, otherwise to return it, he is not bound to do more than allow to such debtor the full time which the execution has to run, to determine the legality of the execution. Thereafter, the sheriff may apply such money on the execution.

APPEAL from Umatilla County.

In August, 1872, an execution issued out of the Circuit Court for Umatilla County, on a judgment in favor of one C. O. Fanning, and against the appellant, D. A. Richards, for four hundred and eighty dollars. This execution was placed in the hands of A. W. Nye, who was sheriff of said county, who made levy thereunder on the 4th of September, 1872, of property belonging to Richards. Richards, so it is alleged in the complaint, for the purpose of regaining possession of the property levied upon, and to prevent further levy, gave to Nye, the said sheriff, four hundred and fifty dollars, and took therefor the following receipt:

"September 4, 1872.

"Received of D. A. Richards, four hundred and fifty dollars ($450) in greenbacks, in lieu of other personal property, to be applied on a certain execution issued out of the Circuit Court of the State of Oregon, county of Umatilla, in favor of C. O. Fanning and against D. A. Richards, to the amount of $544, provided said execution be just and legal, otherwise to be refunded to the said D. A. Richards.

"A. W. NYE,
"Sheriff."

The judgment upon which the execution issued had been entered by the clerk, in vacation, upon the report of a referee, in pursuance of a stipulation of the parties that

such report, when made, should be entered as a judgment of the court. On the 1st of February, 1873, the said decision or report of the referee, and all proceedings thereunder, were set aside by a decree of the Circuit Court. Nye paid the four hundred and fifty dollars, for which the above receipt was given, to Fanning, the plaintiff on the execution. This action was brought by Richards to recover back the said sum of four hundred and fifty dollars, under Nye's written agreement to pay it back, if the execution in question should not be just and legal. Demand for such repayment was made November 13, 1872. Upon the trial, the court instructed the jury that if they found that defendant Nye had "returned the execution, upon which the money in question was paid, to the clerk, together with the money made thereon, the jury must find for the defendant, he not being liable to repay the same."

The jury found for the defendant, and he had judgment accordingly, from which this appeal is taken.

W. W. Thayer and L. Everts, for Appellants.

Jas. H. Slater, for Respondent.

By the Court, SHATTUCK, J.:

The position taken by appellants in this case assumes that Nye, holding the execution described in the record, and the money of the debtor turned out to be applied upon it, owed no duty to the plaintiff Fanning, and that he was at liberty to enter into a contract to disobey the mandate of the writ.

The authorities cited to sustain this position hold, that while a sheriff is unquestionably protected in the execution of a process, regular and valid on its face, although there be, in fact, no valid judgment to support it, he may at the same time be held harmless if he neglects to execute a process, apparently valid and regular, if the fact be that the process was void because of the judgment being void. (16 Wend. 562; 7 Hill, 35; 2 Denio, 643; 1 Hill, 118.)

These authorities are cases where attempt has been made

to hold an officer liable for refusing to execute a process based upon a void judgment, and they sustain the position. But these authorities lend no countenance to the position that a sheriff may, on his own motion, question the validity of the judgment recited in his process, and constitute himself the judge in the first instance of the propriety of executing a regular process.

This case, it is to be noticed, is distinguished from those cited in this: In those cases cited, the action was for *not executing* the process; in this case, the complaint is that the officer *did* execute the process.

The writing offered, as the basis of this action, and the evidence appearing in the bill of exceptions, show that the respondent received this money as and instead of a levy on the personal property of the debtor, and that he held the money under the sanction of official duty, and not as a mere bailee of Richards.

It is claimed by the appellant that the clause in the writing, "to be applied on a certain execution, * * * provided said execution be just and legal, otherwise to be refunded to said D. A. Richards," should be held as an agreement and unconditional obligation, on the part of Nye, to determine, or cause to be determined, whether this execution, valid as it was on its face, was sustained by a valid judgment. This amounts to holding that Nye, inasmuch as the judgment of the court, in a proper case, could alone finally be a determination of the matter, undertook, by this agreement, to institute and carry on, or, as a defendant, to be subjected to tedious and perhaps expensive litigation, to settle the matter, whether or not said execution be just and legal. If this agreement is to be so construed, then we think it ought to be held void for want of consideration, there being no indemnity provided for the expense of such litigation, and also, because it is contrary to public policy. A sheriff has no right to be wiser than his process; what he is in due form commanded to do, he is to do, and will be protected in doing. To allow that Nye, under the agreement, might have refused to return his process, or to execute it, and, by his own refusal have driven the parties to

an action or suit to determine the question, would be to hold that executions are not the end of the law, but that, on the contrary, sheriffs are at liberty to make them the occasion of suit upon suit, and of delay upon delay.

We think that the most that can be allowed for this agreement, under any circumstances, is a promise, on the part of Nye, to take the full time the execution had to run for its final execution, instead of returning and paying over the money to the clerk immediately, as he had a right to do. By such a delay, entirely justifiable according to the terms of the process, Richards would have opportunity to institute proper proceedings to judicially determine whether "said execution be just and legal." As far as Nye was concerned, it appeared to be, and was, just and legal, and would so continue till the contrary was adjudged by the proper tribunal.

The return day of the execution came; no proceedings to avoid the execution had been instituted by any one; no demand had been made by Richards for the money, and, as to Nye, the question was decided by the process itself that the execution was just and legal; he obeyed its mandate, and conformed also to the agreement with Richards—the execution, by these circumstances, being properly deemed just and legal, he applied the money upon it. He should be deemed to have done his duty, and although the judgment may have been void—may since been been adjudged so, and set aside—the remedy of the appellant is not against Nye, but is against Fanning, the plaintiff, who received the money made on the writ.

The judgment should be affirmed.

P. C. SNIDER et al., Appellants, v. JOHN LEHNHERR et al., Respondents.

CONTRACT—TIME, THE ESSENCE OF, WHEN.—Where, by the express terms of a contract for the sale of real estate, it is apparent that it was understood between the parties that the deferred payments should be promptly made at the times specified in the agreement, a court of equity will treat time as of the essence of the contract.

INJURED PARTY MAY RESCIND CONTRACT.—Where time is of the essence of the contract, the party who suffered by the default of the other may, at his election, and on his own motion, rescind the contract.

SPECIFIC PERFORMANCE, MATTER OF DISCRETION IN A COURT OF EQUITY.—The specific performance of contracts is not decreed in courts of equity as a matter of course; but such relief is only granted in the sound discretion of the court, and when it appears to be equitable under all the circumstances of the case.

APPEAL from Douglas County.

This is a suit in equity, by the representatives of G. W. Snider, deceased, for a specific performance of a contract in writing between said Snider and one of the defendants, John Lehnherr, for the purchase by Snider from Lehnherr of a town lot in Roseburg, Oregon. The purchase-price of the lot was six hundred dollars. The complaint alleges, in substance, that one hundred dollars of the purchase was paid when the contract was made; that Snider, failing to pay the balance within the time agreed on, Lehnherr waived the default, and accepted such balance thereafter; that thereafter Snider died, and John Kelley became administrator upon his estate; that after Snider's death his widow, Elizabeth A. Snider, tendered Lehnherr one hundred dollars, which Lehnherr claimed was still due on the contract, which tender Lehnherr refused, and the property, by successive transfers, passed into the hands of the other respondents, who took with full knowledge of appellant's rights. The separate answers, in substance, deny the alleged waiver, or that the purchase-price has been fully paid, or that Elizabeth A. Snider had authority to make, or did make, the alleged tender. They allege that the defendants in possession were purchasers in good faith, without knowledge of plaintiff's claim; that Snider, at his death, was in default, under the contract, in the sum of one hundred and fifty dollars; that there was no money in the hands of the administrator to pay such balance, but that the estate was insolvent; that defendant Lehnherr, by agreement with the administrator, rescinded the contract, took back the property, and repaid to the administrator all money received by him under the agreement, with interest.

The reply traverses the material allegations of new matter contained in the answers.

F. A. Chenoweth, for Appellants.

Courts of equity grant relief to a far greater extent when real than when personal property is concerned, and where strict performance has not been had. (1 Story Eq. Jur. §§ 746, 747, 748, 771, 775, and note 4.)

A waiver may be established by an express agreement to that effect, or by circumstances from which a waiver may be inferred. Proof of such a waiver by parol is not a violation of the rule prohibiting parol evidence to vary or contradict a written contract. (25 Barb. 189.)

L. F. Mosher and Watson & Lane, for Respondents.

The party not in default has the right to rescind the contract on his own motion, or by consent of the opposite party. (2 Pars. on Con. 677, 680; 3 Lead. Cas. in Eq. 56, 60, 62, 63; Fry on Spec. Per. 420.)

An administrator has the right to make an agreement for the rescission of a contract. (Fry on Spec. Per. 400, *note.*)

The specific performance of contracts in courts of equity is not decreed as a matter of course, but only when circumstances do not render it inequitable. (Story Jur. § 750; Id. §§ 769, 770; 2 Lead. Cas. in Eq. 695; 2 Clark, Iowa, 126; 9 Ohio, 511.)

Stale claims are never enforced in equity. (3 Lead. Cas. in Eq. 80; Fry on Spec. Per. 425.)

A witness will not be allowed to testify to his understanding of a conversation. (*Walker v. Dunspaugh*, 20 N. Y. 170.)

Verbal admissions are to be weighed with great caution. (1 Phillips on Ev. 479; 1 Greenl. on Ev. § 200.)

Notice to a purchaser must be sufficient to put him on inquiry, and must be such that inquiry will, if made, lead to a discovery of the facts. (2 Lead. Cas. in Eq. 152, 153.)

By the Court, BONHAM, C. J.:

Although there is some evidence in this case tending to show that G. W. Snider, in his lifetime, paid the full purchase-price (six hundred dollars) of the lot of land in ques-

tion, yet we think that the preponderance of the testimony sustains the position of respondents, that there was a balance due upon the purchase-price of the lot, at the time of the death of Snider, the purchaser, which has never been paid. Some of the evidence on the part of respondents tends to show that the balance due on the lot was one hundred and fifty dollars, as claimed by them in their answer. Other evidence tends to show that the amount due was something less than one hundred and fifty dollars.

The plea of tender of one hundred dollars to Lehnherr, by Elizabeth A. Snider, the widow of G. W. Snider, made, as is claimed, on behalf of the heirs of G. W. Snider, supports the theory of respondents, that a part of the purchase-price of the lot in question had not been paid.

Although appellants allege in their complaint, and have attempted to prove as a matter of fact, that the full purchase-price of the lot in question was paid in the lifetime of G. W. Snider, the purchaser, yet the plea of tender is regarded in law as an admission of the existence and validity of the debt offered to be paid. (2 Greenl. on Ev. § 600.)

That the plaintiff, Mrs. Elizabeth A. Snider, had authority to make a tender of the balance claimed by Lehnherr to be due on the land, as the agent of the heirs of G. W. Snider, is denied by the respondents, and the testimony fails to show that she had any such authority. She does not appear to have any direct interest in the lot of land in question, in any event, because she is not, under the laws of this State, entitled to be endowed of an equitable interest in lands of which her husband died seized. (*Farnum v. Loomis*, 2 Or. 29.) A tender made by a person not a party in interest, and without authority from the debtor, is not valid.

In contracts for the sale of land, time is not regarded by courts of equity as of the essence of the agreement, unless it clearly appears to have been so intended by the contracting parties. But, by the terms of the agreement for the sale of the lot in question, time is made material, or of the essence of the contract, by the clause therein which declares that, "in case of the failure of the said G. W. Snider to pay the aforesaid sums of money at the dates aforesaid, or

any part thereof, in gold coin of the United States, to the said John Lehnherr, his heirs or assigns, then the said G. W. Snider shall forfeit to the said John Lehnherr the sums already paid, and no deed shall pass for said land."

It is claimed by appellants that Lehnherr waived a strict compliance with the terms of the contract on the part of the heirs of G. W. Snider, by allowing his widow to remain in the possession of the property for a time after his death, and by proposing to her to purchase the interest of the heirs in the lot. But we think the evidence is insufficient to establish a waiver of the rights of Lehnherr, under the contract requiring the punctual payment of the balance of the purchase-price. The mere generosity of Lehnherr, in suffering the widow of Snider to remain for a short time in possession of the property in question, ought not, we think, to be construed into a waiver of the rights of Lehnherr under the contract. It would be but the natural promptings of a humane kindness on the part of Lehnherr not to proceed with unseemly haste to dispossess the widow of Snider; and his conduct in suffering her to remain in possession of the property for a time, and in proposing to her to buy her interest, or the interest of the heirs therein, is only evidence of a desire on the part of Lehnherr to deal not only justly, but generously, with the widow and children of the deceased.

We think, then, under the terms of the contract, and by the preponderance of the evidence on the question of the non-payment of a part of the purchase-price, that John Lehnherr, the obligor in the bond or agreement for the sale of the lot in question, had the right, at his election, to treat the contract as rescinded; and, as a matter of strict legal right, this rescission might have been demanded by Lehnherr, without refunding the part of the purchase-price, which had already been paid by Snider. But the evidence shows that Lehnherr, by an agreement made with John Kelley, the administrator of the estate of G. W. Snider, paid to such administrator five hundred dollars in coin, as the estimated amount of advanced payments on the lot in question, including lawful interest thereon, and that it was

then agreed that, in consideration of this payment, the contract of sale should be delivered up to Lehnherr and canceled. It is claimed by counsel for appellants, that the administrator had no authority in law to make this agreement; but, be this as it may, we do not think it would be equitable, even if it were true that the whole of the purchase price had been paid by Snider in his lifetime, to decree a specific performance of the contract while the estate retained the refunded portion of the purchase-price of the land.

It is a well-settled rule of equity jurisprudence, that the enforcement of specific performance is, to a great extent, left to the sound discretion of the court, and that, independent of strict or technical legal right, a party demanding a decree for specific performance, must show not only a legal right to the relief demanded, but also that such decree would be just, and meet with equity. (Story Eq. Jur., §§ 750, 769, 770; 2 Lead. Cas. in Eq. 695; 2 Clark, Iowa, 126; 9 Ohio, 511.)

The decree of the court below, dismissing plaintiff's bill, is affirmed.

W. P. DOLAN, Respondent, v. O. M. BARNARD, Assessor of Multnomah County, Appellant.

AMENDMENT OF STATUTE MUST BE SET OUT AT LENGTH.—An act revised or section amended, must be set out and published in full, as revised or amended, incorporating all changes made.

DECISION APPROVED.—Decision of this Court, in the case of *The City of Portland v. Stock* (2 Ore. 69), cited and approved.

APPEAL from Multnomah County.

Respondent's property was assessed by the assessor of Multnomah County, at eight thousand two hundred dollars. From this assessment, the appellant, who is the assessor, made a deduction of respondent's indebtedness, to the amount of one thousand dollars, in accordance with the provisions of § 2 of an act of the Legislative Assembly, approved October 29, 1874, which makes it the duty of

assessors to deduct indebtedness within the State to the amount of one thousand dollars, and no more. Respondent claimed an exemption of indebtedness to the amount of eight thousand three hundred dollars, due proof of which indebtedness was made before the assessor, and he instituted this proceeding for a writ of mandamus to compel the appellant to deduct the full amount of such indebtedness. The cause was heard upon the petition of respondent and demurrer by appellant thereto. All question as to the appropriateness of mandamus to raise the question at issue, was waived by stipulation of the parties.

The demurrer was overruled, and a mandamus issued in accordance with the prayer of the petition; whereupon this appeal was taken.

H. Y. Thompson, District Attorney, for Appellant.

Dolph, Bronaugh, Dolph & Simon, for Respondent.

By the Court, BONHAM, C. J.:

It appears probable, from the proceedings in this cause, that the appeal to this Court was taken more for the purpose of securing a final adjudication of the questions involved than with the hope of securing the reversal of the judgment of the court below. We arrive at this conclusion from the nature of the questions involved, and the tenor of the argument of counsel for appellant, and mention the fact in justice to him, as it will be conceded that questions of so much financial importance to the State ought to be finally settled by the judgment of this Court.

Two questions are presented, by this appeal, for the consideration of this Court: First. Is the amendatory act of October 29, 1874, relating to the duties of assessors, in violation of § 22 of Art. 4 of the Constitution of this State? Second. Does the act in question contravene the provisions of § 32 of Art. 1 of the Constitution of this State, wherein it is provided that "all taxation shall be equal and uniform?"

For the purposes of this case, we only deem it necessary to pass upon the first of these propositions.

Section 22 of Art. 4 of our Constitution declares that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

The title of the act of October 29, 1874 (Sess. Laws, 1874, p. 117), reads as follows: "An Act to amend an act, entitled 'An Act to amend an act, entitled an act to amend an act, entitled an act relating to assessors, passed January 26, 1854, and an act amendatory thereof, passed January 26, 1855,' approved October 24, 1864; and an act amendatory thereof, approved December 19, 1865."

Amendment, in legislation, signifies, according to Bouvier, "an alteration or change of something proposed in a bill, or established as law." To amend an act is to alter or change some of its provisions, allowing others to stand as valid and existing law; and the evil in legislation, which § 22 of Art. 4 of our Constitution is directed against, is the practice of introducing into, and intermingling with, the provisions of an act, changes or alterations in some of its provisions, in such a manner as to render it difficult to ascertain, by an inspection of the act amended, to what extent and in what respects the same has been modified by the amendatory act. Hence the legislator is required, by our Constitution, to set out and incorporate in the amendatory act, not only the changes made in the act amended, but the portions thereof not affected by the amendment, in such manner that the syntax and meaning of the law, as amended, will be complete within itself. This is required in order that those who are interested in knowing what the law is may find it out, without prospecting through a labyrinth of words, phrases, and sentences, as found in a long list of acts amendatory of the other, to ascertain what the law is, in force at the time.

The title of the act of October 29, 1874, the validity of which is questioned by this proceeding, very fairly illustrates the complications which must necessarily result from the system of legislation therein adopted. Under the system of legislation here adopted, it would be necessary, in order to ascertain what the law is, regulating the duties of assessors in this State, to hunt up and carefully examine the

long list of acts on that subject, which are named in the title of the act of October 29, 1874, running through a period of twenty years, and, if possible, to collate from each the valid and existing law on that subject.

The act in question is not only amendatory in terms, as expressed in its title, but it is so in its nature and effect, as will readily be perceived by an inspection of the provisions of § 16, of Chapter 57, of the Miscellaneous Laws.

Section 1 of the act of October 29, 1874, undertakes to amend the section last above referred to, by fixing a different time when the assessor shall enter upon the discharge of his official duties, and by declaring that *all* property shall be assessed at its true cash value. Section 2 of the same act undertakes to modify the concluding portion of § 16 of Chapter 57 (Mis. Laws), by declaring that the assessor shall deduct, from the value of the taxable property of the person assessed, indebtedness within the State to the amount of one thousand dollars, and no more, instead of all of such indebtedness.

Instead of the almost incomprehensible title, as found in the act of October 29, 1874, involving an examination of each of the acts referred to, the title should have been: "An Act to amend § 16, of Title 3, of Chapter 57, of the Miscellaneous Laws of Oregon, relating to the duties of Assessors." Then, by setting forth and publishing at full length the entire section, as it would read when amended, the proceeding would be intelligible and complete, and in compliance with the requirements of § 22, of Article 4, of the Constitution. We are all clearly of the opinion that the act of October 29, 1874, is in violation of the provisions of our Constitution, last above referred to, and that this case falls within the rule recognized by this Court in the case of *The City of Portland v. Stock* (2 Or. 69), and that it does not come within any of the exceptions to the rule as recognized in the cases of *Bird v. Wasco Co.* (3 Or. 282); *Fleischner v. Chadwick* (ante, 000); and *Grant Co. v. Sels* (ante, 000.)

The judgment of the court below is affirmed.

DECEMBER TERM, 1875

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

DECEMBER TERM, 1875.

EDWIN CARTWRIGHT, Appellant, v. ALFRED SAVAGE, Respondent.

SHERIFF'S SALE.—RIGHTS OF PURCHASER.—A purchaser at sheriff's sale may enter, use, and occupy the premises sold. Such use must be for such ordinary purposes as the premises can be put to during the time he is in.

ITEM—EFFECT OF REDEMPTION.—If the premises are redeemed, the effect of the sale is terminated, and the premises must be restored to their original condition.

ITEM—GROWING CROPS.—When the judgment debtor redeems, he may recover the value of a crop growing upon the land at the time of the sale, and harvested by the purchaser while in possession.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

A. C. Gibbs and J. C. Cartwright, for Appellant.

The statute does not permit the purchaser to keep rents and profits after his judgment is fully paid.

The effect of the redemption from execution sale, by the judgment debtor, is to terminate the sale and restore the property to its original condition. (Rorer on Judicial Sales,

§ 955; 18 Iowa, 474; 16 Id. 399; 14 Id. 128; 7 Minn. 432; 3 Barb. 70.)

Boise & Willis, for Respondent.

The right of possession carries with it the right to all the rents, issues, and profits. (Civ. Code, § 304; 31 Cal. 294; 13 Id. 516; 8 Id. 595; 17 Id. 597.)

By the Court, McARTHUR, J.:

This is an action brought by Cartwright to recover from Savage a certain sum of money, alleged to be the value of a crop of wheat, grown upon certain lands, which are duly described. It appears from the complaint that the land upon which the said wheat was grown, and from which it was harvested by Savage, was mortgaged by Cartwright to Savage in November, 1871; the mortgage was foreclosed and the land sold to Savage, at sheriff's sale, on July 26, 1873, under the decree of foreclosure. Cartwright was then the legal owner of the land, and entitled, under the statute, to redeem the same, and did redeem before the time allowed by the statute for redemption had expired. After Savage had purchased, and before Cartwright redeemed, he, Savage, cut and took from the land a crop of wheat alleged to have consisted of two thousand and sixty bushels, which was growing on the land at the time he purchased. The value of the said wheat is alleged to have been $2333.45, and this amount Cartwright seeks, in this action, to recover. To this complaint a demurrer was interposed, and, after argument, was sustained. The plaintiff, standing by his complaint, judgment was entered accordingly, and from said judgment this appeal is taken.

The question to be determined is, whether or not the purchaser at a sheriff's sale, from the day of sale until the redemption, is entitled to the crops growing upon the land purchased. Section 304 of the Code regulates the matter of the possession of property sold upon execution issuing out of courts of law, and the same section applies to sales under decrees in equity. The section reads as follows: "The purchaser, from the day of sale until resale, or a re-

demption, and the redemptioner, from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and, in such case, shall be entitled to receive from such tenant the rents, or the value of the use and occupation thereof, during the same period."

It is clear that Savage was entitled to the possession of the property, for it was not in the possession of a tenant holding under an unexpired lease. By virtue of this right of possession, a purchaser at a judicial sale may enter and use and occupy the premises, and thereby preserve the premises intact, and better prevent waste and destruction. If the premises are agricultural lands, the use must be for such ordinary purposes of husbandry as the premises could be put to during the time of his possession. He has no absolute legal right in and to the premises until the confirmation of the sale and the execution of a deed by the sheriff. It is well settled that if redemption be consummated, the effect of the sale is terminated, and the property is restored to its original condition. How can the property be said to be restored to its original condition, if, when redeemed, the judgment debtor is obliged to take it back, denuded of the crops which he himself has sown, and which, but for the accidental circumstance that the sale was made just before harvest, he himself would have reaped? We do not think that the section above quoted can properly be construed to give the purchaser any greater rights in the premises, in case there is no tenant, than where there is a tenant holding under an unexpired lease. In the latter case, all the purchaser could claim would be the rents, or the value of the use and occupation; and in the former case he is entitled to enter into possession, and use and occupy the premises for such purposes as they can ordinarily be put to during the time he is in.

It follows, from this view, that the court below erred in sustaining the demurrer and entering judgment. Therefore, the judgment is reversed, and the cause remanded for further proceedings.

THEODORE ROLFES, Respondent, v. E. F. RUSSEL and GEORGE WOODWARD, Appellants.

PLEADINGS—ACTION FOR DAMAGES FOR FALSE REPRESENTATIONS.—The essential allegations in an action to recover damages for false representations are, that the representations were *false;* that the defendant *knew* them to be false, and that they were made with *intent to defraud the plaintiff.*

VERDICT—SPECIAL FINDINGS OF FACT CONTROL.—Where special findings of fact are inconsistent with the general verdict, the former must control, and judgment be given accordingly.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

W. S. Newberry for Appellant.

Caples & Mulkey, for Respondent.

By the Court, PRIM, J.:

This is an action by a vendee against a vendor, to recover damages for false representations as to the character, quality and boundaries of a certain piece of land sold by appellants to respondent.

It is alleged in the complaint, that defendants represented the westerly line of the land sold, as extending from the bank of the Columbia River back to the hills, and running in a straight line with Rooster Rock and two certain trees, represented as witness trees; that a large quantity of high dry land would be included within said boundaries, and that a piece of improved land, with a portion of an orchard upon it, known as Sweeney's orchard, would be so included; that relying upon said representations, plaintiff bought said land of defendants, for which he paid them two hundred dollars in coin; that plaintiff took possession of said land and made improvements upon it of the value of three hundred dollars; that said representations were, and are, wholly false; that the land conveyed is almost wholly worthless, and is entirely unsuited for the purposes for which it was purchased; that by reason of the premises, the plaintiff has been damaged in the sum of six hundred dollars.

To this complaint the defendants filed a general demurrer, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, but afterwards withdrew the demurrer and interposed an answer denying each and every material allegation contained in the complaint.

The cause having been submitted to a jury, a general verdict was returned in favor of the plaintiff, and assessing his damages at three hundred and fifty dollars; and, under the direction of the court, the jury returned special findings of fact as follows:

1. That defendants falsely represented the land described in the complaint as to the boundaries, and as to the character and quality of the land contained within said boundaries;

2. That they could not agree as to whether defendants *knew* that said representations were false or not at the time made;

3. That plaintiff did rely upon said representations in making said purchase, and was induced by said false representations to make said purchase.

The defendants interposed a motion for judgment against plaintiff for costs and disbursements, notwithstanding the verdict. This motion was based upon two grounds: First, That the facts stated in the complaint were insufficient to constitute a cause of action. Second. That the verdict was insufficient to support a judgment.

This motion was overruled by the court, and a judgment rendered for the plaintiff.

From this judgment the defendants have appealed to this Court.

The motion for judgment, notwithstanding the verdict, we think was well taken, and should have been sustained upon either of the grounds upon which it was based.

It is not pretended that this action is based upon a warranty, but upon false representations, made by defendants to plaintiff, as to the character and quality of the land sold to him, by which he was induced to purchase. In fact, it is the old action on the case for deceit, and sounds in tort. The gist of this class of actions being *fraud*, in order to

maintain them it is necessary to aver and prove: 1. That the representations made were false; 2. That defendants *knew* them to be false; 3. That they were made with intent to defraud; and 4. That plaintiff, relying upon the representations, was induced to enter into the contract. (11 Wend. 374; 25 How. Pr. R. 398; 2 Estee, 422.)

In *Lord v. Goddard* (13 How. 211), the court, in referring to this class of actions, said: "The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly stated his own opinion, *believing* at the time that he stated the *truth*, he is not liable in this form of action, although the representations turned out to be entirely untrue." The court further stated that this question had been settled in England, since the decision in *Haycraft v. Creasy* (2 East, 92), which was made in 1801.

In *Younger v. Covell* (8 John. 23), the court said that it had been well settled "that this action could not be sustained without proving *actual fraud* in the defendant, or an intention to deceive the plaintiff by false representations. (*Holmes v. Clark*, 10 Iowa, 423; 32 Iowa, 367.)

By an examination of the complaint in this case, it will be seen that it does not contain any allegation that the defendants *knew* that the representations, alleged to have been made by them to the plaintiff, were false, or that said representations were made with an intention to deceive or defraud the plaintiff; nor does it contain a general allegation that said representations were fraudulent; but the only allegation contained in the complaint, on this subject, is that said representations "are and were wholly false," and the further allegation that plaintiff, relying upon the representations made, was induced to make the purchase.

Thus it will be seen, that no "scienter" is alleged in the complaint, nor is there any other fact alleged which is equivalent to such an allegation. Then, if we assume that all the facts contained in the complaint are true—as we are bound to do, on this motion— they are insufficient to sustain the action; and it is a well-settled rule of law that this objection is never waived and cannot be cured by verdict.

But it is claimed by counsel, in behalf of respondent, that this action can be maintained if it can be shown that the representations were false in relation to a material matter, notwithstanding the party making such representations had no knowledge that they were false. To sustain this position, we are referred to the case of *Bennett v. Judson* (21 N. Y. 238); *Stone v. Denny* (4 Metcalf, 151); and several other authorities. We have carefully examined several of these cases, and none of them appear to sustain this position, unless the case of *Bennett v. Judson* does so; and that case has in effect been overruled, or at least severely criticized, in several later decisions in the same State. The contrary doctrine is announced in the case of *Oberlander v. Spiegs* (45 N. Y. 175). In that case the referee did not find any actual fraudulent intent on the part of the defendants, or that they were *aware* that their statements were false. The court said: "The question, therefore, is whether a recovery can be sustained in the absence of proof that the defendants believed, or had reason to believe, that the representations were false at the time, and, for that reason, that they were fraudulently made. That such proof is necessary to a recovery, is an elementary principle." (2 Kent, 482, 489; *Atwood v. Small*, C. Clark & Finnelly, House of Lords Cases, 444.) The court further said that "all the confusion that has arisen upon this point has been from a misapplication of a class of cases where the party making the representations of a fact has asserted its existence, *as within his own personal knowledge*, as contradistinguished from belief or opinion. *Bennett v. Judson* (21 N. Y. 238), belonged to this class."

The case of *Bennett v. Judson* is fully commented upon and explained in *Marsh v. Falker* (40 N. Y. 562), and this is one of the cases reviewed, and the principle upon which it was decided pointed out. The court said that "the case of *Bennett v. Judson* (21 N. Y. 238), has been pressed upon the consideration of the court as an authority establishing a different doctrine; and a casual reading of it may tend, in some measure, to support that conclusion. But neither the facts upon which it was decided, nor the opinion given by

the court, will maintain that result. That was an action for damages, sustained by means of fraudulent representations made by the defendant's agent. The representations appear to have been made by the agent upon the faith of certain information derived by him, from a source apparently entitled to confidence and credit. * * * But the agent went on to make the representations in such a manner and in such terms as were calculated to produce the conviction, in the mind of the purchaser, that he had personal knowledge of their truth; that, instead of being the result of information obtained by him, he had actual knowledge, acquired by ocular inspection and personal examination; that he made the statements, on which the purchaser relied, upon what he knew, as distinguished from what he had heard. This was not true, and he knew at the time it was not true; and from those circumstances the intent to deceive the purchaser could very naturally be inferred." The case of *Stone v. Denny* (4 Metcalf, 151), is referred to as sustaining the doctrine in *Bennett v. Judson*, but on examination it will be seen that it does not. The court in that case says: "When a person makes a bare representation, it is necessary to aver and prove that he *knew* the representation to be false, otherwise he is not liable in damages."

The case of *Hazard v. Irwin* (18 Pick. 95), is relied upon by counsel for plaintiff as sustaining *Bennett v. Judson;* but on examination it will be found that it does not. In that case Shaw, C. J., said: "We take it to be a well-settled rule that in the case of a *false* and *fraudulent* representation by a vendor, in matters of fact, within his own knowledge, or which he affirms to be within his own knowledge, not as to matters of opinion, judgment, probability, or expectation; in a matter essentially affecting the interests of the other party; a matter in which he reposes confidence in such affirmation, and is, in fact, deceived by it, the party thus deceived by it may repudiate and rescind the contract, at his election."

In the light of the numerous authorities referred to in this case, we are satisfied that the complaint does not contain facts sufficient to constitute a cause of action, and,

therefore, the motion of defendants for judgment should have been sustained upon this ground.

I will now pass to the consideration of the other branch of the motion, based upon the proposition of the insufficiency of the verdict to sustain the judgment.

The jury having failed to agree upon the question submitted to them, as to whether the defendants *knew* that certain representations made to plaintiff in regard to the character and quality of the land were false, it must be treated as though they had found on that issue in the negative.

For the purposes of this motion, the special findings of fact should be considered as having the same legal effect as if they had been written out in full, as follows: "We find, 1st, that defendants falsely represented the character and quality of land mentioned in the complaint; 2d, that plaintiff relying upon said false representations, was induced to make the purchase; 3d, that defendants had *no knowledge* that said representations were false when made.

Thus it will be seen that the special findings of fact are inconsistent with the general verdict; and under the provision of the statute, they must control the general verdict, and the court should have given judgment accordingly. (Civ. Code, § 213.)

According to the special findings, defendants made false representations upon which plaintiff relied, and by which he was induced to make the purchase; but defendants having *no knowledge* that said representations were false at the time made, could not have intended any fraud upon plaintiff.

As has already been seen, representations must not only be false, but fraudulent, to maintain this action, and the rule applies with equal force to the verdict.

The facts contained in the special findings being insufficient to support the judgment, the motion of defendants for judgment should have been sustained upon this ground.

The court below having committed error in overruling the motion of defendants for judgment, the judgment should be reversed.

THE DOUGLAS COUNTY ROAD COMPANY, Appellant, v. THE COUNTY OF DOUGLAS, and THE COUNTY COURT OF DOUGLAS COUNTY.

WRIT OF REVIEW—WHEN AND IN WHAT MANNER FACTS MAY BE BROUGHT BEFORE THE SUPERIOR COURT.—A motion was made in the County Court for the entry in its records, *nunc pro tunc*, of a contract, alleged to have been made with such court and the county. The motion was denied, and a writ of review was sued out of the Circuit Court to review the proceedings of the County Court upon such motion. *Held*, that with the evidence of the facts, upon which the motion was based, before the Superior Court, the Superior Court can have nothing to do; but the facts themselves ought to be brought before the Superior Court; and this may be done by the Superior Court in its return, or by affidavits and the papers of the moving party uncontradicted and standing as admitted; or they may be inferred from a decision upon issues involving such facts; and in such case, such affidavits and papers, brought before the court by the return of the writ, constitute a part of the record.

DISCRETION — NUNC PRO TUNC ORDER, HOW FAR MATTER OF.—The determination of a court of record as to whether its orders have been correctly entered, is not subject to review; but where the fact that an order was made is undisputed, any person injured by an omission to enter such order may insist, as a matter of right, upon its entry *nunc pro tunc*.

APPEAL from Douglas County.

A motion was made in the County Court of Douglas County, on the 8th of April, 1875, for the entry in the records of the court, *nunc pro tunc*, of a contract alleged to have been made on the 10th of April, 1874, between such court and the appellants, by the terms of which the appellants were to have the right to use and occupy the public highway, extending through the canyon. The motion was based upon affidavits which averred the existence of the alleged contract, the order of the court directing the entry of the same by the clerk, and the neglect of the clerk to make the entry. The motion was denied, whereupon appellants sued out a writ to review the proceedings of the County Court denying the motion. The Circuit Court dismissed the writ upon a hearing thereunder, and rendered judgment against appellants for costs, from which judgment this appeal is taken.

W. W. Thayer and E. C. Bronaugh, for Appellants.

W. R. Willis and Watson & Lane, for Respondents.

By the Court, Shattuck, J.:

The first question in this case is, what is to be deemed the *record* of the County Court that was made, or sought to be made, the subject of review?

The return to the writ of review contains a motion, filed by plaintiff in the County Court on the — day of ——, 1875, and the contract which plaintiff desired to have entered up in the journals, together with the affidavit of J. S. Fitzhugh, former county judge, and the affidavit of John Jackson, former county commissioner, and the order or the decision of the County Court denying the motion. The counsel for the defendants insist that these affidavits constitute no part of the record, and that they cannot be considered upon this writ of review, because they are evidence, and to consider them would be to *review* the facts, not to pronounce the law upon the facts.

The authorities fully sustain the position that the writ of review only brings up the record of the inferior court, and that the superior court upon review tries the cause only by the record, and only as to questions of jurisdiction and as to error in proceeding. It will not on review try questions of fact.

It must be supposed, however, that the inferior court was moved to act, and did act, and make its orders or decisions by some conclusions of fact, or in other words, by some facts which were before it in some form, and which entered into and formed the grounds of its decision. These facts, whatever they may have been, or however found by the inferior court, ought to be before the superior court upon a review, and by those facts alone can the superior court pronounce the law concerning jurisdiction, or error in the court below.

With the evidence upon which the inferior court found the facts, the superior court has nothing to do; but the ultimate facts themselves it must have, otherwise the review will not be the case decided below, but of some other case.

But how shall the superior court know upon what facts

the inferior decided? Manifestly, it should be informed by the return which the inferior court makes to the writ. The inferior court might return the facts specifically set out in its decision, or distinctly and separately found, or the facts may appear by the papers of the moving party presented and filed as the grounds of his motion, and uncontradicted and standing as admitted, or the facts may, perhaps, be inferred from an issue having been made by allegation and denial, and the decision being for the one or the other party upon such issue, a decision in favor of the party alleging a fact, implying that the fact was found as he had alleged it, and contrariwise.

In this case the motion of the plaintiff was apparently based upon the affidavits referred to, and the contract. Those papers do not appear by the record to have been contradicted. Counsel ask us to deem them contradicted, and to presume so far in favor of the decision of the County Court, as to find ourselves the facts to be otherwise than those papers allege them to be, a thing which the County Court itself does not appear by the return to have done. Should we do this, we should override the authorities that counsel cite, and virtually review the facts, not upon testimony, but upon mere presumptions, and since there is no contradiction of these papers, upon presumptions without foundations.

These affidavits, as they appear to have been presented and acted upon in this case, are analogous to affidavits in attachment proceedings and in replevin cases, affidavits for writs of arrest and for orders of publication, though in the form of affidavits they are uncontradicted, and should be regarded as allegations of fact, and as the basis of the order or decision which followed them. Such being the case of the affidavits and papers in question in this case, we hold them to be a part of the record, and properly brought before the Circuit Court by the return to the writ.

This decision does not conflict with any decision of this Court heretofore made upon this subject. It has been frequently held by this Court, that the writ of review only brings up the record of the inferior court, and that the supe-

rior court will not review the facts, but in no case has this Court undertaken to determine specially what the record of the inferior court should contain. It is true his honor, Justice McArthur, in his opinion in the case of *The Canyonville & Galesville Road Co. v. Douglas County*, at the last term, referred to the affidavits of the contestant in that case, as constituting no part of the record; but in that case the affidavits referred to, were presented in the inferior court, in support of an objection to the jurisdiction of the court, and related chiefly to the question of appropriating the franchises of a private corporation, a mode of objection and a proceeding which, in the opinion of his honor, was not contemplated by the statute, and accordingly, the papers relating to the matter, were not properly a part of the record of the case, so that the case he was considering was widely different from the one now before us.

We now come to the consideration of the facts presented by this record. They are in substance these: The County Court of Douglas County, in term time, sitting as a Board for the transaction of county business, on the 10th day of April, 1874, entered into an agreement or contract with the Douglas County Road Company, which was a corporation, organized to construct a wagon road through the "canyon" in Douglas County, concerning the extent, terms and conditions upon which that corporation might appropriate, or use and occupy the public highway running through the same "canyon;" that such agreement was reduced to writing, and signed on behalf of the corporation by its officers, and on behalf of the County Court by the county judge, and attested by the clerk of the court; that the agreement so executed, was delivered by the court to the clerk, to be entered in the journal of the court, and was filed and placed, and still remains among the files of the court, but through the negligence or inadvertence of the clerk, it was not recorded or entered in the journal, so as to be available as evidence on behalf of the corporation. Upon these facts, is the plaintiff entitled to have an entry of this agreement, and of the original proceedings of the court relative thereto,

nunc pro tunc? and is it error in the County Court to refuse to order such entry to be made?

It is contended by the defendants that the making of a *nunc pro tunc* order is a matter of discretion which cannot be reviewed. The authorities cited in support of this proposition (7 Cushing 282, and 8 Cushing 317) do not sustain this position to the extent contended for. These authorities hold that the kind and sufficiency of the proofs on which to proceed in making an order to amend or enter a judgment *nunc pro tunc*, are to be judged of by the court whose record is in question; and one of these cases also holds that courts of record are the exclusive judges of the propriety and necessity of extending or amending their records, which is nothing more than allowing to the court the right to determine the fact whether or not its orders and decisions have been fully and correctly recorded. But all the authorities recognize the propriety of every court's making its records conform strictly to its orders, and express accurately its determinations and judgments; and the power to effectuate this object, by making entries *nunc pro tunc*, has been possessed, and exercised by courts of law and equity from the earliest times; and we think that when a judgment has been actually rendered, or an order made by a court, which is entitled to be entered of record, but which, by neglect of the clerk, is not entered at the time it should be, a party interested in such order or judgment, or affected by it, may insist, and demand, as a matter of right, an entry *nunc pro tunc;* and a refusal of any court or tribunal to make such entry (the facts being undisputed), would be a violation of a leading maxim, "An act of the court shall prejudice no one." (Freeman on Judgments, § 56.)

Another position of counsel for defendants is, that as the failure to enter the agreement was the omission or neglect of the clerk, the proper remedy is by some direct proceeding against the clerk; but the clerk is an officer of the court, and acts by the Court's direction, and the Court should directly control its own officers, in respect to its own orders. It would be a strange situation to place parties in, in courts of justice, to hold that they are at the pleasure or caprice of

the clerk, as to whether they should have the benefit of orders and judgments made or given in their favor, or not. We think an application to the Court was the proper mode of proceeding.

It is also suggested, that the entry of this agreement was only a ministerial act, and not judicial, and consequently, not a subject of review. The mere writing of it in the book is ministerial, but the hearing and determining of the question whether it should be entered *nunc pro tunc,* is judicial in its character, and is a proper subject of review. (Freeman on Judgments § 53.)

For these reasons, we are of opinion that the Circuit Court erred in dismissing the writ of review, and in affirming the decision of the County Court, and the judgment should be reversed; and under § 581 of the Code, the Circuit Court should exercise its mandatory power, and remand the case to the County Court, with instructions to proceed according to this opinion.

MARY E. BARRETT, Appellant, v. CHARLES BARRETT and XARIFA J. FAILING, Respondents.

DIVORCE — CONVEYANCE MADE AFTER CAUSE OF DIVORCE SUIT MAY BE ATTACKED.—The right of a divorced wife, at whose suit the divorce was granted, to question the validity of a conveyance of real property by the husband, dates from the time when the decree of divorce was entered; and such decree, when entered, arms the wife with the right to question the validity of any conveyance of real property, made by the husband after the cause of the suit of divorce arose.

PARENT AND CHILD — WHEN CONTRACT TO PAY FOR SERVICES NOT IMPLIED.— The law will not imply an agreement on the part of a parent to pay for the ordinary services, as housekeeper, of his daughter, who is living in his family.

APPEAL from Multnomah County.

The complaint alleges that on the 25th of September, 1866, the plaintiff was the wife of the defendant, Charles Barrett; that the former was then a resident of San Francisco, California, and the latter of Portland, Oregon; that on that day, plaintiff began a suit for divorce against said

defendant, in the District Court of the State of California for the Fifteenth Judicial District; that said defendant Barrett filed his answer therein on the 5th of June, 1867; that on the 13th of April, 1867, said defendant Barrett was ordered, by said court, forthwith to pay, as plaintiff's counsel fees in said suit, the sum of three hundred dollars, and one hundred and twenty-five dollars for her alimony, and to thereafter pay, monthly, on the thirteenth of each month, during the pendency of the suit, or until the further order of the court, one hundred and twenty-five dollars for such alimony; that on the 18th of April, 1870, plaintiff obtained a decree of divorce, decreeing that defendant Barrett should pay five thousand five hundred and four dollars and thirty cents, in gold coin, for alimony and counsel fees then due, and the additional sum of one hundred and twenty-five dollars per month, alimony, so long as plaintiff remained single; that on the 8th of December, 1870, she brought an action in the Circuit Court of this State for Multnomah County, on this decree, and on the 18th of February, 1871, recovered judgment in said action against said Charles Barrett for five thousand nine hundred and twenty-one dollars and thirty cents in coin, and for forty-six dollars and thirty cents, costs; that on the 14th of March, 1871, execution was issued on this judgment, which was returned unsatisfied, and that no part of said judgment has been paid; that at the time of the commencement of the divorce suit, and for a long time thereafter, said Charles Barrett was the owner in fee of the west half of lots 7 and 8, in block 63, in the city of Portland, Oregon, of the value of about five thousand dollars; that on or about the 4th of February, 1868, said Barrett, combining and confederating with the defendant, Xarifa Jane Failing, then Xarifa Jane Barrett, who is his daughter, and was residing with him, with intent to defraud the plaintiff of her demand against him, fraudulently made a pretended conveyance of said real property to said Xarifa Jane, by a deed of that date; that said conveyance was without any consideration; that the said property is held by Xarifa Jane for the use and benefit of the said Charles Barrett, upon secret trust between them, solely

to defraud plaintiff, and that such transfer was not followed by an immediate and continued change of possession.

Each defendant answered separately, and each denies all of the allegations of the complaint which tend to show that the conveyance of Charles Barrett to Xarifa Jane was fraudulent, or that said Charles has any interest in the property, or that it is held in trust for him; and each alleges that such conveyance was for a full and valuable consideration, which was paid.

W. W. Thayer, W. H. Effinger, and Page & Yocum, for Appellant.

William Strong and John Catlin, for Respondents.

By the Court, BURNETT, J.:

The first question presented by the appeal is, whether the plaintiff is in a situation to inquire into the validity of the deed made by Charles Barrett to his daughter Xarifa Jane, on the 4th of February, 1868. Was she a creditor, or did she have a lawful suit or demand against said Charles Barrett, at that time, within the meaning of § 51, Chapter 6 of Miscellaneous Laws? It was conceded in the argument, that any woman who has obtained a divorce from her husband may question the validity of any conveyance made by him after the cause of suit arose; but it was insisted that the right of suit must have existed in this State at the time the deed complained of was made, or the plaintiff cannot be benefited thereby; and, as this suit for divorce between the plaintiff and Charles Barrett was pending in another State at the time the deed in question was made, that she could not have had a right of suit here, and is therefore debarred from the right of questioning the validity of the deed. It seems from the authorities that the right of a woman to question a conveyance, made by her husband under the circumstances mentioned, can never arise until the decree of divorce, which establishes the fact that she had a cause of suit against her husband, and fixes the time when the cause of suit arose, is made; and whenever that decree is made, by a court of competent jurisdiction, it arms the injured

wife with power to call in question the validity of any conveyance made by her husband after the cause of suit arose. It will not be claimed that, if Barrett had become indebted in San Francisco to the amount of five thousand dollars, and had given his note, payable in five years, he could the next year have made a conveyance that could not be inquired into by his California creditor, although such creditor would have no right of action, either in California or Oregon, for four years; but when he once obtained a judgment on his note, he could then go back and inquire into every conveyance made by his debtor after the debt was contracted, and, if he saw fit to sue him in California, and then sue the judgment over here, it would make no difference in its effect when once obtained.

In the case of *Bouslough v. Bouslough* (68 Penn. S. R. 499), treating upon this question, the court uses this language: "There is no reason why a wife, whose husband has deserted her and refused to perform the duty of maintenance, or who by cruel treatment has compelled her to leave his house and commence proceedings for a divorce and maintenance, should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. So long as she is receiving maintenance, and is under his wing, as it were, she is bound by his acts as to his personal estate; but when she is compelled to become a suitor for her rights, her relation becomes adverse and that of a creditor in fact, and she is not to be balked of her dues by his fraud. But it is argued that this cannot exist until a decree be made for the alimony. But why is her case before the decree not as much within the spirit and intent of the statute of the 13th Elizabeth as that of a subsequent creditor, who was intended to be affected by a deed made before his debt was contracted, but in view of it? It is not doubted that a voluntary conveyance, made in contemplation of future debts to be contracted, and with a view to defeat them, is within the spirit of that statute, though not within its letter."

In the case of *Livermore v. Boutelle & Tenny* (11 Gray, 217), it is held that a conveyance of real estate by a husband after he has committed adultery, though before his wife

has filed a libel for divorce, is void, if made to prevent her from recovering such alimony as the court may decree her.

These cases establish the doctrine that the right of the wife to question conveyances made by the husband dates from the time the cause of suit arose, and not from the date of the decree; and, in fact, as has been stated, it was conceded in the argument that such was the law. But it was claimed by counsel for the respondent that in this case the appellant cannot question any conveyance made by Charles Barrett prior to the 18th of April, 1870, that being the date of the decree of divorce and for alimony; and to sustain this position the cases of *Nary v. Nary* (41 Vermont, 180), and *Barber v. Barber* (21 How. U. S. 582), are cited. In the case of *Nary v. Nary* it appears that the plaintiff sued her husband for a divorce, and pending the suit obtained an order requiring him to pay her one hundred dollars as temporary alimony; that within two weeks after this order was entered, and before any payment was made and while the suit was pending, the husband died; that thereafter she presented this order for temporary alimony as a claim against his estate, and it was disallowed, on the ground that the death of the husband discontinued the suit for divorce, and thereby the order for temporary alimony became inoperative, especially as no steps had been taken to carry the order into effect prior to his death. The courts have the power to require the defendant in a divorce suit, in proper cases, to support the plaintiff and contribute to the expenses of the litigation during the pendency thereof, though it may establish the fact that the plaintiff is not entitled to relief and has no claim upon the defendant or his property. And if the plaintiff here had obtained nothing more than an order for temporary alimony she would occupy an entirely different position to what she does with a decree of divorce in her favor, for the sum of $5,504 alimony. In the case in 21st Howard the court held that where a woman had obtained a divorce from bed and board of the husband, under the New York statute, that though the decree did not sever the marital relation, she could afterwards sue her

husband in Wisconsin, on that judgment, for the amount of the alimony.

Having reached the conclusion that the plaintiff has a right to inquire into the conveyance made by Charles Barrett to Xarifa Jane Barrett on the 4th of February, 1868, the next and more difficult question is, whether that conveyance is fraudulent. Charles Barrett and Xarifa J. both testify that the conveyance in question was *bona fide* and for full value; but when we consider that when Charles Barrett is questioned directly on that subject his answers are evasive, indefinite and entirely unsatisfactory, we are forced to the conclusion that so far as he is concerned, his principal object in making the conveyance to his daughter was to place the property beyond the reach of any judgment for alimony his wife might obtain against him in the suits then pending in California. So far as Xarifa Jane is connected with the transaction, it would appear that she had full knowledge of the suit pending against her father, but that her principal object was to secure herself for services rendered to her father prior to that time. Hence, we conclude that while this conveyance is not absolutely void as against the plaintiff, yet the suspicious circumstances as to the adequacy of the consideration and fairness of the transaction require that it should be set aside so far as it is voluntary; and this leads us to inquire what amount was *bona fide* due from Charles Barrett to Xarifa Jane, on the 4th of February, 1868. The court below found that "the said defendant Xarifa J., on the said 4th day of February, 1868, had a *bona fide* lawful claim and demand against said defendant Charles Barrett for the sum of three thousand seven hundred and sixty-five dollars, which she was then entitled to receive and recover of him in an action at law." We do not think this view of the case is correct. In the first place, the referee finds that there was no express contract between Charles Barrett and Xarifa for any kind of services prior to November 3d, 1866, and then only for services as housekeeper, at thirty dollars per month; but he allows her for services as housekeeper, on an implied contract, from June 3d, 1863. This we think was error. If she was entitled to services as

housekeeper, it must be upon an express contract. The law will not imply an agreement on the part of a parent to pay his daughter, who is living in his family, wages for ordinary services such as housekeeping. (15 Barb. 444; 33 N. H. 581.)

It is claimed by counsel for respondent that the evidence shows that there was an express contract on the part of Charles Barrett to pay Xarifa J. wages as housekeeper, from the time she arrived in June, 1863. It is true that both the defendants so testify; but these statements, viewed in the light of Xarifa's voluntary admissions, made long after that time, that she was working for her board and clothes, and the subsequent actions of both defendants, fully warranted the referee in finding that no such agreement had been made. The testimony of Charles Barrett, in connection with the ledger account introduced by him, tended to show that there was an express agreement to pay Xarifa thirty dollars per month wages as a housekeeper, from December 3, 1866, and the referee was justified in so finding. And this amount would appear from the account to have been paid. The referee further found that Xarifa had rendered services for Charles Barrett from June 3, 1864, to February 4, 1868, for which there was an implied contract on the part of Charles Barrett to pay, and that they were reasonably worth the sum of thirty dollars per month. We think this finding was correct, as the evidence tends to show that this employment was not in the ordinary course of services from child to parent in the household duties of the parent's family; and further, that they were rendered by Xarifa with the expectation that she would receive pay. On the whole evidence we are of the opinion that two thousand two hundred dollars is the full amount of the claim that Xarifa had against Charles Barrett on the 4th of February, 1868, and that the consideration expressed in the deed approximates the correct amount; and this view of the case is strengthened by the testimony of Charles Barrett as well as by that of Judge Strong. In answer to Interrogatory 44, as to what the true consideration for the deed was, Barrett says: "She paid me fifty

dollars in this way, she lent me fifty dollars on interest previous to this; that fifty dollars and interest, whatever it was, I do not remember, was turned over as part payment; the remainder was paid by salary, *calculated up to that date,* due to her for services." In answer to Interrogatory 45, as to how much salary was due her at the time of making the deed, he says: "I don't remember, but it was as much or more than the property came to."

Judge Strong says, in answer to Interrogatory 4, in his examination: "From what was stated to me by the parties at the time the deed was executed, the consideration was the compensation due Xarifa from Charles Barrett for services rendered him by her for some years previously. I know of no other consideration." Allowing Xarifa Jane two hundred and eighty-five dollars, for the balance due her on the express contract for services as housekeeper, and two thousand two hundred dollars, on an implied contract for services in the store, the consideration to the amount of two thousand four hundred and eighty-five dollars should be held good. Taking the property to be of the value of four thousand five hundred dollars, at the time it was conveyed, it would follow that the plaintiff herein would have a lien for the sum of two thousand and fifteen dollars and ten per cent. interest thereon from the 18th of February, 1871, the time her judgment was obtained in this State.

The decree of the court below will be modified in accordance with this opinion.

B. GOLDSMTH, Appellant, v. A. H. BROWN, State Treasurer, Respondent.

ACT OF 1874, RELATING TO LOCK BONDS, UNCONSTITUTIONAL.—The act to authorize the State treasurer to convert currency funds into coin in certain cases, and also to pay off the Lock bonds, approved October 26, 1874, is unconstitutional, for the reason that it impairs the obligation of the contract, entered into between the State and the Willamette Lock and Canal Company by act of the Legislative Assembly, approved October 21, 1870.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

W. H. Effinger, for Appellant.

By the Court, McARTHUR, J.:

This case turns upon the construction of an act of the Legislative Assembly of this State, entitled "An Act to appropriate funds for the construction of a steamboat canal at the Willamette Falls, approved October 21, 1870. As between the State of Oregon and the Willamette Falls Canal and Lock Company, the said act is a contract, and the rights of the parties are to be determined by a proper construction of that contract. By said act, the State pledged its faith that upon the completion of the canal and locks at the Willamette Falls, in the manner set forth therein, it would issue certain bonds, establish a fund out of which those bonds should be paid in ten years, or sooner, and that the funds should be so administered as to make them available at the earliest period for the payment of the said bonds. In pursuance of the provisions of the said contract, the Willamette Falls Canal and Lock Company performed and discharged all the obligations resting upon it. From time to time the fund, out of which payment of the aforesaid bonds was agreed to be made, has been increasing, until there is now on hand forty or fifty thousand dollars. Payment is withheld, and the State treasurer refuses to pay the said bonds in any other manner than that prescribed by an act of the Legislative Assembly, entitled "An Act to authorize the state treasurer to convert currency funds into coin in certain cases, and also to pay off the Lock bonds," approved October 20, 1874. By this act, the treasurer is directed to accept bids from the holders of said bonds for their redemption, but in no case to pay more than ninety-five per cent. of the par value thereof; and, in case no bids for the redemption of said bonds are made, then he is authorized and directed to loan out the fund in the same manner in which the school fund is loaned.

The act of 1870 is a contract, and the act of 1874, in our opinion, seriously impairs the obligations of that contract.

The Constitution prohibits the passage of laws impairing the obligations of contracts; and the clear and comprehensive views of the Supreme Court of the United States, in the *Dartmouth College Case* (4 Wheaton, 518), affords the best and safest guide in all cases in which that provision of the fundamental law is an element. Applying the principles of that case to the one in hand, we can reach no other conclusion than that the act of 1874 is unconstitutional.

Under the act of 1870, the faith of the State was pledged that the funds should be so managed as to make them available for the payment of the bonds in question at the earliest period; and we think the evident meaning of that act is, that the bonds be discharged as fast as there is money in the treasury available for discharging them. We, therefore, think that a writ of mandamus should issue commanding the treasurer to pay said bonds.

Decree reversed.

BENJAMIN E. SNIPES, Appellant, v. JOSEPH BEEZLEY, Respondent.

JUDGMENT — WHEN SATISFIED, WHAT FURTHER PROCEEDINGS CAN BE HAD.— When a judgment has been satisfied, the clerk has no authority to make a further entry of judgment in the case, or to issue execution, until such satisfaction is canceled or set aside in a proper proceeding, in the court where the judgment was rendered.

APPEAL from Wasco County.

The facts are stated in the opinion of the Court.

Thayer & Williams, for Appellant.

N. H. Gates, for Respondent.

By the Court, BURNETT, J.:

On the 28th day of November, 1874, the appellant filed a complaint in equity, in the court below, praying for an injunction restraining the sale of certain of his real property upon an execution issued by the clerk of the Circuit Court for Wasco County, for the collection of certain disbursements taxed by said clerk in favor of the respondent herein

and against the appellant. The respondent interposed a demurrer to said complaint, upon the ground that it did not state facts sufficient to constitute a cause of suit. The cause came on for hearing upon said demurrer, at the June term, 1875, of the Circuit Court, and, after argument of counsel for the respective parties, the court sustained the demurrer and dismissed the complaint, from which ruling the case comes into this Court.

It appears from the complaint that the respondent, on the 18th day of June, 1873, recovered a judgment, in the Circuit Court for Wasco County, against the appellant, for the sum of twenty-one dollars and seventy-five cents and costs and disbursements to be taxed; that on the 28th day of the same month, judgment was entered, and docketed for twenty-one dollars and seventy-five cents, and for twenty-three dollars and fifty-three cents costs; that on the 8th day of July, 1873, the appellant paid said judgment and costs in full and the respondent receipted the docket; that on the 21st day of November, 1873, an additional cost bill was filed and another entry made, in the lien docket of judgment against the appellant, for the same, as follows: "Sixty-eight dollars and forty-eight cents additional cost bill, filed November 21, 1873;" that said additional cost bill was filed and such entry made in vacation without any order of the court, and that the execution aforesaid was issued upon such entry and to collect said sum. The Code provides (Civ. Code § 545) that "the costs and disbursements, which a party is entitled to recover from another, may be collected by the execution to enforce the judgment or decree as a part thereof." It would seem to be fairly inferred that if the judgment be already satisfied, no execution can legally issue thereon. It appears that the judgment obtained by the respondent, against the appellant, on the 28th day of June, 1873, was fully paid and satisfied, and receipted by the respondent on the 8th day of the following month. If there had been no costs taxed at that time—the five days, in which the prevailing party is allowed to tax his costs and disbursements, having expired, without notice—the presumption would be that he had waived his right to tax

them. But more than half of the amount paid by the appellant was for costs. More than four months after the payment of said judgment and costs, the respondent filed an additional cost bill in said cause, and the clerk, without any authority of law, undertook to enter a judgment in the lien docket against the appellant for the amount of the additional bill and to issue an execution thereon.

It was admitted on the argument of the case, that the costs were only an incident of the judgment. If so, when the judgment was fully paid and satisfied, there was no authority to issue an execution thereon until that satisfaction was set aside or canceled, in a proper proceeding in the court where it was entered. In the case of *Schemerhorn v. Van Voast* (5 How. Pr. R. 480), in which a motion was made to readjust the costs, it was said: "This motion may be regarded as a motion for a new trial, as respects the costs; but a new trial is not to be granted because the party who ask for it neglected to bring forward all the evidence in his power to support his claim." * * * * Again, suppose a jury erroneously reject one half the items of the plaintiff's account, he enters up judgment on the verdict and receives payment, it will then be too late for him to move for a new trial. He should have done it before he entered judgment on the verdict. So in this case, after the plaintiff knew how the clerk had adjusted the costs, if he then intended to move to have the costs readjusted, he should not have entered judgment for them as adjusted, and received payment of the judgment."

In the case at bar, if the respondent had intended to object to the taxation of costs made by the clerk on the 28th day of June, 1873, he should not have accepted the amount paid, and satisfied the judgment. By so doing, he virtually admitted that the amount of the judgment, as well as the amount of the costs taxed, was correct, and placed it beyond the power of the clerk to issue an execution upon that judgment.

The judgment of the court below must be reversed, and the cause remanded.

MARTHA A. ESPY, Respondent, v. JAMES D. FENTON, Appellant.

USE AND OCCUPATION —RELATION OF LANDLORD AND TENANT MUST BE SHOWN.— In an action for the use and occupation of land, a contract, express or implied, creating the relation of landlord and tenant, must be shown; where such relation does not exist, the possession is hostile, and the owner's remedy is by ejectment and for damages.

INSTRUCTIONS — MUST CONFORM TO THE ISSUES.—The court may refuse to give an instruction which is not applicable to the case presented by the party asking it.

APPEAL from Yamhill County.

This is an action by the respondent, a married woman, to recover five hundred dollars for the use and occupation of a farm owned by her in her own right, which farm, it is alleged in the complaint, appellant occupied with the permission of the respondent, and with the knowledge that it was her separate property.

The allegations in the complaint are denied in the answer, and for a separate answer, appellant alleges that he leased the premises in question, by an express contract in writing, from John H. Epsy, the respondent's husband, executed on the part of said Espy by one Snow, who was the attorney in fact of both John H. Epsy and Martha A., with authority to execute such lease on the part of both. The answer further alleges that before, at, and after the execution of such lease, Martha A. permitted John H. to rent the farm and receive the rents and profits thereof to his own use; that on the 16th of October, 1874, appellant paid, upon an execution against John H. Epsy, in proceedings of garnishment against appellant, the sum of two hundred and sixty-one dollars and sixty cents, out of money due on the said contract of leasing.

The cause was tried before a jury, and a verdict and judgment had against appellant for three hundred and fifty dollars and seventy-five cents, from which judgment this appeal is taken.

The errors relied upon in the appeal, and other facts, are stated in the opinion of the Court.

R. P. Boise, H. Hurley and W. D. Fenton, for Appellant.

Ramsey & McCain, for Respondent.

By the Court, PRIM, J.:

This is an action in the nature of assumpsit, for the use and occupation of a certain farm owned by plaintiff in her own right.

In order to maintain this action, a contract either express or implied must be shown, creating the relation of landlord and tenant between the parties; and the pleadings in the case, as well as the instructions, appear to be based upon this theory. It appears, however, that the defendant took exceptions to the instructions on this point. We have examined these instructions, and when considered together as a whole, they are to the effect that, although no express contract may have been entered into between the parties to this action creating the relation of landlord and tenant, such relation might be implied or inferred from the facts and circumstances surrounding the parties. The objection taken to these instructions, we think, was not well taken, and was properly overruled by the court.

The defendant, by his counsel, asked the court to give the following instructions: "If the defendant entered as the tenant of another, the real owner (not the tenant's landlord) cannot maintain assumpsit, but must sue in ejectment and for damages." The instruction having been refused by the court, the ruling was excepted to by defendant.

By this instruction, the court was asked in effect to instruct the jury, that if defendant went into possession as the tenant of the husband, the plaintiff, although the real owner of the premises leased, could not maintain this form of action, but would be compelled to sue in ejectment and for damages. The instruction is based upon the theory that defendant, having gone into possession of the premises in question under a lease from the husband, such possession should be treated as hostile and adverse to that of plaintiff, and therefore precludes the existence of any such relation as landlord and tenant. As has already been

stated, this action cannot be maintained unless that relation can be shown to exist either expressly or by implication. If defendant had based his answer upon this theory, the instruction asked would have been applicable, and should have been given; but upon an examination of the answer, it will be seen that the theory adopted is directly the reverse of the one involved in the instruction. The theory adopted is, that plaintiff, being the owner of the premises in her own right, could either rent them herself independently of her husband, or authorize him to rent them for his own use and benefit, and that plaintiff, having adopted the latter course, and defendant having paid the rent under such an arrangement, she could not ignore what her husband had done under her authority and by her permission, and compel defendant to pay the rent directly to her. This was the defense tendered in the answer of defendant, and inasmuch as it is wholly inconsistent with the theory that the possession of defendant was adverse and hostile to the title of plaintiff, it would have been error in the court to have given the instruction asked for.

The court instructed the jury as follows: "If a party should enter wrongfully into the possession of the lands of another, the owner might waive the tort and maintain assumpsit for the reasonable value of the use and occupation, if the real owner acquiesced in the possession."

Upon this question there appears to be a conflict of authority; but we do not deem it necessary to pass upon the question in this case. If the instruction does not contain a correct statement of the law, we are unable to see how it could have operated to the injury of defendant. It was a mere statement of a hypothetical case, not applicable to any state of facts developed in the case, and could not have misled the jury.

There being no substantial error in the record, the judgment is affirmed.

J. A. McWHIRTER et al., Appellants, v. E. C. BRAINARD et al., Respondents.

DECISION APPROVED — TITLE OF ACT, WHAT MUST EXPRESS.— The case of *Simpson v. Bailey* (3 Or. 515), approved, wherein it is held that the object of Art. 4, § 20 of the Constitution, which provides that every act shall embrace but one subject, etc., is to prevent matters, wholly foreign and disconnected from the subject expressed in the title, from being inserted in the body of the act; but that such section does not require that all subjects, properly connected with the main subject, shall be so expressed.

EMERGENCY.—While the Legislature cannot create an emergency, it may declare that certain existing facts create one, so as to give an act effect from its passage and approval by the Governor.

COUNTY SEAT — ACT OF 1872, SUBMITTING THE LOCATION OF, TO A VOTE, CONSTITUTIONAL.— The Legislature of 1872 enacted a law providing that the question of the location of a county seat for Union County should be submitted to a vote of the people of the county, at the ensuing Presidential election; specifying five points to be voted for, and restricting the designation to the points so specified; that if neither of such points received a majority of the votes cast, the two highest should be voted for at the next general election, and providing that the point finally receiving such majority should be the county seat. *Held*, that the act does not delegate the power to locate but exercises it; and that the submission to the voters, authorized in the act, merely provides a particular mode by which the location shall take effect.

CONTESTING ELECTION IN LOCATION OF COUNTY SEAT — CANNOT GO BEHIND CANVASS OF VOTES BY PROCEEDINGS IN EQUITY.—Upon the submission of the question of the location of a county seat to an election, the question of fact, as to whether the canvass of the vote was correct, and as to what the true vote was, and subordinate questions, cannot be tried in equity. The proper remedy to try the qualification of voters, the legality of the conduct of the judges, or of the canvass, is by mandamus and not by injunction.

APPEAL from Union County.

In accordance with provisions of an act of the Legislature of 1872, the question of the location of a county seat for Union County, Oregon, was submitted to the voters of said county, at the Presidential election of that year. The places to be voted for at such election were restricted by the act to La Grande, Union, Cove, Oro Dell, and Summerville. Neither of these points received a majority of all the votes cast; whereupon, as provided in the act, the question was submitted at the regular election of 1874, upon

the two points having the greatest number of votes in the November election. These points were La Grande and Union. Upon a canvass of the vote of 1874, Union was declared to have received a majority of all the votes case, and proclamation was duly made to that effect. Thereafter, an injunction was prayed for by appellants to restrain respondents, who are county officers of Union County, from removing their offices from La Grande to Union. Upon the final hearing the injunction was denied, and judgment rendered for respondents. Thereupon the appellants brought this appeal.

M. Baker and W. W. Thayer, for Appellants.

The canvass of the judges and proclamation of the Governor were not conclusive as to the result of the election. Appellants have the right to go behind all that, and ascertain what the vote in fact was. (*Smith v. Pease*, 27 N. Y. 45.)

Appellants had a right to have tried the other fact, as to whether or not each legal voter in the county was asked by the judges of election his choice for the several points named in the act. (Session Laws, 1872, p. 29.)

The subject-matter of the act in question is not expressed in the title, as required by the Constitution. (Art. 4, § 20, Const.; *Powers v. Larabee*, 1 Wis. 200; *State v. Silver*, 14 Minn. 524; 9 Nev. 227.)

The Legislature cannot create the emergency in the act itself; but the emergency, to make a law take effect by virtue thereof, must be one existing independent of the act. (Art. 4, § 28, Const.)

The Legislature cannot delegate to the people of any county the power to locate a county seat. (Art. 1, § 21, Const.; Art. 4, § 1, Id.; *Barto v. Himrod*, 4 Seld. 483; *Knowlton v. Williams*, 5 Wis. 308; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, Id. 122; *Geebrick v. The State*, 5 Iowa, 491; *Parker v. Commonwealth*, 6 Penn. 507; *Maize v. The State*, 4 Ind. 342; *Cathren v. Lean*, 9 Wis. 279; *Ex parte Wall*, 48 Cal. 279; Coolie's Con. Lim. 116.)

The question was not submitted to the voters of the county exclusively, but to all those who could legally vote

in the county for Presidential electors, which included every voter in the State. (5 Wis. 308.)

The act is incomplete. Its becoming a law depends upon the act of the citizens of the county. (§ 3 of the act.)

The taking effect of the law depends upon the act of the Governor. (15 Barb. 112; Id. 122.)

The effect of the act is to authorize the citizens of the county to repeal the prior act of 1864, locating the county seat at La Grande. (5 Iowa, 491; 23 Barb. 34.)

Mallory & Shaw, for Respondents.

The canvass by the clerk and the proclamation of the Governor are conclusive. When the question arises collaterally, the decision of the canvassers cannot be questioned, but is presumed correct. (Cooley, Const. Law, 624.)

The act in question is not a delegation of authority to locate a county seat, and is constitutional. (Art 1, Const. § 21; Art. 4, Id., §§ 20, 28; *Simpson v. Bailey*, 3 Or. 515; *Moore v. Packwood et al.*, ante, 000.)

The admission of illegal votes at an election will not necessarily defeat the election. It should appear that the result would have been different had the alleged illegal votes been excluded. (Cooley, Const. Lim. 620.)

To authorize an injunction, it must appear that the applicant has acted promptly, and has not impliedly authorized what he now objects to. (U. S. Eq. Dig. § 17, p. 65.)

Injunction is not the proper remedy in a case like this. The plaintiffs should have availed themselves of their remedy at law to contest the election. (Id. §§ 25, 32.)

By the Court, SHUTTUCK, J.:

The objections to the decree of the court below are embraced in two propositions:

1st. That the pleadings presented issues of fact that ought to have been, but were not, tried.

2d. That the act of the Legislative Assembly in question was unconstitutional and void.

These propositions may be considered in the inverse order.

On the second proposition, the appellants submit that the subject matter of said act is not expressed in the title, as required by §. 20, Art. 4 of the State Constitution. This point was directly before this Court at the September Term, 1869, in the case of *Simpson et al. v. Bailey et al.*, relating to the county seat of Umatilla County.

This case, so far as this point is involved, is so like that of *Simpson v. Bailey*, that we deem it settled by the decision in the latter case, and do not find cause to disturb the ruling; consequently, this objection by the appellant is not well taken.

Again, the appellants object that the Legislature cannot create the emergency in the act itself; but allege that the emergency, to make a law take effect by virtue thereof, must be one existing independent of the act.

We do not think this act is open to the objection here made. The Legislature does not pretend to create the emergency; it only declares that certain existing facts are an emergency. The object of the Legislative Assembly appears to have been to submit this question of location of the county seat to the people of Union County, at the Presidential election in 1872, in order to save the voters the time and expense of a special election; and the facts were, that this Presidential election was to be held before the act could take effect under the ninety-day limit of the Constitution, and that a special election would cause a great expenditure of time and money. This the Legislature decided to be an emergency authorizing it to put the act into force at once; and we think the act, in this particular, is within both the letter and spirit of § 28 of Art. 4 of the Constitution. This objection is not well taken.

Another objection is, that the Legislature cannot delegate to the people of any county the power to locate a county seat, and a large number of authorities are cited as sustaining the point made by appellants. This as a general proposition is true, but the act in question does not, either in terms or effect, delegate to the people of Union County the power to make a law. It enacts in substance (although the terms employed are not the best that could have been chosen), that one of five places shall be the county seat of

Union County, when the legal voters of the county shall have declared, in a certain mode, which one they prefer; and that the place chosen by the majority of voters shall be declared the county seat. The power of location is exercised by the Legislative Assembly, but it takes effect in a particular mode, or not at all, by a vote of the electors interested. This is within the provisions of § 21 of Art. 1 of the Constitution of Oregon. (*Simpson v. Bailey*, 3 Or. 517; *Moore v. Packwood*, ante, 000; *People v. Reynolds*, 5 Gilman, 1.)

The appellants also contend that the act is incomplete and inoperative, because they say its becoming a law depended upon the act of the citizens of Union County; that the second election or vote on the question, was dependent on the will of the voters of the State, and not on the will of the Legislature, and that by the terms of the act the citizens are authorized to repeal the law of 1864, which located the county seat at La Grande.

All these objections are answered by what has been already said, and by the authorities cited; but it is proper to add that we think the act in question, in effect, locates the county seat at such place as the legal voters of the county shall, by a particular mode prescribed by the act, designate. The power of designation is not left by the act to the arbitrary and uncontrolled choice of the people, but they are required to limit their suffrages, in the first instance, to five places: *Oro Dell, La Grande, Summerville, Cove,* and *Union.* If upon the first vote, no one place shall have a majority of all the votes cast, then another vote shall be taken at the next general election; but upon the second vote, there are to be only two candidates—"the two points receiving the greatest number of votes cast" are to be voted for, and the one of these two which receives the greater number of votes shall be declared the county seat. The mode of canvassing the vote, and the proclamation of the Governor, are substantially only modes of ascertaining and publishing the result of the vote. This Court held at the December Term, 1874, in *Moore v. Packwood* (ante, 325), that an act which provides that a term of court should be held at such time as the court should appoint, by an order

entered in the journal, etc., and authorizing the court to appoint the time, was a valid act. This act authorizes the removal and re-location of the county seat, but leaves or refers the designation of the time and place of such removal or re-location to the electors of the county. In principle, this act is on the same footing as the one considered by the court in the case of *Moore v. Packwood.*

It is objected, however, that the act does not, in terms, submit the question of re-location to the electors of the county, but to the legal voters at a Presidential election. As we have before said, the phraseology of this act is not the clearest or the best chosen; but we think that a fair construction of the terms employed, can leave no doubt of the intention to submit the question to the legal voters of Union County alone. It is true that citizens of Oregon, not legal voters for county officers in Union County, might lawfully vote in Union County for Presidential electors, and that only electors of Union County, under the Constitution, could lawfully vote upon the question of location of county seat; but the court is not to presume that voters from other parts of the State went to Union County, or were there present to vote for Presidential electors, or, if such was the case, that they also voted upon this question of county seat. That is a question of fact to be averred and proven, as well as whether or not the judges of election duly inquired of the legal voters, as the act provides, what their choice was of the candidates for county seat.

And this leads to the consideration of the first proposition of the appellants. We think the matters of fact, which counsel claim should have been tried, do not constitute a cause of suit in equity—do not present a case wherein relief can be had by injunction. There is no special statutory provision for contesting an election for location of county seat; but we think that when the question, in such a case, is the qualification of the voter, the conduct of the judges or the legality of the canvass, the proper remedy is by mandamus, and not by injunction in equity. In this respect, the appellants have mistaken their remedy.

The decree of the court below should be affirmed.

WINFIELD S. CHAPMAN and JOHNSON & SPAULDING, Appellants, v. THE STATE OF OREGON, Respondent.

USURY LAWS.—The usury law of 1862 is constitutional, and a contract made in violation of it will not be enforced.

IDEM — MORTGAGE TO SECURE USURIOUS LOAN, HOW EFFECTED.— The forfeiture of a usurious debt to the school fund carries with it the security for the payment of the debt, for the reason that the security is an incident of the debt and is tainted with the usury.

CHATTEL MORTGAGE DOES NOT CONVEY TITLE.—A chattel mortgage simply creates a lien upon the property mortgaged. It does not, without foreclosure, vest any title.

A COURT OF EQUITY WILL DECREE A FORFEITURE.— A court of equity is clothed with power to decree a forfeiture, where usury appears; and it is bound, in obedience to the statute, to exercise it.

APPEAL from Multnomah County.

On the 12th of March, 1875, one Henry Watkins executed his promissory note to one Shuker, for three hundred and fifty dollars, coin, payable in sixty days, secured by a chattel mortgage of the same date upon certain personal property. The note covered several loans, upon which usurious interest had been taken, and it also included fifty dollars given as a bonus for the loans. Usurious interest was also paid upon the note. In May, 1875, before maturity, Shuker assigned the note and mortgage to the appellant Chapman. On March 31, 1875, Watkins executed his promissory note for $1486.96, to appellants Johnson & Spaulding, with a chattel mortgage upon the same property described in the mortgage to Shuker. Each mortgage was duly filed on the day of its execution. On June 2, 1875, Chapman brought suit in equity against Watkins, to foreclose the Shuker mortgage, and enforce payment of the note, by which it was secured, making Johnson & Spaulding, as subsequent mortgagees upon the property described in the first mortgage, parties defendant. Watkins answered setting up the usury, to which plaintiff demurred. The demurrer was overruled, and the plaintiff did not further plead. Johnson & Spaulding, assuming that the forfeiture of the Shuker debt to the school fund

did not carry with it the lien of the mortgage by which the debt was secured, answered setting up their note and mortgage, claiming a priority of lien upon the property and praying a foreclosure of their mortgage. The State intervened, for the use of the school fund, and prayed a forfeiture of the Shuker debt and a foreclosure of the mortgage securing it for such fund. The Circuit Court decreed a forfeiture to the school fund of the actual debt due on the note to Shuker of three hundred dollars and a foreclosure of the mortgage by which the debt was secured, for the benefit of such fund.

Chapman, plaintiff, and Johnson & Spaulding, defendants, appealed from the decree.

J. G. Chapman, for appellant Chapman; *Page & Yocum,* for appellants Johnson & Spaulding.

H. Y. Thompson, District Attorney, for the Respondent.

By the Court, BURNETT, J.:

This appeal presented two questions: first, as to the validity of the usury law of 1862; and second, as to its construction.

It is contended by counsel for Chapman that the law is unconstitutional, because it is penal in its nature, and in effect punishes one man for another's crime; that is to say, in this case, Shuker is the user, and Chapman is the innocent holder of the note in question. Chapman, in this case, is in just the same condition of any man who buys a note or contract, made in violation of an express provision of the statute. He has nothing to forfeit; the note being illegal and void in its inception, it never had any legal existence, and Chapman never had any property in it. He may have been unfortunate in buying it; so would he be in buying one made on Sunday, or one that was forged. In each case, he would have a note that was worthless. That the Legislature has the right to pass a law prohibiting persons lending money from contracting for or receiving any greater rate of interest than a fixed amount, will hardly be

denied; and that a contract, made in violation of such a statute, is void, there is abundant authority to show.

The last paragraph in § 1 of the usury law reads as follows: "But on contracts interest at the rate of one per cent. per month may be charged, by express agreement of the parties, and no more." Section 2 provides, in effect, that no person shall, directly or indirectly, receive, in money or goods, etc., any greater sum for the loan or use of money than one per cent. per month.

The Constitution of the State of Maryland contains the following provisions: "That the rate of interest shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded." It will be seen that the provision in the Maryland statute is very similar to our own statute, except as to the rate of interest allowed. Chief Justice Taney, before whom a case was brought, involving the construction of this provision of the Maryland statute, says: "These words are free from all ambiguity; they prohibit, in plain, positive, and direct terms, the taking or demanding of more than six per cent. interest. * * * * * Can a contract, by which a higher interest is taken or demanded, be enforced in a court of justice? It is true, the Constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it; for it is well settled, by a multitude of decisions in this country and in England, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice." He further says: "We do not stop, at present, to refer to judicial decisions to support this proposition. Many cases to that effect are cited in the opinions delivered by the Supreme Court of the United States in *The Bank of the United States v. Owens* (2 Pet. 527); and we are not aware of any decisions in any court in which a contrary doctrine has been held. Indeed, in a State where the legislative, executive, and judicial departments are separated, it would render all law uncertain and ineffectual if the judicial power enforced, in whole or in part, the performance of a contract to do an act which is altogether forbidden by the Constitution or laws of the State."

The counsel for Chapman further contended that the chattel mortgage in this case passed the title to the personal property to Shuker, and that the plaintiff became the absolute owner thereof upon default being made by Watkins, the mortgagor.

It is no doubt true that at common law, a mortgage of chattels vested the title in the mortgagee, and after default by the mortgagor, the title of the mortgagee was absolute; but under the statute he is not entitled to the possession of the chattels as a matter of right until condition broken (Mis. Laws C. 40 § 1); and it appears from the different sections of the statute in regard to chattel mortgages, that they simply create a lien upon the property mortgaged in favor of the mortgagee, and do not vest any title without foreclosure.

The second question raised, and the one that affects the appellants, Johnson and Spaulding, involves a construction of § 3 of the Usury Law. That section provides as follows:

"If it shall be ascertained in any suit brought on any contract, that a rate of interest has been contracted for greater than has been authorized by this chapter, etc., * * * the design of which is to obtain for money so loaned, or for debts due or to become due, a rate of interest greater than that specified by the provisions of this chapter, the same shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted, to the school fund of the county where such suit is brought."

The same section further provides that the court in which such suit is prosecuted, shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, against the defendant, and in favor of the State of Oregon, for the use of the common school fund of the county where the suit is brought, and against the plaintiff for costs of suit, whether such suit be contested or not.

This statute is somewhat peculiar in its provisions; and while there is no other one like it, it is the duty of the court to construe it in such manner as to give full effect to the legislative will, within the limits prescribed by the

Constitution. If the statute had gone no further on the subject than the second section, then the usurious contract would be void and the borrower could keep the money. (Tyler on Usury, 381.) But the third section declares the effect of the usury upon the contract, and forfeits the debt or money in the hands of the borrower (now beyond the reach of the lender), to the school fund. This is not, strictly speaking, a penalty, for the borrower might have paid the whole amount, usurious interest and all, and no action could be maintained against the lender, either civil or criminal. Nevertheless, it was the act of loaning the money at usurious interest that enabled the court, when that fact was judicially ascertained, to forfeit the debt to the school fund; and we think the forfeiture of the debt carried with it the security as an incident, for the reason that the security was tainted with usury, and as it was that taint that authorized and empowered the court to forfeit the debt, it necessarily affects the security or incident of the debt in the same manner.

It was further claimed that the court should have dismissed the suit on the plaintiff's motion, after the answer of the defendant Watkins had been filed for the reason that a court of equity should not decree a forfeiture. The statute has clothed the court with power and made it their duty to declare a forfeiture in cases of this kind, and when the plaintiff admitted that the contract was usurious, the court below was bound, in obedience to the statute, to make the decree made in this case.

Decree affirmed.

KASPER KUBLI, Treasurer of Jackson County, Respondent, v. E. MARTIN et al., Appellants.

STATUTE CONSTRUED.—The Act to provide for the loaning of common school funds, approved December 19th, 1865, is constitutional and valid.

APPEAL from Jackson County.

This is a suit brought by Kubli, treasurer of Jackson County, to foreclose a mortgage, executed in 1866 by one

Horne and wife, to secure the payment of two promissory notes. The appellants, being judgment lien creditors of Horne, were made parties defendants. They demurred to the complaint, and their demurrers were overruled. They then filed answers setting forth their judgments, and alleging that the money specified in the promissory notes, secured by the mortgage sought to be foreclosed, was a portion of the separate and irreducible school fund of the State, and that the county treasurers have no authority to loan such fund. The respondents demurred to this answer, and the court below sustained the demurrer and rendered a decree in conformity with the prayer of the complaint. An appeal was taken from this decree.

Kahler & Watson, and Dolph, Bronaugh, Dolph & Simon, for Appellants.

H. K. Hannah, and Thayer & Williams, for Respondent.

By the Court, MCARTHUR, J.:

The legality of the decree of the court below depends upon the constitutionality of a certain act of the Legislative Assembly, approved December 19, 1865, entitled "An Act to provide for the loaning of common school funds," and which is set forth at length in § 18, p. 633 of the compilation of the general laws for 1872. The language employed by the law makers is as follows: "The county treasurers of the several counties are hereby required to loan the school fund in their respective counties, at the legal rate of interest, with security by mortgage on real estate of the value of three times the amount loaned *provided,* no money shall be loaned for a longer time than one year; *provided further,* that the county treasurer shall require the borrower to give his note and mortgage for the principal and interest, payable in the same kind of money, specifying whether the same is coin or currency; and the interest shall be paid annually, and when collected shall be placed by the county treasurer in the school fund of the county; *provided,* nothing in this chapter shall be so construed as to deprive the State of the right to control the common school fund created by the sale of school lands."

Article 8, § 2 of the Constitution, after referring to money arising from certain sources, declares that the same "shall be set apart as a separate and irreducible fund, to be called the common school fund;" and § 5 of the same article declares that "the Governor, Secretary of State, and State Treasurer shall constitute a Board of Commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, and their powers and duties shall be such as may be prescribed by law," etc.

If the act of December 19, 1865, operates to take away the control of the common school fund from the Board of Commissioners created by § 5 of Art. 8 of the Constitution, it must be regarded as unconstitutional; if such is not its operation, it must, of course, be declared an effective law.

Had the act been passed without the third proviso, it might have been regarded as unconstitutional; but we think that proviso is of such a character as to warrant the conclusion that the Legislative Assembly did not intend by the act to take away the control of the "separate and irreducible fund" from the Board of Commissioners. The act, in effect, makes the county treasurers, in their respective counties, mere agents, subject to the control, direction, and authority of the Board. Decree affirmed.

JOHN LONG, Respondent, v. ALFRED SHARP, Appellant.

APPEAL FROM JUSTICE'S COURT — JUDGMENT FOR WANT OF ANSWER.— When an answer is purposely stricken out, or set aside on a trial in Justice's Court, and, defendant failing to file any other answer, judgment is rendered against him, such judgment, upon a question of defendant's right of appeal, will be considered as a "judgment for want of answer," and not appealable.

IDEM — NO JURISDICTION IN CIRCUIT COURT TO AFFIRM JUDGMENT BELOW.— Where the Circuit Court dismisses an appeal for want of jurisdiction, it has no authority to render any further judgment than that of dismissal; and an affirmance of the judgment below by such Circuit Court is error.

IDEM— WRIT OF REVIEW.— The remedy of a party defendant in Justice's Court, whose answer has been set aside, is by writ of review.

APPEAL from Linn County.

This action was first begun and tried in a Justice's Court to recover $150 damages for breach of a contract for leasing a farm.

A part of defendant's answer was stricken out on motion, and a demurrer of plaintiff to the remaining part was sustained. No further answer having been filed, judgment was rendered in favor of the plaintiff, for want of answer, for the amount claimed and for costs and disbursements. From this judgment the defendant appealed to the Circuit Court, where the appeal was dismissed, upon the ground that the judgment appealed from was rendered for want of an answer, and was therefore not appealable. Upon the dismissal of the appeal, the Circuit Court affirmed or rendered the same judgment rendered in the Justice's Court, against the defendant and his sureties on appeal. From this judgment defendant appeals.

Powell and Flynn, for Appellant.

J. K. Weatherford and D. R. N. Blackburn, for Respondent.

By the Court, PRIM, J.:

It is claimed by counsel for appellant that, inasmuch as it has been held by this Court that a demurrer to a complaint is a sufficient answer, within the meaning of § 526 of the Code of Civil Procedure, to authorize an appeal to the Supreme Court from the judgment of the Circuit Court thereon, that it must follow that the same rule would apply to an appeal from a justice of the peace to the Circuit Court.

This position of counsel is based upon the fact that § 67 of the Justice's Code, which provides for appeals to the Circuit Court, is very similar to the provisions of § 526 of the Code of Civil Procedure, providing for appeals to the Supreme Court, so far as the kind of judgment from which an appeal will lie is concerned. Because each section referred to declares that an appeal will lie from a judgment which is not given for want of an answer, it would, upon the

first impression and without looking beyond these two particular sections, appear that the same rule of practice should apply in the one case as in the other.

But, looking at the different provisions on the subject of appeals to the Supreme Court, and of appeals to the Circuit Court, and considering the diversity of the objects and results of an appeal in the one case, from those in the other, we think there is ample reason for inquiring whether it can be reasonably supposed that the law-maker intended that the practice should be the same in each of the cases suggested.

In an appeal to the Supreme Court in a law case, only questions of law can be reviewed; and after the cause has been heard and determined on appeal, if any further inquiry into the facts of the case is required, the cause is remanded to the court below, with directions to proceed accordingly. But on an appeal to the Circuit Court the case is tried *de novo*, on substantially the same issues as were tried in the court below, and the judgment of the appellate court is a finality; and the law does not seem to contemplate that the lower court from which the appeal originated, should have anything more to do with the case. The case must either be tried in the appellate court, on the issues made in the court below, or new issues must be formed and tried for the first time in the appellate court—the latter of which, we think, is not contemplated by Chapter 9 of the Justice's Code. There is no authority in that chapter, or elsewhere, to remand a cause to the court below, to form and try the issues which may be tendered; because the law contemplates that the issues shall be joined before the case is appealed, and no change of the issues is allowed which will introduce a new cause of action or defense. (Civil Code, § 80.)

Although a "judgment for want of an answer," in its limited technical sense, may properly be held to embrace only those cases where the defendant has been duly served with process, and where the defendant is in default in making, or attempting to make, defense therein, and, in fact, by his acquiescence in the proceedings against him, vir-

tually confesses plaintiff's right to recover, yet we think the term has a more unlimited and comprehensive signification in the sense in which it is used in § 67 of the Justices' Code.

It is a well recognized rule of statutory construction that, in determining what is intended by any given part of a statute, the court should take into consideration the whole of the statute on that subject, and keep in view the objects intended to be affected by the law, and, if possible, so construe it as to give effect to every part of such law.

From a consideration of the whole of the provisions of chapter 9 of the Justices' Code, we think it is apparent that the law-maker never contemplated the trial of a cause, like the one at bar, in the Circuit Court for the first time. By the ruling of the justice of the peace, the answer, which had been filed by appellant in this case, had been stricken out and set aside; and the defendant, declining to further answer or plead, judgment was rendered against him as for want of an answer. If the answer was insufficient, the justice properly treated it as no answer, and properly rendered judgment against appellant as for want of an answer. If any error was committed by the justice, it was an error of law which could be most conveniently corrected by writ of review, where the Court has authority to remand the cause for such further proceedings as the nature of the case and the ends of justice may require. In its broader and more comprehensive sense, the judgment in this case was a "judgment for want of answer;" and such a judgment as the law-maker contemplated should be reviewed by writ of review, and not by appeal to the Circuit Court.

And the correctness of this view is still more apparent, when we take into consideration § 119 of the Justices' Code, which is in these words "No provision of this act, in relation to appeals, or the right of appeal, in either civil or criminal cases, must be construed so as to prevent either party to a judgment given in a Justices' Court from having the same reviewed in the Circuit Court for errors in law, appearing upon the face of such judgment, or the proceedings connected therewith, as provided in Title I of Chapter 7 of the Code of Civil Procedure."

It follows from this view of the case that an appeal would not lie from the judgment in question to the Circuit Court, and consequently that the Circuit Court committed no error in dismissing the appeal for want of jurisdiction.

But it appears that the Circuit Court, after dismissing the attempted appeal of defendant for want of jurisdiction, proceeded to render judgment against the defendant and his sureties for the amount of the judgment in the Justice's Court, and costs and disbursements. This, we think, was error. The Circuit Court, having failed to acquire jurisdiction over the cause on an attempted appeal from a judgment from which no appeal would lie, had no authority to move in the matter, except to dismiss the case, or strike it off the docket, as being improperly there. (*H. Hurley, County Judge of Yamhill Co., v. J. F. Bewley.*)

So much of the judgment below as dismissed the appeal is affirmed, and as much of it as affirmed the judgment rendered in Justice's Court is reversed.

J. J. WHITNEY, District Attorney, Respondent, v. WILLIAM DARROW, SUSAN WHITLEY and WILLIAM DELANEY, Appellants.

UNDERTAKING—OMITTED WORDS MAY BE SUPPLIED, WHEN.—In an action upon an undertaking where the obligors bound themselves in the sum of "five hundred" but omitted to use the word "dollars:" *Held*, that the undertaking must be construed in connection with the statute which authorized it; that the omitted word may be supplied and the instrument read as though it had been expressed.

APPEAL from Marion County.

The facts are stated in the opinion of the Court.

Knight & Lord, for Appellants.

J. J. Whitney, for Respondent.

By the Court, BURNETT, J.:

This action was to recover five hundred dollars on an undertaking which is as follows:

"*In the Recorder's Court for the city of Salem, Marion County, State of Oregon*:

"Before James Coffey, Recorder and ex officio Justice of the Peace.

STATE OF OREGON
v.
FRANK HIBLER. } Undertaking.

"An order having been made on the 24th day of March, 1874, by James Coffey, said recorder of the city of Salem in said county and State, that the said Frank Hibler be held to answer upon a charge of arson, upon which he has been duly admitted to bail in the sum of five hundred dollars, we, William Darrow of the county of Polk, State of Oregon, farmer, and Susan Whitley and William Delaney of Marion County, Oregon, hereby undertake that the above-named Frank Hibler shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and, if convicted, shall appear for judgment and render himself in execution thereof, or, if he fail to perform either of these conditions, we will pay the State of Oregon the sum of five hundred.

"WILLIAM DARROW,
"SUSAN WHITLEY,
"WILLIAM DELANEY."

"STATE OF OREGON,
County of Marion. } ss.

"We, William Darrow and Susan Whitley and William Delaney, sureties, each for himself being duly sworn, do depose and say that we are residents and householders within the State of Oregon; that we are each worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

"WILLIAM DARROW,
"SUSAN WHITLEY,
"WILLIAM DELANEY."

"Subscribed and sworn to before me, this the 24th day of March, A. D. 1874. JAMES COFFEY,
"City Recorder."

The complaint further avers that the said Hibler was afterwards, at the June term, 1874, of the Circuit Court for Marion County, indicted by the grand jury of said Marion County for the crime of arson; that said Hibler failed to appear as required by said undertaking; that said defendants failed to produce said Hibler after being duly called, and that default was duly entered against them.

Appellant Delaney demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer and rendered judgment in favor of respondent for the amount claimed in the complaint, from which judgment Delaney appeals to this Court.

The only question presented in this case, is whether the undertaking sued on is invalid on account of the omission of the word "dollars" after the word "five hundred," in the penal part of the undertaking. In every other respect, the undertaking is perfect. Instruments of this kind are treated as simple contracts between the parties signing them and the State. (*State v. Hays*, 2 Or. 314.)

It is a rule of construction that a contract should be supported, rather than defeated, and the law frequently supplies, by its implications, the want of express agreements between the parties. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies had they thought of it.

The appellant insists that upon the face of the undertaking, he is not liable on account of the omission of the word "dollars" therein, and relies mainly on the case of *Spencer v. Buchanan*, cited in 15 Ohio Reports, p. 573. But we think the weight of authority as well as the better reasoning is against this case. Story, on Contracts, says that the first rule of exposition, which originates and governs every other rule, requires that the contract shall be so interpreted as to give effect to the intentions of the parties, as far as it is legal and mutually understood. Whenever such intent can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also even where it contradicts particular terms of the agreement. Thus, where the

condition of a bond for payment of money was that the bond should be void if the money was *not* paid, it was held to be wholly inconsistent with the nature of the bond itself, and the word "not" was therefore rejected, leaving the bond in full force as a perfect contract.

The same rule applies to cases where an evident mistake has been made in an instrument. Thus, an agreement to convey "the Hawkins lot, containing one hundred acres," was held to convey the whole lot set off to Hawkins, and answering to the general description, although it contained one hundred and six acres. So, also, where a bond was given conditioned to pay one hundred pounds by six equal installments on certain specified days, "until the full sum of *one* pound should be paid," the court allowed the word "hundred" to be inserted after "one," in order to give effect to the evident intention of the parties. (Story on Con. § 636.)

This undertaking was given under § 255 of the Criminal Code, which is as follows: "The taking of bail consists in the acceptance by a competent court or magistrate of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the State a specified sum of money." The sum specified in the order admitting Hibler to bail in this case was five hundred dollars, as shown by the recital in the undertaking, and it clearly appears that the officer intended to require and the bail to make an undertaking in that sum. The Supreme Court of California, in a similar case, declared the undertaking to be an original independent contract on the part of the sureties, and that it must be construed in connection with the statute which authorizes it. The court said: "Looking at the undertaking and the statute, no one can doubt as to what was the intention of the parties. This being so, the omitted word may be supplied, and the contract read as though it had been expressed." (*Frankee v. Stern*, 44 Cal. 168.)

It was further said in the same case, that "When the words of a bond are not sufficiently explicit, or, if literally construed, the words would be nonsense, it must be con-

strued with reference to the intention of the parties. In doing this, it is allowable to depart from the letter of the condition to reject insensible words, and to supply *obvious omissions.*"

In the case of *Coles v. Huleme* (8 Barn. & Cress. 568), referred to in the California case, the action was commenced upon a bond, the condition of which recited an indebtedness in various sums of money, which were stated in pounds sterling. In the obligatory part of the bond the word "pounds" was omitted. In holding the bond good, Lord Tenterden, Chief Justice, said: "In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is whether there is in this bond, that degree of moral certainty as to the species of money in which the party intended to become bound. I thought at the trial there was. The obligatory part of the bond purports that the obligor is to become bound for seven thousand seven hundred. No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay." And looking at the recitals in the conditions of the bond, and seeing that they were to pay pounds sterling, he further said: "That being so, I cannot entertain a doubt that the intention was that the obligor should, in order to secure the payment of those sums, become bound in a penalty consisting also of pounds sterling; and if that were the intention, then the bond ought to be read as if the word 'pounds' were inserted in it."

In the same case, Bayley, J., said: "It has been decided that in the furtherance of the obvious intent of the parties, even a blank may be supplied by a deed. In *Waugh v. Russell* (1 Marshall, 214), the word 'hundred' was omitted in the latter part of the condition of a bond. It was held that it might be supplied, and that in pleading the bond might be described according to its legal effect, as if the

word 'hundred' had been inserted in it. I think in this case, that it is obvious that the obligor meant to bind himself in a penal sum consisting of pounds sterling, and therefore, that the omssion of the word 'pounds' may be supplied."

In a case in Louisiana a bond was perfect in every respect except that in the penal part, after the words "fourteen hundred and ten," the word "dollars" was omitted; but the bond having been given pursuant to a judge's order directing one in the sum of fourteen hundred dollars, the court thought the omission a mere clerical error, which might be supplied even in an action on the bond, when there existed as high or higher evidence by which to act. (6 Mort. La. R., N. S. 494.)

We think, in view of the fact that there is a recital in the undertaking that Hibler had been admitted to bail in the sum of five hundred dollars, and that the whole undertaking is perfect, except that one word is omitted in a blank, there can be no doubt as to the intention of the parties. This being so, the weight of authority justifies the supplying of the omission.

Judgment affirmed.

J. MOSER, Respondent, v. N. JENKINS, Appellant.

REPLEVIN.—The action for the recovery of personal property, under the Code, is substantially the former action of replevin, and is governed by the same principles and rules, especially in relation to demand and refusal.

IDEM — AFFIDAVIT NO PART OF THE PLEADINGS.—The affidavit, under which an immediate delivery is sought, is no part of the pleadings, and the facts therein set forth form no part of the issues in the case.

PLEADINGS — CONJUNCTIVE DENIALS.—No issues can be raised by conjunctive and literal denials.

APPEAL — WHAT AMENDMENTS NOT ALLOWED ON. — Upon an appeal from an inferior court to the Circuit Court, no amendment, which substantially changes the issues raised and tried in the inferior court, can be allowed.

APPEAL from Marion County.

This is an action by Moser to recover certain personal property owned by him, alleged to have been wrongfully

taken and detained by Jenkins. It was originally brought in a Justice's Court, and after judgment was duly appealed to the Circuit Court. In the Circuit Court, Moser had a verdict in his favor, and recovered judgment thereon, from which Jenkins appeals.

The other facts are stated in the opinion of the Court.

P. C. Sullivan and E. L. Eastham, for Appellant.

Mallory & Shaw, for Respondent.

By the Court, MCARTHUR, J.:

Section 206 of the New York Code, and § 509 of the California Code, are almost identical with § 130 of the Code of Oregon. They differ only as to the time within which an immediate delivery of the property, the subject of the action, can be claimed by the plaintiff. Such being the fact, § 130 must be viewed in the light of the New York and California cases. In the absence of any precedents of this Court, we cannot but regard all the well-considered cases in New York and California as authorities binding upon us. The view taken by the New York courts is, that the action given by the Code for the delivery of personal property is substantially the former action of replevin; changed, indeed, in its name, and modified in its form, but in its principles and objects identical. (*McCurdy v. Brown,* 1 Duer, 105.) There were no substantial changes made as to the requisites of maintaining the action. (*Scofield v. Whitelegge,* 49 N. Y. 261.) An examination of the California reports discloses the fact that it is almost universally regarded as the old action of replevin, and the word itself, as descriptive of the character of the action, is used in nearly all the cases.

The action lies both in the *cepit* and *detinet.* Where goods or chattels are wrongfully taken the action is in the *cepit,* and where they are wrongfully detained it is in the *detinet.* The complaint in this action is for both wrongful taking and wrongful detention. There is no allegation of demand and refusal; hence it is contended by the appellant's counsel that the complaint does not state facts sufficient to consti-

tute a cause of action. This position is not well taken; for in an action for wrongful taking *and* wrongful detention demand is not necessary. When, however, the plaintiff relies upon wrongful detention, demand must be pleaded as well as proved. When he relies upon wrongful taking, or upon wrongful taking *and* wrongful detention, demand is not necessary. Nor is this complaint defective upon the other point alluded to in the argument. It alleges lawful possession in the plaintiff, at a certain time and place, of certain personal property, which is sufficiently described. It is not necessary, in an action for the recovery of the possession of personal property, that the complaint should correspond with the affidavit, which the Code requires to be made and indorsed in the manner prescribed, before delivery can be had. In such affidavit certain prescribed facts must be set out and sworn to, but they form no part of the issues in the case. (*Kerrigan v. Ray*, 10 How. Pr. R. 213.)

Passing to the consideration of the answer, we find that the denials are in the following form:

1. "That on the 10th day of April, 1875, the plaintiff was lawfully possessed of one dark bay mare about six years old, and one bay horse about seven years old, and one set of two-horse harness;

2. "That on and ever since the 10th day of April, 1875, the defendant wrongfully took and detained said goods and property from this plaintiff;

3. "That he still unjustly detains the same to the damage of this plaintiff in the sum of fifty dollars, or any other sum."

It will be observed that the first and second denials are in the conjunctive form, and are also what is known as literal denials. They are insufficient to raise any issues, and are virtual admissions of the truth of the allegations they were intended to deny. (17 Cal. 569; 22 Id. 163; *Scovill v. Barney*, 4 Or. 288.) The third denial, besides being a literal denial, except as to the amount of damages, is insufficient to raise an issue in relation to the wrongful taking, which is the gist of this action.

Entertaining the views just expressed in relation to the

pleadings, we do not deem it necessary to examine into any of the errors complained of, except one which will be presently alluded to; for when a party by his bad pleadings has admitted away his case, any error committed by the court must be regarded as innoxious.

The exception alluded to, and the one which we have deemed it necessary to express our views upon, is, that after the trial had begun in the court below, the appellant moved that he be allowed to file an amended answer. The court denied the motion, and this is charged as error. By the proffered amended answer, the defendant sought to set up a state of facts in justification. The Court properly denied the motion. It was its duty to try the cause on the pleadings substantially as they came from the Justice's Court; and the amended answer tendered other issues entirely. It is only when the proposed amendment does not substantially change the issues tried in the Justice's Court, that the Circuit Court should permit it.

Judgment affirmed.

JAMES TIPPIN, Respondent, v. THOMAS M. WARD, Appellant.

EVIDENCE — DECLARATIONS AND ADMISSIONS, HOW MAY BE SHOWN.—In an action upon a contract for support, the affidavit of the defendant, made subsequent to the alleged breach of contract, before the county judge, in a proceeding to have the plaintiff placed in the county poor-house, is admissible in evidence as showing the declarations and admissions of defendant in relation to the issues involved in the litigation.

NONSUIT WILL NOT BE GRANTED, UNLESS THERE IS AN ENTIRE LACK OF EVIDENCE.— A case should be submitted to the jury, unless there is entire lack of evidence tending to maintain the issues on behalf of the plaintiff; or, unless, upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover.

EVIDENCE, WHAT WILL CONSTITUTE A REFUSAL TO PERFORM.—In an action upon a contract to support and provide for an infirm person, want of courtesy, personal indignities, and the general demeanor of defendant towards the plaintiff, may be sufficient to show a breach, on defendant's part, although he may not have refused to support plaintiff in direct terms.

MEASURE OF DAMAGES.—When there has been a total breach of contract, the plaintiff may, if he demands it, recover full and final damages for the future, as well as the past, although the period for full performance has not elapsed.

APPEAL from Wasco County.

This is an action by Tippin, an aged and infirm person, against Ward, to recover damages upon an alleged breach of contract for the support of Tippin by Ward. On the trial it was shown to prove the alleged breach by Ward, that a conversation took place between the parties, in which it was proposed by Ward that Tippin should leave Ward's house and go on the county as a pauper; to which proposal Tippin answered, "Well, I can go;" that thereafter Ward, who is the appellant, took Tippin, the respondent, to the county seat, a hundred miles distant, for the purpose of having the respondent go upon the county; that respondent refusing so to do, was left by appellant without provision for his support; that thereafter appellant appeared before the County Judge and made an affidavit in proceedings to place respondent in the county poorhouse, stating in a conversation then had with the Circuit Judge, that he could not, and would not, support respondent any longer. Appellant moved for a nonsuit, which was refused by the court. The court instructed the jury as follows:

"To establish a breach of the alleged contract, it is not necessary that the defendant should have by violence or force expelled the plaintiff from his house and home; proper proof that defendant sought to have the plaintiff taken and supported by the county of Wasco, and sent him or brought him to the proper authorities for such purpose, is sufficient to establish a breach of the contract.

"A contract of the character declared on in this action, being an entire contract, your verdict, if you find for the plaintiff, should not only compensate the plaintiff for the past inconvenience he has suffered from a breach of the alleged contract, but also for the future inconvenience he may suffer therefrom."

Respondent recovered judgment for $1,000, from which judgment this appeal is taken.

The above instructions, and the rulings of the court in overruling the motion for a nonsuit, and in admitting the affidavit referred to in evidence, are relied upon as errors on the appeal.

W. H. Effinger, for Appellant.

N. H. Gates and J. C. Cartwright, for Respondent.

By the Court, SHATTUCK, J.:

The admission in evidence of the affidavit of the appellant, made before the county judge, in a proceeding to have the respondent placed in the county poorhouse, was not error. The making of that affidavit, although subsequent in date to the alleged breach of contract, was an act of the appellant, and the statements contained in the affidavit were his declaration and admissions relating to the subject-matter of the contract involved in this litigation, and as such were clearly admissible in evidence.

The denial of the motion for nonsuit was proper, because the evidence which had been introduced strongly tended to show a breach of the contract alleged. The respondent had put in evidence a conversation between appellant and respondent, wherein appellant proposed to respondent that he should leave appellant's house and go on the county as a pauper, to which proposal the respondent, although unwilling to go, only replied, "Well, I can go." It is true, that it does not appear that in this conversation, the appellant *in terms* refused to support respondent any longer, but it is stated that the appellant then caused the respondent to enter a wagon driven by appellant's son, and carried him to the county seat, when the respondent refused to go on the county, and that the respondent, being old (88 years of age) and infirm, and a hundred miles from the residence of appellant, was left by appellant at the county seat, without any provision for his support. It was further shown that about two weeks after this transaction, appellant appeared before the county judge and made the affidavit referred to above, to the effect that the respondent was a pauper, and entitled to support from the county, and asking to have him received as one of the county poor; and in a conversation then had with the county judge, the appellant further declared that he could not and would not any longer support the respondent. Manifestly, this evidence does not show, nor tend very strongly to

show, that the respondent consented to leave appellant, or waived all further claims on him for support. On the contrary, we think that upon such evidence the case ought to have been, as it was, submitted to the jury, and they be left to say whether or not there had been a breach of the contract alleged.

A case should be submitted to the jury, unless there is an entire lack of evidence tending to maintain the issues on behalf of the plaintiff, or, unless upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover.

The giving of the instruction objected to, to the effect that it was not necessary, in order to show a breach of the alleged contract, that a violent or forcible expulsion of the respondent by appellant from his, appellant's house should be shown, but that it would be sufficient to show that appellant sought to have the respondent taken and supported as a pauper by the county of Wasco, and sent him, or brought him, to the proper authorities for such purpose, is assigned as error. This presents the question whether, admitting the contract alleged, the fact that appellant sought to have respondent taken and supported by the county as a pauper, and actually sent him or brought him, to the proper authorities for that purpose, would warrant the legal conclusion of a breach of the contract, *without* its further appearing that the respondent did not sanction such proceedings. We think that, *prima facie*, the fact assumed by the instructions amounted to a breach of the contract. It was conduct wholly inconsistent with the terms of the contract, and in violation of appellant's duty, and wholly contrary to what seems to have been the purpose of respondent in making the contract in the beginning. It appears that the respondent, already an old man, and without relations, fifteen years ago, entered into this contract with appellant for the very purpose of avoiding the condition to which this conduct of appellant was subjecting him; and, to secure exemption from such a fate, he gave up and transferred to appellant all his property, consisting of a land claim and considerable personal proper-

ty. He is now about eighty-eight years old, and quite infirm, and the necessity for the care and support, which he had contracted for, is greatly increased. To allow the claim of appellant's counsel on this point, it would be necessary to assume, without evidence, that the respondent had changed his mind—an assumption not required by any rule of law or by any circumstance proven in this case. We think that the instruction given was correct and justified by the evidence reported.

The refusal of the court below to give the instructions asked by appellant's counsel is also assigned as error. One of these related to the measure of damages, and was not insisted on in argument. Had this instruction been insisted on, however, we should hold that the measure of damages adopted by the court below was the proper one. When there has been a total breach of contract, the plaintiff may, if he demands it, recover full and final damages for the future as well as the past, although the period for full performance has not elapsed. (8 Barb. 412.)

The other instruction asked was properly refused by the court below, because it was too general, and cannot be declared as a rule of law. It was this: "That no words of the defendant, addressed to the plaintiff, suggesting that plaintiff should remove from his (defendant's) care and protection, are sufficient under the law to constitute a breach of the alleged contract, unless at the time defendant did refuse to longer carry out the said alleged agreement or contract." This instruction might be considered as disposed of by our opinion already expressed upon the instructions given and excepted to, but we may properly add a few words.

This instruction requires a direct and positive refusal on the part of appellant to perform in order to constitute a breach of his contract, and does not allow that a party may indicate his refusal by any words short of direct and positive terms. A reference to the nature of the contract under consideration will make manifest the error of this instruction. The appellant had agreed to support, board, and clothe respondent, and furnish him with a home and the necessaries of life. The provisions here stipulated for re-

quired on the part of the appellant courteous and respectful treatment of the respondent; a home was to be provided; a place of security, of comfort, and quiet allowed. Abuse and personal indignities, which may be inflicted by words no less than by acts, were inconsistent with the idea of a home. The suggestions of appellant concerning the putting of respondent on the county as a pauper, might easily be such, or the tone and manner such, as to destroy respondent's peace and quiet, and render his life miserable, and yet not be in terms a positive refusal to feed and clothe him.

Whether the words of appellant, on the occasion in question, amounted to a breach of the contract or not, or authorized a conclusion that appellant wished to be understood, and was understood, to refuse longer to keep and take care of respondent, was a proper question for the jury to decide, upon a fair consideration of the circumstances, relations, and demeanor of the parties at the time. We think, therefore, that the instructions asked ought not to have been given, and that the refusal of the court below to give them was not error.

The judgment of the court below should be affirmed.

WILBERT NOYES, Appellant, v. GEORGE STAUFF, Respondent.

EVIDENCE.—To prove a leasing, a paper was offered in evidence which did not describe the property claimed under the alleged lease, and the court rejected such paper for uncertainty; *Held*, that there was no error.

IDEM — PAROL EVIDENCE NOT ADMISSIBLE TO EXPLAIN PATENT AMBIGUITY.— Where a paper, purporting to be a lease, does not describe the property leased, the ambiguity is patent, and parol evidence is not admissible to explain it.

VARIANCE.— The plaintiff alleged a lease in writing for two years: *Held*, that he could not be permitted to prove by parol an agreement of leasing for two years, for the purpose of establishing a lease for one year, valid under the statute of frauds.

APPEAL from Coos County.

On the 3d of November, 1874, defendant conveyed to plaintiff, by deed containing a covenant of warranty against incumbrances, lots 5 and 6, in the town of Marshfield, Coos County, Oregon.

The complaint alleges that at the time this deed was made the premises were not free of incumbrances, but that there existed at that time an unexpired lease by the defendant to James Ferry and S. S. Bailey, for the term of two years, from April 15, 1875, with a privilege to Ferry and Bailey of an additional year after the expiration of said term; and that by reason of this incumbrance plaintiff had been kept out of the possession of the premises, to his damage in the sum of two thousand five hundred dollars, for which he prays judgment with costs.

The answer denies the leasing alleged by plaintiff, or that plaintiff has been kept out of possession of the premises or has suffered damages; and for a separate answer it alleges that about the 15th of April, 1874, it was agreed between defendant and Ferry and Bailey that defendant would build a house, and that Ferry and Bailey should lease such house, when it was built, for two years, with the privilege of one year; that in pursuance of this agreement Ferry and Bailey became tenants of defendant in the premises in controversy and were so in possession at the time of the purchase by plaintiff; that plaintiff took with full knowledge of such possession, and agreed to accept Ferry and Bailey as his tenants, and receive rent from them.

The reply denies the matter set up in the separate answer. Upon the trial the plaintiff offered in evidence the following writing:

"We, the parties of the second part, agree with George Stauff, the party of the first part, to furnish one man to perform labor on the said house which is to be in construction as soon as possible; the labor of said man is to be confined strictly to the finishing of the dining-room and kitchen of said house as soon as the building is inclosed. We, the parties of the second part, do further agree with George Stauff, the party of the first part, to lease and to rent the said house for the term of two years, with the privilege of one year, at the rate of forty dollars per month, the said rent to be paid monthly in advance.

"GEORGE STAUFF,
"S. S. BAILEY,
"JAMES FERRY."

The genuineness of this paper was admitted; but on objection by defendant it was excluded by the court. The defendant recovered judgment for his costs and disbursements, from which judgment this appeal is taken.

J. F. Watson, for Appellant.

W. R. Willis, for Respondent.

By the Court, PRIM, J.:

This is an action to recover damages for a breach of warranty in a deed against incumbrances upon certain lots sold to plaintiff by defendant.

The principal issue of fact raised by the pleadings is, as to the existence of a valid and unexpired lease for a term of two years, upon the lots in question. The first assignment of error contained in the notice of appeal is, "that the court erred in overruling plaintiff's demurrer." This assignment was not relied upon in the argument by counsel for plaintiff. If, however, there was error in overruling the demurrer of plaintiff, it was waived by replying and going to trial.

The principal objections to the ruling of the court, which appear to be relied upon by plaintiff, are as follows:

"2. The court erred in rejecting evidence offered by plaintiff."

"3. The court erred in sustaining the objection by defendant to the admission as evidence of the writing, purporting to be a lease, contained in the bill of exceptions."

The rejection of the paper purporting to be a lease was, we think, correct upon two grounds: First. Such paper does not contain any description whatever of the premises alleged to have been leased, by which it could be ascertained that any reference was had to the lots in question—it does not even appear that such lots are in the State of Oregon; and this paper is, therefore, void for uncertainty, and was properly rejected. (7 Ind., 717.) Second. Said document is not a lease, but a mere agreement on the part of Ferry and Bailey to lease some house "to be in construction." It contains no promise or agreement on the part of defendant to let them have the premises.

The parol evidence, offered by plaintiff to explain the paper and to identify the property intended to be embraced by said document, was all properly rejected, as it does not appear to contain a latent ambiguity; the ambiguity is patent, and parol evidence is not admissible to explain it. (1 Greenl. on Ev. § 301; 4 Mass. 205; 7 Cranch, 167.)

But it is further claimed that a parol lease for one year would be valid under the statute of frauds, and that parol evidence ought to have been admitted to prove such a lease. This we think would have been improper under the state of the pleadings. The incumbrance alleged in the complaint was a written lease for the term of two years. If plaintiff had desired to prove a different incumbrance than the one complained of, he should have obtained leave to amend his complaint.

Any evidence tending to show the rental value of the premises was proper for the purpose of showing the damages; but, as plaintiff failed to prove any incumbrance, the evidence was immaterial, and its rejection could work no injury to the plaintiff.

No substantial error appearing in the case, the judgment is affirmed.

JOHN SOUTHWELL, Respondent, v. JOSEPH BEEZLEY, Appellant.

NONSUIT WILL NOT BE GRANTED WHERE THERE IS ANY EVIDENCE.— A cause should be submitted to the jury, unless there is an entire lack of evidence to establish the allegations of plaintiff's complaint.

CONTRACT, SEPARABLE OR ENTIRE.—The question as to whether a contract is entire or separable, depends to some extent upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract.

SEPARABLE CONTRACT, IN PART BAD.— When a contract bad in part is separable, the court will enforce the valid part. Where there is no imputation of *malum in se*, the bad parts will not affect the good.

STATUTE OF FRAUDS.—Where the parties must have expected that the contract would not be performed within a year, and yet by the terms of the contract it might have been so performed, the contract is not within the statute of frauds.

APPEAL from Wasco County.

The facts are stated in the opinion of the Court.

J. C. Cartwright and Thayer & Williams, for Appellant.

W. H. Effinger, for Respondent.

By the Court, BURNETT, J.:

This action was brought by the respondent against the appellant for damages, for the violation of a contract. The appellant, after denying the allegations in the complaint, set up, among others, the following affirmative defenses: That the contract sued on was not in writing, and was not to be performed within one year from the making thereof; that said agreement was for the sale of personal property for a price of more than fifty dollars, and that respondent at the time of said agreement, did not accept or receive any part of such personal property, and did not pay any money.

The contract sued on is, in effect, as follows: In March, 1873, the respondent and the appellant made an oral agreement, by the terms of which appellant was to sell respondent six hundred head of ewe sheep, provided that respondent would go into partnership with appellant's son, to whom appellant was to give six hundred head; the appellant was to furnish twelve hundred head on his own account. The respondent and the son of appellant were to hunt up a sheep ranch and fit it up, and the whole number of sheep (twenty-four hundred), were to be put together and herded, and kept thereon for three years, when they were to be divided, and each party was to receive his interest in the proportion, as aforesaid; that respondent was to pay appellant, for the six hundred sheep which he was to receive under the agreement, the same price which the appellant would have to pay for the sheep which he proposed to buy during the summer and fall of 1873, and to pay the same from the wool or clip of the sheep during the said three years; that the increase was to remain, and was not to be divided until the final division at the end of three years; that the sheep were to be delivered on the first day of the following September; that they were to be delivered in one

band of twenty-four hundred head. No particular sheep were to be delivered to the respondent as his six hundred head, but he was to have an undivided fourth part of the twenty-four hundred head; that it was intended the delivery should be in one band, which should contain the interest of all parties; that the respondent and the appellant's son were to receive twenty dollars per month for herding the appellant's portion of the sheep during the three years, and were also to receive twelve dollars per ton for one-half of the hay put up each year.

After the respondent had rested his case in the court below, the appellant moved for a judgment of nonsuit, on the ground that the contract sued on is invalid under the statute; that by its terms, as shown by the evidence, it was not to be performed within one year; that the respondent acquired no vested interest in the sheep under the same or by any act of the parties; that the sheep were not delivered so as to constitute a sale. The court overruled the motion, and this is assigned as error.

The rule on this subject, as laid down by the court at the present term, is, that a cause should be submitted to the jury, unless there is an entire lack of evidence to establish the issues on the part of the plaintiff. Applying this rule to the case in hand, we are of the opinion that the judgment of the court in overruling the motion is correct. The evidence, as contained in the bill of exceptions, tended strongly to show that the contract was as set out herein, and was not invalid to the extent of preventing the plaintiff from recovering. It tended further to show that there had been a delivery of the sheep in question to the plaintiff by the defendant, and the court would not have been justified in taking the case away from the jury.

When this case was before this Court, at the term before the last, one of the questions raised by this motion for nonsuit was presented in a somewhat different shape, and the Court, in passing upon it, used the following language: "Upon the question of delivery, the counsel insist upon a precise technical separation and counting out of the six hundred sheep, in order to fix any rights of Southwell under the

contract. While the position of counsel may be correct, as a general rule, we do not think it controls in this case; for this case had its own peculiar circumstances. The question was properly left to the jury to say whether, upon the facts in the case, the acts performed by the parties were intended by them to operate as a delivery."

In view of the fact that the evidence shows that there was an express stipulation that the six hundred sheep were not not to be separated and counted out, but were to be delivered as a part of the twenty-four hundred head mentioned, and of the further fact that about the time mentioned in the contract, to wit, the 1st of September, 1873, the appellant did place the respondent in possession of four thousand sheep, and the respondent took actual possession of them, under the contract—in view of these facts, we think that the delivery of the four thousand head necessarily included the twenty-four hundred head; and as both parties were present, and no objection was made by either party to the manner of the delivery, it is now too late for the appellant to object that there was not a technical delivery of the six hundred head. (*Downer v. Thompson*, 6 Hill, 208.)

The principal question raised by the exceptions to the instructions given, and the rulings of the court in refusing instructions, is whether the contract sued on was entire so as to make it invalid under § 775 of the Code, which provides that an agreement that by its terms is not to be performed within a year from the making thereof is void, unless the same is in writing and signed by the party to be charged.

The question whether a contract is entire or separable, is often of great importance. Any contract may consist of many parts, and those may be considered as parts of one whole, or as so many distinct contracts, entered into at one time and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends to some extent upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. (3 Pars. on

Con. 517.) Applying this rule of construction to the case before us, we are of the opinion that neither the purchase of the six hundred sheep by respondent from appellant, nor the payment for them to appellant, was so connected or interdependent on the agreement to herd the twenty-four hundred for three years, as to render it invalid. The herding was to be done by the respondent and the appellant's son, and, while it was incidentally connected with the purchase of the six hundred from the appellant, they were not so connected as to make it one entire contract. When a contract, bad in part, is separable, the court will enforce the valid part.

The rule in such cases, where there is no imputation of *malum in se,* is that the bad parts do not affect the good. (*Gelpcke v. City of Dubuque,* 1 Wall. 222; *Murray v. Oliver,* 3 Or. 539.)

It was urged in the argument that the agreement shows that the appellant would not have sold respondent the six hundred sheep, only upon the understanding that respondent would take and herd the twenty-four hundred sheep for three years, and sustains the view that the contract is entire, and is void because it is not in writing. Admitting that the appellant did sell the six hundred sheep to respondent in order to secure the herding of the twelve hundred, owned by himself, for three years, it does not follow that the contract is not separable. The cases are indeed very numerous where the parties must have expected that the contract would not be fully performed within a year, and yet, because by the terms of the contract, it might be, it is held not to be within the statute. (2 Am. Rep. 210; *Blandin v. Sargent,* 33 N. H. 239; *Gault v. Brown,* 48 N. H. 183.)

But the question here is not as to whether the contract, taken as a whole, could be performed within a year, but whether any part of it could; and if so, whether such part is separable from the part requiring more than a year for its performance. And upon this proposition, I will again quote from the former opinion of the court in this case. Referring to the contract in question, the Court says: "Upon these points, we hold in this case that this contract,

so far as paying for the sheep was an element, might, by its very terms, have been performed within the year, and it was within the contemplation of the parties, when it was made, that such a contingency as Southwell's ability to pay, and payment in fact within the year, was not only possible, but probable."

There were some other questions presented in the argument, but we think they are not material in the decision of the case. We have arrived at the conclusion that there is no error sufficient to warrant a reversal of the judgment. It is therefore affirmed.

E. BLACHLEY, Appellant, v. J. J. BUTLER, Respondent.

DONATION LAW — WIDOWS EMBRACED BY.— The twenty-second section of the Donation Law embraces two classes of widows, to whom the provisions of the act are extended.

APPEAL from Lane County.

The appellant brings this suit to have the title to a tract of land in Lane County, now vested in the respondent, inure to him. The appellant is the assignee of Sarah Butler, who settled upon the land in question in 1855, and claimed the same under the Donation Act. In 1859, something in the nature of final proof was submitted to the Surveyor-General, but the papers relating to it were lost. In 1864, Sarah Butler conveyed to Blachley. In 1859, J. J. Butler made application to pre-empt the premises, and deposited money in the land office at Oregon City for that purpose. In 1864, upon a contest between the parties, the register and receiver decided that Sarah Butler was not entitled to hold the premises, and that her claim was invalid. Subsequently to his application to purchase under the pre-emption law, Butler, the respondent, relinquished his pre-emption right, and took the land under the homestead law; and, in 1873, patent issued to him. The appellant brings this suit to show that the title to said premises vested in him, as the assignee of Sarah Butler,

and to have J. J. Butler declared a trustee of the legal title for his benefit.

The court below dismissed the suit.

J. J. Walton, Jr., and Thayer & Williams, for Appellant.

Thompson & Fitch and G. B. Dorris, for Respondent.

By the Court, McARTHUR, J.:

This case is here upon the pleadings and the proofs to be tried anew. The only question of law presented is, Could Sarah Butler, under whom Blachley claims, take and hold lands under § 22 of the Donation Act? We are of opinion that two classes of widows are provided for under said section. First, those residing in the Territory of Oregon at the time of the passage of the section (February 14, 1853); and, second, those whose husbands, had they lived, would have been entitled to take under the act of September 27, 1850, of which the act of February 14, 1853, is an amendment. The testimony shows that Sarah Butler was a widow, and was residing in Oregon at the time of the passage of the aforesaid amendment. She was fully entitled to take. It appears that she settled upon the land in controversy, in 1855; but the testimony wholly fails to show that she complied with the requirements of the Donation Act, in reference to the four years' continued residence and cultivation. Having acquired no rights, her deed to Blachley passed none to him.

Decree affirmed.

MARY F. GARRETT, Appellant, v. R. C. CLARK, Respondent.

A PAROL LEASE, ACCOMPANIED WITH POSSESSION AND PAYMENT OF RENT, HOW CONSTRUED.— An estate for life cannot be created, transferred, or declared by parol; but a parol lease for an indefinite time, or even for life, accompanied by possession and the payment of rent, is not for all purposes void. Such tenancies are constructively taken to be tenancies from year to year, and when once established will continue until determined by notice to quit, or some other sufficient legal cause.

APPEAL from Benton County.

On the 7th of December, 1872, John Lloyd, in consideration of love and affection and of the payment of taxes thereon, made a verbal agreement with his son, William Lloyd, by which he, William, was to have the possession of certain lands, with their rents, issues, and profits, during his, John's lifetime. In pursuance of this agreement, William entered upon the premises and paid the taxes thereon. On the 15th of October, 1873, William leased the premises to one Prose for one year, the rental to consist of one-half the hay and oats grown on the premises during the year, William reserving to himself the use of the pasture lands. Prose took possession under the lease, and raised a crop. On the 1st of January, 1874, William died, leaving a will, under which the appellant, who was his wife, became his sole legatee. On the 7th of March, 1874, Clark, the respondent, became the owner in fee simple of the premises in question, under a conveyance from John Lloyd, and thereafter, by virtue of such ownership, converted to his own use the hay and oats amounting in value to two hundred and seventy-six dollars, set apart by Prose, William Lloyd's lessee, as the rental due on the lease of William to Prose. The appellant, as the representative at law of William Lloyd, brought this action to recover damages for such conversion.

It was held on the trial by the court below that William Lloyd's estate in the premises in question was a mere life estate; or, if not, that it was no more than a tenancy at will, and that no notice to quit was required; and that plaintiff could not recover, unless, at the death of William, he, William, or his tenant, had sown a crop, or unless John Lloyd, in conveying to respondent, had reserved the growing crops to appellant. Respondent having recovered judgment in the court below, appellant brings this appeal, and assigns these rulings as error.

Chenoweth & Eglin and W. W. Thayer, for Appellant.

W. B. Higby and W. S. McFadden, for Respondent.

By the Court, SHATTUCK, J.:

There were a number of questions presented upon the argument of this cause which it is unnecessary to consider. The point in controversy, arising on the allegations of the complaint, is, who owned the personal property mentioned in the complaint at the time of its alleged conversion by the defendant? By the answer and replication, however, a question of tenancy of real property is raised, and the main question of title to personal property thus involves the determination of what was the relation of the prospective parties to the land described in the answer.

It is agreed that the personal property in controversy was a part of the produce, for the year 1874, raised on the farm called, in the pleadings and evidence, the John Lloyd Donation Claim. The defendant claims said property on the ground that he became the owner in fee of said farm in March, 1874, by a warranty deed from John Lloyd, the owner, whereby he became entitled to this produce as the rents, issues and profits of said farm. The plaintiff claims said produce, because, she says, that John Lloyd, on the seventh day of December, 1872, made an agreement by parol with his son William Lloyd, plaintiff's former husband, whereby, in consideration of love and affection, and the further consideration that William would pay the annual tax on said land, he, John Lloyd, leased and demised said premises to said William for and during the life of said John; that thereupon said William paid the taxes on said land for that year, and said John, on said 7th of December, 1872, put William into actual possession; that said William remained in possession, taking the rents, issues and profits, till October 15, 1873, when he sublet said land, or a portion of it, to one Aries Prose, for the term of one year from that date, and put Prose in possession, the rent reserved being the amount of hay and grain in controvery herein; that said William Lloyd died on the 1st of January, 1874, having made a will, bequeathing to plaintiff whatever interest he had in said land and in the rents, issues and profits thereof; that the defendant Clark had purchased

with full notice of plaintiff's claims, and subject thereto, and furthermore, that John Lloyd had reserved out of the sale to Clark the rents claimed by plaintiff for that year.

Thus the question is directly presented, What estate or interest or right in or to this land did William Lloyd, acquire by virtue of this parol lease from John Lloyd, accompanied as it was by possession and payment of rent or its equivalent?

The court below, by the instructions given, and by the refusal to give those asked by plaintiff, seemed to assume that the transactions of John and William Lloyd created a tenancy for life, which was terminated by the death of William, or, if not a tenancy for life, no more than a mere tenancy at will, and that no notice to quit was required; and that the plaintiff had no right to any share in the crop of 1874, unless it had been sown before William's death, or had been expressly reserved to her by John Lloyd when he sold to Clark.

We think the court below erred in holding this view of the case. An estate for life cannot be created, transferred or declared by parol (Statute, page 264, § 771); but a parol lease for an indefinite time, or even for life, accompanied by possession and the payment of rent, is not for all purposes void; some benefit or estate inures from such a transaction to the tenant. Under the old rule the tenancy would probably be deemed one merely at will.

The better and later authorities, however, hold that such tenancies are constructively taken to be tenancies from year to year. (4 Kent's Com., 10th ed. 128.) Washburn (1 Washb. on Real Prop. 396) declares that "it will be sufficient to establish a tenancy from year to year to show an entry made under a general letting or a letting for an indefinite time, and either an agreement to pay rent, measured by the year or its aliquot parts, or an actual payment of rent; * * * and such tenancy, once established, will continue until determined by notice to quit or some other sufficient legal cause."

Taylor (Landlord and Tenant, § 56) states the rule to be, that "a person who holds as tenant at will, on

payment of rent, which is accepted as such by the owner, becomes a tenant from year to year."

This point, thus stated, is strongly supported by the authorities cited by these learned authors, and we deem further citation of authorities unnecessary.

Now, in this case, the facts are that William Lloyd paid the first year's taxes (the rent stipulated by the parties) and was in full possession at the commencement of the second year. It is true he had sublet to Prose, but he retained possession of the pasture lands and general control over the premises, and the possession of Prose must be regarded as the possession of William. He then paid the taxes for the second year, and remained in possession nearly a month from the commencement of that year to the time of his death.

We do not wish, however, to be understood by this opinion as construing the statute of this State relating to forcible entry and detainer. (Mis. Laws, ch. 23, § 11.) That statute (Subs. 2d, § 11) seems to regard a tenancy existing "without any written lease or agreement therefor," as determinable by notice, and in case of agricultural lands (§ 13) a notice of ninety days is required.

There is no pretense in this case of notice to quit, nor has counsel on either side relied on this statute or invoked the opinion of the Court as to its construction or application.

But applying the general principles and rules above announced to these facts, it must be held that William had in the land an estate and a right to the continuous possession of it for that current year, to terminate December 6, 1874.

This interest or estate which William thus had was neither forfeited nor terminated by his death, but is passed to his representatives. (Mis. Laws, § 14, pp. 547, 548, 550.) The plaintiff, as the legatee of William Lloyd, took and succeeded to his rights and interests, and was entitled, as against John Lloyd, to hold the premises the remainder of the year, and to have and enjoy the rents, issues and profits thereof.

The defendant Clark appears by the evidence to have bought with full notice of the transactions between John and William Lloyd and of the facts above referred to. Assuming that to be the fact, he took the land subject to plaintiff's right of possession during the year and to her right to take the rents and profits, notwithstanding his deed with full recitals and warranty. The subtenant, Prose appears to have performed his part of the agreement with William Lloyd, and to have delivered the share of the crop to which William or his representatives were entitled at the appointed place, and this is the property in controversy. The defendant, in converting it to his own use, converted what was not his own, and should be held to account therefor.

It follows from these views that the judgment below should be reversed and a new trial ordered.

MARY WETMORE, Appellant, v. N. C. WETMORE and J. P. O. LOWNSDALE, Respondents.

DIVORCE — REAL ESTATE, HOW AFFECTED BY.— Whenever a marriage contract shall be dissolved, the party at whose prayer such decree is obtained is entitled peremptorily (under § 495 Civil Code) to the undivided one-third part of all the real estate shown to be owned by the other party at the time such decree was made. In all such cases, it is the peremptory duty of the court to so decree.

THIRD PARTIES — WHEN MADE DEFENDANTS IN DIVORCE SUITS.—When a husband conveys the bare legal title to a third party in trust for his use, to prevent the marital rights of the wife from attaching thereto, such third party is a proper party to the proceeding.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Thayer & Williams, for Appellant.

Caples & Mulkey, for Respondents.

By the Court, PRIM, J.:

This is a suit in equity commenced by plaintiff against her husband, W. C. Wetmore, to obtain a divorce predicated

upon the ground of harsh and cruel treatment rendering life burdensome. The legal title to certain real property being in the name of J. P. O. Lownsdale as trustee for the said W. C. Wetmore, he was also made a party defendant.

The plaintiff alleged in her complaint, among other things, that W. C. Wetmore induced her to execute a certain mortgage upon certain real property belonging to her in her own right, situated in the city of Portland, to Messrs. Ladd & Tilton, by which he secured the advancement of money with which he purchased lot 3, in block 217, in East Portland; that in order to prevent the marital rights of plaintiff from attaching thereto, he conveyed said lot to other parties, and at the time of the commencement of this suit the legal title was vested in said Lownsdale; that said lot was of the value of one thousand five hundred dollars and had been acquired with her money. The complaint, after praying for a dissolution of the marriage contract, between plaintiff and defendant, prayed that the title to said lot 3 inure to her, and for general relief.

W. C. Wetmore made no denial to the allegations in the complaint, except that he denied inducing the plaintiff to execute any mortgage to any one, and denied that said lot 3 was worth one thousand five hundred dollars or any sum greater than six hundred dollars. Lownsdale made no answer in the suit. At the hearing the court below granted a divorce to the plaintiff with costs and disbursements against W. C. Wetmore, but decreed that Lownsdale should have and hold lot 3 as trustee, solely to pay said costs and disbursements, and that upon their payment he should be discharged from such trust, and that said trust property be wholly discharged from all claims and demands on the part of said plaintiff, and that she be barred, divested, and precluded from all estate, right or claim in any lands of said W. C. Wetmore.

From this part of the decree, relating to said lot 3, the plaintiff has appealed to this court.

The plaintiff having established her right to have the marriage contract dissolved, and the same having been dissolved by the court, it is claimed by counsel for plaintiff

that, under § 495 of the Civil Code, she is entitled to the undivided *one-third* part of all the real estate owned by her husband at the time the decree was made, and that it is the imperative duty of the court to so decree in all cases.

Said § 495 reads as follows: "Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made *shall, in all cases,* be entitled to the undivided one-third part, in his or her individual right in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in § 497; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

The provisions of this section appear to be peremptory in their character in two aspects: 1. In regard to the rights of the party, at whose prayer the divorce is obtained, in the land owned by the other party at the time such decree is granted; 2. In regard to the duty of the court in all such cases to enter a decree in accordance with this provision. The provision is that such party "*shall, in all cases,* be entitled to the undivided *one-third part* of the real estate *owned* by the other at the time of such decree, * * * and it *shall* be the duty of the court in all such cases to enter a decree in accordance with this provision."

But it is insisted, on behalf of defendant, that this statute does not operate in this case to give one-third of the lot in question to plaintiff, for the reason that the legal title was not in Wetmore, he being invested only with the equitable ownership, while the naked legal title was in defendant Lownsdale.

We apprehend, however, that this position is not well taken and cannot be maintained, without giving to this statute such a construction as would defeat the object and intention of the Legislature.

While it is true that the naked legal title to the lot was in Lownsdale, yet it appears that Wetmore was in possession, and was, to all intents and purposes, the equitable and real owner; in fact, it is alleged in the complaint, and not denied in the answer, that it had been conveyed to

Lownsdale by defendant Wetmore for his, Wetmore's, use and benefit, and for the purpose of preventing the marital rights of plaintiff from attaching thereto. If the construction contended for by defendant should be given to this statute, it would be entirely worthless and inoperative to secure the rights of the injured party in the property of the other. The husband could always defeat the rights of an injured wife to one third of his real estate, and prevent the effective operation of the statute, by making a conveyance, of the bare legal title to his real estate, to some friend, reserving the substance thereof for his own use and benefit.

It is further claimed that the title in fee, not being in said W. C. Wetmore, but in Lownsdale, it was not within the power of the court to invest plaintiff with such fee; that the court could not invest plaintiff with a greater estate than defendant had; but in this case there is nothing to prevent the court from dealing with the legal title, as the trustee was a party before the court. And under the rule laid down in *Bamford v. Bamford,* heretofore decided by this Court (4 Or. 30), he was a proper party before the court. (28 Wis. 510, 296; 6 Paige Ch. 366.)

Under the view herein taken, the decree of the court below should be modified so as to give the plaintiff an undivided one-third interest in said lot 3; and it is so ordered.

BOARD OF COMMISSIONERS FOR THE SALE OF SCHOOL LANDS, Appellants, v. A. D. BABCOCK, et al., Respondents.

INDEX — NO PART OF RECORD OF CONVEYANCE.— The index is no part of the record of a conveyance. When the grantee delivers his deed to the county recorder and has it copied by him into the proper book, he has done all the law requires of him to give notice to subsequent purchasers, and the party who suffers through the neglect of the clerk to properly index such conveyance, must look to the clerk and his sureties for redress.

APPEAL from Polk County.

In July, 1871, the respondent, A. D. Babcock, owned the land in question, and at that time executed a mortgage

thereon to the appellants to secure the sum of five hundred dollars. In said month of July, 1871, said mortgage was by the clerk of Polk County copied into the record of mortgages for said county, but was not indexed as by law required or in any manner; and immediately after being so copied, was delivered to the plaintiffs. In December, 1871, one Leona R. Babcock obtained a judgment in the Circuit Court of the State of Oregon for the County of Polk, against said A. D. Babcock, for the sum of five hundred and twenty-four dollars. On the 15th day of May, 1873, in the same court, one S. M. Babcock obtained another judgment against said A. D. Babcock, for the sum of five hundred dollars.

Executions were issued on said judgments, and said land was duly levied upon by the sheriff of Polk County and sold to satisfy said executions, on the 30th day of August, 1873, to Boise, Lady et al., and said sale was, by said Circuit Court, duly confirmed on the 25th day of November, 1873, and sheriff's deed was duly executed in accordance with said sale and confirmation to said purchasers on the 28th day of February, 1874, which sheriff's deed was duly recorded and indexed on the 3d day of February, 1874, in the records of said Polk County. The respondents, Boise, Willis, and Lady, now own and represent all the interest conveyed by said sheriff's deed. Neither Boise, Willis, nor Lady, nor any of the purchasers at said sheriff's sale, had, until after the execution and recording of all the conveyances above mentioned, any notice or knowledge whatever of the execution of plaintiff's mortgage, unless the copying thereof aforesaid, without any index thereof, was constructive notice to them.

Upon these facts a decree was had in the court below in favor of the defendants, from which plaintiff appeals.

R. S. Strahan and L. Vineyard, for Appellants.

We maintain that the plaintiffs cannot be prejudiced by the mistake, inattention or neglect of a mere clerical officer after they had done all that the law required them to do.

(*Dodge v. Potter*, 18 Barb. R. 193, 202; 54 Barb. 467; 16 Ill. 450; 2 Am. R. 533.)

And it is elementary law that the record of a mortgage is sufficient notice, though not mentioned in the alphabet or index. (1 Hilliard on Mortgages, 721, § 46; *Curtis v. Lyman*, 24 Vt. 338; 13 U. S. Dig. 475, § 45; *Green v. Carrington*, 16 Ohio St. R. 548; 2 Am. R. 533; 38 Ill. 252.)

For the misfeasance or nonfeasance the recorder is liable to the party injured, and in this case the persons injured are those who were misled by the want of the index. (*Green v. Carrington*, 16 Ohio St. R. 551.)

Section 23, ch. 6, Mis. Laws, provides the books in which deeds and mortgages are to be recorded. Section 24 requires the clerk to certify upon every conveyance when the same was recorded, which shall be considered as recorded at the time it was so received, and § 25 provides for the index. The word *record* in these sections is evidently used in its ordinary sense—to register; to enroll; to record a deed or lease. (Webster's Dic.)

Boise & Willis and P. C. Sullivan, for Respondents.

Registry acts should be liberally construed to protect *bona fide* purchasers. (*Ford v. Burch*, 6 Barb. 69; *Chamberlin v. Bell*, 7 Cal. 292.)

The act of registry, unless in full and strict compliance with the law, is to be treated as a mere nullity. (1 Story Eq., Juris., § 404; *Jennings v. Wood*, 20 Ohio, 261; and 7 Cal. 292.)

The index is a necessary part of a complete record, as much so as the copy of the instrument. (Mis. Laws, ch. 6, §§ 23, 25; *Gwynn v. Turner*, 18 Iowa, 1; *Whally v. Small*, 25 Iowa, 184.)

If the clerk should fail to make the proper entries in the docket after judgment is rendered and entered in the journal of the court, the redress of an aggrieved judgment creditor is against the clerk only. A party searching the records is not required to look beyond the lien docket, which is only an index of the judgment rendered. (Freeman on Judgments, § 343; Hance's Appeal, 1 Penn. St. R. 408; *Ridgeway, Budd & Co.'s Appeal*, 15 Penn. St. R. 177.)

By the Court, Burnett, J.:

The only question presented by this appeal is, whether a mortgage of real property, properly filed and recorded in the clerk's office of the county where the lands lie, but not indexed, is constructive notice to subsequent purchasers of the same real property. It is contended by counsel for respondent that, because the mortgage in question was not indexed by the clerk, it was not recorded according to law, and, therefore, failed to give even constructive notice to a subsequent purchaser. This necessarily raises the question, whether the index is a part of the record, and whether the mortgagee has done all that the law requires of him, to give notice to a subsequent purchaser, when he procures his mortgage to be filed in the clerk's office and recorded in the proper book. In the case at bar, the mortgage was duly filed and regularly recorded, and a certificate indorsed on the instrument stating that fact. The mortgagee then relied on the assurance that the clerk had done his whole duty, and that he would be protected in his rights; but, by the neglect and carelessness of that officer, no index to the mortgage was made, as the statute directs, and hence persons searching the records were liable to be misled as to the existing incumbrance. The sections of the statute bearing upon this subject are as follows: "§ 23 (Mis. Laws, Chap. 6). Separate books shall be provided by the county clerk in each county for the recording of deeds and mortgages; in one of which books all deeds left with such clerk shall be recorded at full length, with the certificates of acknowledgment or proof of execution thereof; and in the other, all mortgages left with the county clerk shall in like manner be recorded." The next section (§ 24) provides that the county clerk "shall certify upon every conveyance recorded by him, the time when it was recorded, and a reference to the book and page where it is recorded, and every conveyance shall be considered as recorded at the time it was so received." The next section (§ 25), provides that he shall keep an index, direct and indirect, to the books for recording deeds and mortgages. The next section (§ 26) is as follows: "Every conveyance of real

property within this State hereafter made which shall not be recorded, as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." It follows, of course, that if the conveyance shall be recorded, as provided in that title of the statute, then it will be valid.

It is claimed by counsel for respondent that the language of § 26, requiring the conveyance to be recorded as "provided in that title," and the section requiring the clerk to keep an index to the books for the recording of deeds and mortgages being contained in the title referred to, it should be construed to require all such conveyances to be indexed as well as recorded, in order to give notice to subsequent purchasers; or, in other words, that the index is a part of the record. But this I do not think is a proper construction of the statute. Section 23, heretofore quoted, is complete in itself, and fully defines what is the record of a conveyance, and the index is made no part of it. Again, the section providing for the index, after requiring that it shall contain the name of every party to each and every instrument recorded, provides that such index shall contain a reference to the *book* and page where the same is *recorded*. It would seem to be a contradiction in terms to say that the index shall refer to the record, and at the same time say that it is a part of the record.

There are some other sections of the statute that indicate that the index is not treated as any part of the record; for instance, § 27 provides that the record of a conveyance, duly recorded, etc., may be read in evidence, etc.; and § 30 provides that any mortgage that has been or may hereafter be recorded, may be discharged by an entry on the margin of the record thereof. It is claimed that it would be a great inconvenience to require persons examining titles to go beyond the index in their examination. This may be so, but there is no argument that can be founded upon the inconvenience of the matter that will not apply with equal force in either view. This brings us back to the point whether

the grantee or mortgagee has done all the law requires of him, to give notice to subsequent purchasers, when he files his conveyance in the clerk's office, and has it recorded in the proper book; if so, then he is entitled to protection, and the party who suffers through the neglect of the clerk to do his duty in making an index, must look to the clerk and his sureties for redress. To give the statute the construction claimed by respondent's counsel would require § 26 to be read that every conveyance which shall not be recorded and indexed as provided in this title shall be void as against subsequent purchasers.

The Iowa statute, upon which the cases in 18th and 25th Iowa Reports referred to and relied on by respondent's counsel are based, reads as follows:

"SEC. 1943. The recorder must keep an entry book, or index, the pages of which are so divided as to show, in parallel columns: 1. The grantors; 2. The grantees; 3. The time when the instrument was filed; 4. The date of the instrument; 5. The nature of the instrument; 6. The book and page where the record thereof may be found; 7. The description of the land conveyed.

"SEC. 1944. The recorder must indorse upon every instrument, properly filed in his office for record, the time when it was so filed, and shall forthwith make the entries provided for in the preceding section, except that of the book and page when the record of the instrument may be found, and from that time such entries shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument."

It will be seen that the Iowa statute expressly provides that the index shall furnish constructive notice. No doubt our Legislature might have made the same provision in regard to our registry act; but, in the absence of such a provision, I conclude that the filing and recording furnish such notice; and this view is sustained in all the States that have registry acts similar to ours.

In the case of *Bishop v. Schneider* (46 Mo.), the Supreme Court of Missouri, in passing upon the identical question presented in this case, and on a statute very much like ours,

Judge Wagner delivering the opinion of the court, says: "In my opinion the proper office of the index is what its name imports, to point to the record; but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder, and transcribed on the record, it shall be considered as recorded from the time it is delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section, for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of noncompliance with that duty the party injured has his redress. The purchaser, or grantee, when he has delivered his deed, and seen that it is correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury." And to the same effect are the cases in 24 Vermont, 338; 16 Ill. 450; 16 Ohio, 548; and 28 Texas, 605.

In accordance with these views, the decree of the court below will be reversed.

Mr. Justice McARTHUR, dissented.

R. D. HUME et al., Respondents, v. JOHN H. NORRIS, Appellant.

SHERIFF — DEFINITION OF.—The word "sheriff," in § 110, Subd. 1, of the Civil Code, is a generic term, and comprehends constable, whose duties are of a like nature.

CONSTABLE—DUTY OF, WHERE SURETIES IN A CIVIL ACTION SURRENDER THEIR PRINCIPAL.—Where a constable executes a writ of arrest, in a civil action, and the sureties subsequently deliver the party back into his custody, it is his duty to acknowledge the return of the party by certificate indorsed upon a certified copy of the undertaking of bail.

APPEAL from Multnomah County.

The facts are stated in the opinion of the Court.

Caples & Mulkey, for Appellant.

F. R. Strong, for Respondents.

By the Court, MCARTHUR, J.:

Shaeffer was arrested upon a civil process, issued out of a Justice's Court, in an action in which one Paddock was plaintiff, and he (S.) defendant. The process was executed by Norris, who was constable in the precinct in which the action was brought. Subsequently, Shaeffer gave the necessary undertaking, for release from custody, with Hume and Herman as sureties. Afterwards, the sureties, desiring to surrender S., caused a certified copy of the undertaking of bail to be delivered to Norris, and gave into his care and keeping the body of said S., and then and there demanded that he should acknowledge such surrender by certificate in writing, upon the certified copy of the undertaking. This, Norris refused to do. The court below, upon the petition of the respondents, and after a hearing, ordered a peremptory mandamus to issue to appellant to make such certificate, and this is charged as error. We are of opinion that it is not error. By § 12 of the Justices' Code, the provisional remedies of arrest, attachment, and delivery of personal property, are extended to the Justices' Courts. Writs issued out of those courts are allowed to be served by the constable; in fact, he is the executive officer of the said courts. (Mis. Laws, ch. 42, §§ 36, 37; Jus. Code, §§ 9, 13.)

Norris executed this writ, and accepted Shaeffer after he was surrendered, but refused the certificate; and the argument to sustain such refusal is based upon § 110 of the Code of Civil Procedure, which provides in subdivision 1 that "a certified copy of the undertaking of bail shall be delivered to the sheriff," etc. The sheriff being the only officer designated, it is contended that therefore to him alone can a surrender be made. Such a construction would, in effect, prevent the jurisdiction of the Justices' Courts extending to the matters enumerated in § 12, above referred to, for we find that in those sections of the Code pointing out the methods by which the benefits of the provisional remedies above mentioned, are procured, acts are required to be performed by the sheriff and the clerk. Justices' Courts have

no such officer as clerk; and if no one but a clerk can issue writs in the provisional remedies, then justices of the peace cannot exert their jurisdiction in those matters. The true rule is, that when, in an action in the Justices' Court, a party desires to resort to any of the provisional remedies above named, the justice should perform, as nearly as may be, all those acts that are required to be performed by the clerk in like cases in courts of record; and the constable, if the writ is put in his hands, should perform all those acts that are required to be performed by the sheriff. In that manner alone can the jurisdiction of the Justices' Court be fully and adequately extended under § 12. The word "sheriff," in § 110, subdivision 1, must be held to be a generic term. In *Winchell v. Pond* (19 Vermont, 198), the court, in passing upon a statute which provided that "no sheriff or deputy sheriff shall be allowed to make any writ, declaration," etc., held the word "sheriff" to be a generic term, and to comprehend the entire class of executive officers, including constables, whose duties are of a like nature. And such is our view of the word in the section under consideration.

The writ under which Shaeffer was arrested was put into the hands of constable Norris. He executed it. To him Shaeffer was surrendered, and it was his duty to acknowledge such surrender by a certificate in writing upon the certified copy of the undertaking of bail presented by the sureties.

Judgment affirmed.

MAHALA WILSON, Appellant, v. FRANK MADDOCK and H. A. KATHAU, Respondents.

EVIDENCE — COMMON REPUTATION.— Under Subd. 12, § 766, of the Code Civil Procedure, common reputation is admissible in evidence to prove the ownership of property in dispute, and this statute changes the general rule in this respect.

IDEM.—OPINION OF WITNESS NOT ADMISSIBLE.—A question which calls for the opinion of the witness as to whom common reputation ascribes the ownership of property, is not admissible.

APPEAL from Umatilla County.

W. W. Thayer, for Appellant.

James H. Slater, for Respondents.

By the Court, SHATTUCK, J.:

The only ground of error assigned and insisted on in this case, is the refusal of the court below to allow the plaintiff's counsel to ask of the witness Scott the following question, to wit: "Do you know who is the owner of the property described in the complaint, according to common reputation?"

The issue on trial between the appellant and the respondent was as to the ownership of certain personal property, and the proposal to put this question assumes that ownership of property may be proved by common reputation.

The objection to the question is two fold; that the evidence called for is incompetent, and that the question is not in proper form, even if common reputation could be received as evidence of ownership.

We hold that common reputation cannot be received as evidence of title to property, unless it be authorized by express provisions of the statute, or unless the case is one within the exceptions to the general rule. It has been long held that common or general reputation may be received concerning a matter in which the public have an interest, or which directly concerns and affects the mass of the people of a town or locality. This case is one merely personal and of a private nature, concerning which the parties alone can be *presumed* to be informed or have any accurate knowledge. Consequently, common reputation could not, by the general rule, be received to show title in this case. (1 Greenleaf on Ev., §§ 127, 131.)

Our statute, however, in the Criminal Code, § 652, has declared common fame to be competent evidence in case of indictment for keeping a brothel, and that provision of the statute has been applied without question in that class of cases, ever since its enactment. There can be no doubt that the Legislature had the power to enact it. It is said to have been a rule of the Roman law, that common reputa-

tion in all cases might be received as evidence. (1 Greenleaf on Ev., note 5 to § 128.) The Legislature of this State might, if they deemed it expedient, make such to be the rule here. We think they have done so by Subd. 12, § 766, of the Civil Code, which provides among disputable presumptions, satisfactory unless overcome, "that a person is" (presumed) "the owner of property from exercising acts of ownership over it, or from common reputation of his ownership." By this provision common reputation is placed on an equal footing with possession, as furnishing a presumption of ownership, and for this reason, as to the general competency of the evidence, we think the objection to its introduction should have been overruled.

The form of the question was, however, objectionable, and it was not error to refuse to allow an answer to be given. The question does not ask for the common reputation of ownership, but for the opinion or inference of the witness. The proper fact to be proven was merely the common reputation. Of this alone the witness was competent to testify. The inference or presumption to be drawn from that fact was matter for the jury.

The judgment below is affirmed.

JOSEPH KNOTT, Respondent, v. T. C. SHAW, Sheriff of the County of Marion et al., Appellants.

JUDGMENT LIEN — PROPERTY WHEN SOLD LIABLE FOR IN INVERSE ORDER OF SALE.—The statute gives to the State a lien upon all the property, real and personal, of a criminal from the time of the commission of the crime. When such property has been sold, either by the party convicted or by his executor or administrator, it is chargeable with the incumbrance in the inverse order of its alienation,—that is to say, the property last sold is to be first charged.

APPEAL from Marion County.

On the 13th day of August, 1873, A. H. Whitley and Susan, his wife, for a valuable consideration, conveyed lot 8, in block 50, in the city of Salem, to one Ramsey. On the 27th of the same month Ramsey, for a valuable consideration, conveyed said lot 8 to said Susan Whitley, by whom

it was for a valuable consideration conveyed, on the 4th of February, 1875, to the plaintiff.

Prior to this first conveyance, and at the June term of the Circuit Court, for Marion County, said A. H. Whitley was convicted of the crime of assault with intent to kill, committed upon one Glaze, and judgment of imprisonment for one year in the penitentiary and for costs and disbursements, amounting to $1850.40, was rendered against him. The judgment for costs and disbursements was entered in the lien docket for Marion County on the 5th of July, 1873, and in the lien docket for Polk County on the 4th day of September, 1873.

On the 6th of October, 1873, said Whitley was killed by Glaze, and on the 17th of the same month, Susan Whitley was appointed sole executrix of his will, and so continued until July 27, 1875.

On the 16th and on the 18th days of September, 1873, A. H. Whitley made conveyances of distinct parcels of land to one J. W. Smith. Smith having died subsequently, his widow who is the administratrix of his estate, and his minor heirs are made parties herein. On the 20th of June, 1874, Susan Whitley, as executrix, in pursuance of an order of sale by the County Court of Marion County, sold a large quantity of land belonging to the estate of said A. H. Whitley, to different persons, and realized therefrom the aggregate sum of about eighteen thousand dollars.

On the 15th of March, 1875, an execution issued out of the Circuit Court for Marion County, against A. H. Whitley and in favor of the State, for $1850.40, costs and disbursements in the criminal action, and was placed in the hands of the defendant Shaw, who was sheriff, who made levy thereunder on said lot 8 and advertised the same for sale. Plaintiff sued for an injunction to restrain the sale. The defendants interposed a demurrer, which was overruled by the court and an order made that the lands sold by Whitley in his lifetime, after the commission of the crime for which he was convicted, are liable for the payment of said judgment in the inverse order of their sale.

From this ruling and judgment the defendants appealed.

Oregon, made and delivered to the defendant, S. N. Arrigoni, a certain promissory note, a copy of which is set out in complaint as follows:

$950. PORTLAND, OREGON, JAN. 29, 1867.

"For value received, on demand, I promise to pay S. N. Arrigoni, or order, the sum of nine hundred and fifty (950) dollars in United States gold coin.

(Signed) "L. L. BLAKE,
"S. N. ARRIGONI."

That on the 27th day of May, 1867, the defendant sold and delivered the said note to the plaintiff, and transferred the same by writing his name on the face of the note under the name of the maker; that at the time of such transfer, it was agreed between the plaintiff and the defendant, that the defendant's rsponsibility to the plaintiff, on this note, should be deferred, and that no recourse on said note should be had against him until January, 1868, and a memorandum of said agreement was then and there indorsed upon said promissory note.

That prior to the 31st day of December, 1867, the said L. L. Blake left said State of Oregon, for some place unknown to plaintiff, and on and after said last-named date, plaintiff has not, although he has made diligent search and inquiry, been able to find him, so that he might present the note to him, the said L. L. Blake, for payment; of all of which, the said defendant, then and there, had notice, and the said defendant, on January 1, 1868, and on divers days thereafter at the city of Portland, and elsewhere, promised plaintiff to pay him, plaintiff, the sum of money due on said promissory note; each of which said several promises defendant has hitherto failed to keep and perform.

There is an averment that the plaintiff is the owner and holder of the note, and that the amount due thereon is $1600, for which sum plaintiff prays judgment in gold coin.

The defendant filed a demurrer to this complaint:

"That it does not state facts sufficient to constitute a cause of action against defendant, for the following reasons:

"First. The allegations of notice in said complaint are in-

sufficient in law to charge defendant with any liability to pay said note, or any part thereof.

"Second. It is not alleged, in or by said complaint, that the agreement between the plaintiff and the defendant, at the time of the sale and transfer of said note by defendant to plaintiff, was reduced to writing or signed by plaintiff and defendant, or either of them, or that the memorandum alleged to have been indorsed on said note, was made at defendant's request, or was signed by any one.

"Third. The promises, alleged in complaint to have been made in January, 1868, and since, are insufficient in law to enable plaintiff to maintain his said action against defendant.

"Fourth. The complaint of plaintiff shows that this action has not been commenced within six years next after the cause of action first accrued upon the contract, or note set forth in plaintiff's complaint."

The demurrer was sustained and judgment rendered against the plaintiff, who now appeals.

William Strong and John B. Waldo, for Appellant.

W. H. Effinger and W. W. Upton, for Respondent.

By the Court, PRIM, J.:

The fourth specification, contained in the demurrer to the complaint, is that it appears on the face of the complaint that the action was not commenced within six years next after the cause of action, upon the contract set out, first arose.

In order to determine whether this objection or specification is well taken, it becomes necessary to ascertain the relation of defendant to the note as well as the time when the cause of action accrued to plaintiff against the defendant.

The complaint seems to be based upon the theory that defendant Arrigoni signed the note as an indorser, and undertook to become liable to the plaintiff in that capacity; and we have concluded that he should be so treated in order to decide upon his liability.

The note was executed January 29, 1867, and was made payable on demand to S. N. Arrigoni, or order. On May 27, 1867, nearly four months after its execution, Arrigoni transferred the note to plaintiff by writing his name on its face under the name of the maker.

It is usual for an indorser to put his name upon the back of a note when he wishes to assume the position of indorser thereon; yet it is immaterial where he puts it; all that is necessary is that he put his name somewhere on the note with the intention of making a present transfer of it. This note was payable to his order, and he could make that order as well upon the face as upon the back of the note. (Story on Prom. Notes, § 121; Edwards on Bills and Prom. Notes, 267.)

It is well settled that an indorser may limit or qualify his responsibility at the time of making the indorsement; and in this case it appears that Arrigoni undertook to do so. (Edwards on Bills and Notes, 282, 283.)

It is alleged, in the complaint, that it was agreed between plaintiff and defendant that the responsibility of defendant on this note should be deferred, and no recourse on said note should be had against him until January, 1868, and that a memorandum of said agreement was then and there indorsed upon said note. These facts are admitted by the demurrer to be true, and cannot be disputed in this stage of the case. Every indorsement upon a note is a new contract, and can be executed as other contracts. (Edwards on Bills and Prom. Notes, 263.)

The facts alleged in the complaint show a contract between plaintiff and defendant having the same legal effect as if it had been written out in full as follows: "I hereby transfer to A. H. Johnson or order, this note, without recourse upon me, until January, 1868." Signed "S. N. Arrigoni," and dated "May 27, 1867."

Arrigoni, in indorsing the note, took the precaution to defer his liability to pay, in case it should be dishonored, until January, 1868. Since it was a note payable on demand, he was liable to be called upon immediately, if

the maker should fail to pay, unless provision should be made against it at the time of indorsement.

Entertaining the view herein expressed of the contract, we think the plaintiff's right of action against defendant did not accrue until January, 1868, and therefore was not barred in December, 1873.

Having reached the conclusion that the defendant occupied the position of an indorser, and assumed the liability of such, he was entitled to due demand and notice before his liability to pay the note could be made absolute. The note being due on demand, it was the duty of the holder to present it for payment within a reasonable time; and what is a reasonable time, is a question of law for the court, to be decided on the facts of each particular case. In this case, it appears that no effort was made to find Blake, the maker of the note, in order to present it for payment until the 31st of December, 1867, which was more than seven months after the time when Arrigoni indorsed the note. This, we apprehend, would be held to be an unreasonable delay, under all the authorities.

It is admitted by counsel for plaintiff that no demand on Blake is alleged; but it is claimed, that a state of facts have been alleged sufficient to excuse a want of demand or take the place of such allegation. These facts are, "that, at the time of making of said promissory note, the said Blake was residing in the State of Oregon; that prior to the 31st day of December, 1867, the said Blake left said State for some place unknown to the plaintiff, and that, on or after said last-named date, plaintiff has not, although he has made diligent search and inquiry, been able to find him, so that he might present said note to him for payment; or all of which the said defendant then and there had notice; and the said defendant, on the 1st day of January, 1868, and on divers other days thereafter, at the city of Portland and elsewhere, promised to pay plaintiff the sum of money due on said note."

Thus it will be seen that it is alleged in the complaint that defendant made a subsequent promise to pay said note, after having notice of the laches of plaintiff in failing to make

an effort to present the note for payment within a reasonable time.

A subsequent promise to pay, after full knowledge of such laches on the part of the holder as would operate to discharge an indorser, all the authorities hold is sufficient to render him liable to pay the note. In discussing this proposition, Mr. Edwards, in his work on Bills and Promissory Notes, says: "When the fact appears that there has been laches on the part of the holder, a subsequent promise by the indorser to pay the bill will not render him liable unless it also appears that the promise was made with full knowledge of the fact that he had been discharged by the laches of the holder. But, on proof of a promise by the indorser, with knowledge that he was not liable on the bill, the holder may recover; not, however, on the ground that the indorser is bound by the promise as a matter of contract, for it wants consideration, but on the ground that a promise amounts to a waiver of the objection that the proper steps have not been taken to discharge the indorser." He further says: "By this it is not meant that it must appear that the drawer or indorser knew the law of the case when he made the promise. It is enough if the promise is made with knowledge of the facts; for he cannot defend himself upon the ground of his ignorance of the law when he made the promise."

In the complaint, the facts showing laches on the part of the holder are clearly alleged, and that defendant, after having notice of such facts, made a subsequent promise to pay, which we think renders him liable.

The judgment is reversed, and the cause remanded to the court below for further proceedings.

STATE OF OREGON, Respondent, v. DANIEL DOTY, Appellant.

ASSAULT WITH INTENT TO KILL — INDICTMENT — WHAT OBJECTIONS TO ARE WAIVED BY FAILURE TO DEMUR.—An indictment charging an assault with intent to kill, which follows the language of the statute and omits to state the acts constituting the offense, is sufficient where no objection is made to it until after verdict; but if demurred to, such indictment is insufficient.

IDEM.—All objections to the sufficiency of an indictment which appear upon its face, except the first and fourth grounds specified in § 123 of the Criminal Code, are waived by a failure to demur. *State of Oregon v. Dougherty et al.*, (4 Or. 200), and *State of Oregon v. Bruce*, (ante, 68), cited and approved.

IDEM—EVIDENCE.—A defendant on trial for an assault with intent to kill, will not be permitted to show in his justification that, prior to the affray, he made complaint before a peace officer charging the assaulted party with having threatened his life, and asking to have him bound over to keep the peace.

APPEAL from Jackson County.

At the November term, 1875, of the Circuit Court for Jackson County, Oregon, Daniel Doty was convicted of the crime of assault with intent to kill, upon an indictment of which the following is a copy omitting the formal parts:

"Daniel Doty is accused by the grand jury of the county of Jackson by this indictment, of the crime of assault with intent to kill, committed as follows: The said Daniel Doty, on the 18th day of April, 1875, in the county of Jackson, State of Oregon did assault Brooks Johnson with intent to kill him, the said Brooks Johnson, contrary," etc.

No demurrer was interposed, and the defendant pleaded "not guilty." At the trial, it was proved that at the time and place named in the indictment, there was an affray between the defendant, on one side, and Brooks Johnson and Thomas W. Johnson on the other, in which the defendant killed Thomas W. Johnson, and wounded Brooks Johnson. The defendant offered a witness to prove that prior to the affray, he made complaint to the district attorney charging Thomas W. Johnson with having made threats against his life, and asking to have him bound over to keep the peace. The testimony was rejected by the court. After

verdict, the defendant made a motion in arrest of judgment and for a new trial, alleging, among other specifications of error, that the indictment was defective, and that the court erred in excluding the evidence above mentioned. The motion was overruled, and there was judgment upon the verdict. The defendant appealed to this Court.

H. K. Hanna, District Attorney, and J. F. Watson, for Respondent.

J. D. Fay and Thayer & Williams, for Appellant.

By the Court, BONHAM, C. J.:

The bill of exceptions in this case discloses the fact that numerous objections were made by the defendant to the proceedings at the trial in the court below, touching the admission of testimony offered by the State and the rejection of evidence offered by the defendant, and concerning instructions given by the court, as well as those asked for by the defendant, which were refused. We shall review here, however, only those objections which counsel for appellant have presented in their brief and argument in this Court, believing, from a careful examination of the bill of exceptions, that none of the numerous other objections are well taken.

The first objection urged here by counsel for appellant is, that the indictment in this case is fatally defective, in that it does not state facts sufficient to constitute a crime. It is claimed that the State should have specified in this indictment the means by which, and the manner in which, the alleged assault was committed, naming the weapon used if any, so that the defendant might be intelligibly informed of "the nature and cause of the accusation against him," and be thereby enabled to prepare for his defense. In support of this position, counsel for the appellant cite *State of Oregon v. Dougherty et al.*, decided by this Court at its December term, 1871 (4 Or. 200), and also Bishop on Criminal Procedure, § 77 and note, and 3 Sneed. 66.

In answer to this proposition counsel for the respondent

cite the decision of this Court in *State of Oregon v. Bruce* (ante, 68; 26 Iowa, 467; 5 Cush. 365; 21 Ind. 441; Wharton's Am. Crim. Law, § 292; 44 Cal. 93.

As to the sufficiency of an indictment framed in manner and form like the one in this case, the authorities certainly are not uniform; but without reviewing the cases cited, *pro* and *con*, from the courts of other States on this subject, we desire to note briefly the decisions of this Court made in *State v. Dougherty et al.*, and in *State v. Bruce*, and consider the question of the sufficiency of this indictment with reference to the law, as it is construed in these cases, and with reference to the language of our Criminal Code on this subject.

We think that upon a careful examination of the two decisions of this Court above cited, they will be found to fully harmonize with each other, as well as with the provisions of our Constitution and laws on the subject of criminal practice in this State. The case of *State of Oregon v. Dougherty et al.*, decides that a person accused of crime in this State, has not only a statutory but a constitutional right to demand before he is placed upon his trial "the nature and cause of the accusation against him" (Code, p. 76; § 11, Bill of Rights); also to have submitted to him by the indictment "a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Criminal Code, § 69.) In *State v. Dougherty et al.*, the indictment was held to be defective, because it failed to describe the character of the lottery which the defendants were charged with setting up, so as to enable them to know what was intended, and to be prepared for their defense when the case should be called for trial. In other words, it was held in that case that the indictment was subject to objection on the second ground of demurrer, as prescribed in chapter 2 of the Criminal Code, to wit: "That it does not substantially conform to the requirements of chapter 8 of this Code." But in *State v. Dougherty et al.*, the defendants raised the question as to the sufficiency of the indictment at the proper time and in the proper manner, by demurrer. But in this case,

as also in the case of *State of Oregon v. Bruce,* no demurrer was interposed, but the objection to the indictment was for the first time presented on motion in arrest of judgment. In *State of Oregon v. Bruce,* it was conceded by the Court that a demurrer to the indictment, had one been interposed, should have been sustained, on the ground that it did not substantially conform to the requirements of chapter 8 of the Code. And we say the same of the indictment in the present case. But we do not think it can be maintained that this indictment does not charge a crime within that meaning of subdivision 4 of § 123 of the Criminal Code. The charge is in the language of the statute, and the legal signification of the term "assault with intent to kill," implies an unlawful and felonious attempt to take the life of another.

The indictment in this case, to have been perfect and free from objection, should have specified the weapon or means employed in making the assault complained of; but in the absence of a demurrer such indictment is sufficient after verdict. It should be understood, because our statute is paramount authority on that subject, that three of the five grounds of demurrer, as specified in § 123 of the Criminal Code, are waived by the failure to demur, if the objection appear on the face of the indictment. And we repeat here in substance what we said in the case of *State v. Bruce,* that to hold otherwise would be to do violence to a plain provision of the statute, and to impose unnecessary additional expense and labor upon the State in the prosecution of offenders, and would in many cases, by the resulting delays, afford to the guilty means of escape from merited punishment for their crimes.

The second objection urged by counsel for the appellant is to the effect that the court erred in refusing to admit the testimony of H. K. Hanna, District Attorney, called on the part of the defendant on the subject indicated by the following question: "State whether or not defendant came to you about two weeks before the affray of April 18, 1875, and made complaint against Thomas W. Johnson, for menacing and threatening him, and asked that proceedings might be instituted against him to have to him bound over to keep the

peace toward the defendant?" The evidence suggested by this question, it is claimed, was offered by appellant for the purpose of showing that he had reason to believe, and did believe, that he was in danger of great bodily harm or the loss of his life at the time of the difficulty complained of, out of which originated the charge of assault with intent to kill. Counsel for the appellant claim that this evidence, if it had been admitted, would have tended to show that the appellant was under the protection of the rule as recognized in *Goodall v. The State* (1 Or. 333). The rule, as laid down in that case, is, "that if they (the jury) believed, from the evidence in the case, that there was reasonable ground for Goodall to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and acting on such belief killed the deceased, he was excusable and that it was not necessary that he should wait until an assault was actually committed." But the evidence offered in this case was properly rejected, for two reasons: First, no reference is made, in the question asked Mr. Hanna, to Brooks Johnson, the assaulted party in this case, but it was Thomas W. Johnson whom the appellant claims he wanted to have put under bonds to keep the peace, because he was afraid of personal violence from him. In the second place, we think that the evidence offered savors too much of declarations in the interest of the party making them to be admissible under the well-established rules of evidence on that subject. To illustrate the effect of such evidence, suppose that A. should go to B., a peace officer, to-day, and declare that C. had threatened to take his (A.'s) life, and had threatened to shoot him on sight if he should meet him again, and should ask for a warrant for the arrest of C., which for some reason should be refused, and no further inquiry into the truth of the matter should be made, tomorrow A. shoots C., and kills him; would the evidence of A.'s declaration to B. be admissible on the trial of A. for the murder of C.? We think not.

We find no error in the judgment of the court below. It is therefore affirmed.

WILLIAM STRONG, Administrator of the Estate of AMORY HOLBROOK, Deceased, Respondent, v. WILLIAM H. BARNHART, Impleaded with Others, Appellant.

JUDGMENTS OF TERRITORIAL COURTS.—By the act of June 4, 1859, regulating "the practice of the Supreme and Circuit Courts," the judgments of the District Courts of the late Territory of Oregon were transferred to the State courts for the proper counties, to be thereafter enforced as judgments of such courts, and the subsequent repeal of that act did not affect the transfer.

STATUTE OF LIMITATIONS.— The provisions of the statute of this State, limiting the period within which an action may be brought on a judgment do not apply to a proceeding under § 292 of the Civil Code for the enforcement of a dormant domestic judgment. The case of *Murch v. Moore* (2 Or. 189), cited and approved.

DORMANT JUDGMENT — HOW ENFORCED.— After the expiration of five years from the rendition of a judgment, it can only be enforced by obtaining leave to issue an execution, as provided by § 292 of the Code.

APPEAL from Multnomah County.

On the 28th day of July, 1875, the plaintiff, who is the respondent here, filed his motion in the court below, under § 292 of the Civil Code for leave to issue execution for the sum of $25,376.40, upon a judgment recovered by Amory Holbrook, now deceased, against William H. Barnhart and others, in the District Court of the Territory of Oregon for the County of Multnomah on the 3d day of March, 1856. William H. Barnhart, who was the only defendant served, interposed a demurrer to the motion on the ground: 1st, that the court had no jurisdiction of the subject-matter of the motion; 2d, that the motion did not state facts sufficient to constitute a cause for relief; and 3d, that the plaintiff had not moved within the time limited by the Code, to wit, within ten years from the rendition of the judgment. The court overruled the demurrer, and made an order allowing the motion of the plaintiff, from which ruling and order the defendant appealed to this Court.

W. W. Thayer and William Strong, for Respondent.

Simpson and Waldo, for Appellant.

By the Court, BURNETT, J.:

The first question presented by this appeal is, whether the Circuit Court for Multnomah County had jurisdiction over this cause. It is contended by counsel for the appellant, that, as it appears that the judgment in question was rendered in the District Court of the Territory of Oregon, it was in a different jurisdiction, and that the Circuit Court of the State has no authority or control over it whatever.

When the territorial government ceased to exist, the State government became its legal successor, and the Circuit Courts of the State the successors of the District Courts of the territory; and certainly the organization of a State government could not take from the people the rights accruing to them as citizens thereof under the former territorial government, nor make their exercise depend upon the action of Congress after the State government was formed and the State admitted into the Union.

When the State was "received into the Union on an equal footing with the other States in all respects whatever," she was a sovereign in all matters pertaining to the administration of her domestic affairs; and instead of the act of 1859 of the first legislature that met under the Constitution being (as was claimed by counsel for appellant) "a rape upon the territorial courts," or "an effort to deflower them," it was simply disposing of the effects of one who was dead, and ready for sepulture; the territorial government having been deposed by those who had originally caused it to exist: a greater power than Congress—the *people*—in whom the elements of sovereignty were born.

The Constitution of the State provides, Art. 8, § 9, that "all judicial power, authority and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts, and they shall have appellate jurisdiction and supervisory control over the County Courts, and all other inferior courts, officers and tribunals." And § 10, Art. 18, is as follows:

"All property and rights of the Territory and of the sev-

eral counties, subdivisions and political bodies corporate of or in the Territory, including fines, penalties, forfeitures, debts and claims of whatsoever nature and recognizances, obligations and undertakings to or for the use of the Territory, or any county, political corporation, office, or otherwise to or for the public shall inure to the State, or remain to the county, local division, corporation, officer or public, as if the change of government had not been made and private rights shall not be affected by such change."

In pursuance of this authority and to carry into effect the provisions of the Constitution, the Legislature, at its first session under the State government, passed the act of 1859, heretofore referred to, § 3 of which reads as follows:

"All books, records, journals, causes, proceedings, matters, files and papers being or pending in or returnable to the Supreme Court of the Territory of Oregon, are hereby transferred to, and shall be kept, perfected, executed, heard, and disposed of by the Supreme Court of the State of Oregon, and the books records, journals, causes, proceedings, files, matters and papers being or pending in or returnable to the District Courts of the Territory of Oregon, *are hereby transferred*, and shall be kept, perfected, executed, heard and disposed of by the Circuit Courts of the State of Oregon."

It is, however, contended by appellant's counsel that this act of 1859 was repealed by the general repealing act, which took effect June 1, 1873, and that this proceeding should have been instituted during the time the law of 1859 was in force. The law of 1859 certainly had the effect to transfer the records and papers of the District Courts of the Territory into the Circuit Courts of the State. The language of the act of 1859, "hereby are transferred to," certainly is as strong as it could well be. If, then, the Circuit Court for Multnomah County obtained possession and control of this judgment by the act of 1859, we must look to some other statute for authority to enforce it, and this we find in the Act passed October 11, 1862, providing for enforcing judgments by execution, which continues substantially the law as it stood in 1854, during the territorial

existence, with the addition of the sections provided for the reviving dormant judgments. The last-mentioned act is the one under which the proceeding was commenced, and we think embraces this judgment, for the reason that it was a record of the Circuit Court, for Multnomah County on the 1st day of June, 1863, expressly made so by an act of the Legislature, and that court had as complete jurisdiction over it as it would have had over one rendered since that time.

The next question presented is that of the statute of limitations. It is claimed by the appellant's counsel that this proceeding falls within either § 5 or § 11 of the statute of limitations. Those sections are as follows: Section 5 provides that "an action upon a judgment or decree of any court of the United States or of any State or Territory within the United States, shall be commenced within ten years after the cause of action accrues."

Section 11 provides that "an action for any cause not hereinbefore provided for, shall be commenced within ten years after the cause of action shall have accrued."

This court gave a construction to § 5, above quoted, in *Murch v. Moore* (2 Or. 189), holding that a domestic judgment is not within that provision, and we are unable to see that there is any error in that conclusion. Counsel for appellant calls our attention to the case of *Mason v. Cronise* (20 Cal. 211), holding a different view, but we are not convinced that it is correct. In fact, we think much the better reason is in favor of the decision in *Murch v. Moore*. Suppose we were to apply this section to domestic judgments, at what time does the "cause of action accrue?" It must be as soon as the judgment is entered; and if a person obtaining a judgment can sue it over once, there is no limit to the number of actions that may be maintained on each succeeding judgment. The effect of giving this construction to the statute is a strong argument against it. The means provided by the statute for enforcing a judgment is by execution, which may be issued at any time within five years of the rendition of the judgment, after which time it can only be enforced by obtaining leave to

issue an execution as provided in § 292 of the code. To hold that an action can be maintained on a domestic judgment would be inconsistent with the whole theory of our statute, which entirely excludes the idea of any such a proceeding, and in fact the action of debt upon judgment had fallen into disuse at common law and was discontinued by the courts at the time Blackstone wrote. (2 Blackstone's Com. 160.)

If it were true that § 5 of the statute of limitations, in the absence of any other statute on the subject, would embrace domestic judgments, still when there is a subsequent statute providing that execution may issue at any time after five years, upon leave being obtained, without any limitation as to time, we cannot see how the general statute on that subject could control.

There is no error in the decision of the court below overruling the demurrer.

RACHEL DOVE, Respondent, v. BENJAMIN HAYDEN, Appellant.

COUNTER-CLAIM IN EQUITY — SUFFICIENCY OF, TO DEFEAT MOTION FOR NONSUIT — MUST NOT BE COUPLED WITH DENIALS OF PLAINTIFF'S WHOLE CAUSE OF SUIT.—In a suit in equity, where plaintiff claims equitable title to real property, of which defendant is alleged to hold the legal title, basing the claim on the grounds of agency, fraud, and trust, and the defendant denies all these grounds, and sets up ownership in himself in the premises in fee, an allegation in the answer that the defendant has expended a certain sum of money in payment for the land, or in making improvements thereon, is not such a plea of counter-claim as will defeat a motion for nonsuit under §§ 243 and 398 of the Code.

IDEM—A CLAIM OF DAMAGES FOR WASTE NOT SUFFICIENT WHERE PLAINTIFF IS FEME COVERT.—In such a suit, where the plaintiff is a married woman, a claim in the answer for damages for cutting growing timber, etc., on the premises in dispute, is not a counter-claim, because it could not be maintained against the plaintiff alone; and because it is a ground for an *action* and not for a *suit*.

IDEM — PLEA OF OWNERSHIP IS NOT.—An allegation in the answer in such a suit that the defendant is the owner of the premises in fee simple, cannot be treated as a counter-claim, because it is not connected with the subject of the suit.

APPEAL from Polk County.

This is an appeal from a judgment of nonsuit, granted on motion of the plaintiff, after issue joined and before proceeding to trial. The defendant resisted the motion, on the ground that he had pleaded a counter-claim, and relied on subdivision 1 of § 243 of the Code (made applicable to suits by § 398), which provides that a judgment of nonsuit may be given against the plaintiff, on his own motion, "at any time before trial, unless a counter-claim has been pleaded as a defense."

The facts are stated in the opinion of the Court.

G. W. Lawson and Thayer & Williams, for Respondent.

W. W. Upton, R. P. Boise, and P. C. Sullivan, for Appellant.

By the Court, BURNETT, J.:

The substantial question presented by the motion to dismiss is, whether any counter-claim to the plaintiff's cause of suit is set up in the answer. Unless the facts there alleged constitute a counter-claim, the judgment of nonsuit on the motion of plaintiff was properly granted. This is not an action arising on contract, but is strictly a suit of equitable cognizance. The counter-claim, therefore, which the defendant is authorized to interpose, must be one upon which a suit might be maintained by the defendant against the plaintiff in the suit, and must be connected with the subject of the suit. (See Code, § 389.)

The legal title to the land in question is alleged by the complaint to be in the defendant. The plaintiff claims the equitable title, and bases her claim for relief on three grounds, to wit: agency, fraud, and trust. The defendant's answer denies the agency, denies the fraud, and denies the trust, and denies the indebtedness claimed under them.

The answer alleges that defendant paid one thousand two hundred and twenty-five dollars for the premises; also, that defendant made improvements thereon of the value of nine hundred and sixty dollars. That the plaintiff had cut and destroyed timber growing on said land to the amount

and of the value of five hundred dollars, and that defe
is justly and legally the owner of said parcel of lan
fee.

The term counter-claim seems to be a word of moder
vention; and it is said by some of the text-writers that n
the professional nor the judicial mind has as yet full
tled the meaning and true interpretation of this term.
it may be safely said to partake of the nature both of
and of recoupment.

It is said in *Matoon v. Baker* (24 Howard, 330), th
counter-claim, to be available to a party, must afford
protection in some way against the plaintiff's deman
judgment, either in whole or in part. It must, ther
consist in a set-off, or claim by way of recoupment, or
some way connected with the subject of the action stat
the complaint. It must present an *answer* to the plai
demand for relief; must show that he is not entitled, a
ing to law, or under the application of just principl
equity, to judgment in his favor as, or to the extent, cl
in the complaint. It must, therefore, contain not onl
substance of what is necessary to sustain an action in
of the defendant against the plaintiff, but it must also o
in some way to defeat, in whole or in part, the plai
right of recovery in the action."

This would seem to be a very fair statement of the
of a counter-claim.

When a defendant sets up a counter-claim in plea
he assumes that the plaintiff has a cause of action o
against him, and proposes to meet it by establishing an
cause of action or suit against the plaintiff. But her
defendant says that the plaintiff never had any cause o
against him, and it would seem strange for a defenda
set up a counter-claim where there was no claim existi
favor of the plaintiff. If the defendant had denied
fraud, but admitted that he purchased the land fo
plaintiff and then set up the amount he paid for the
and the amount paid for the improvements made o
place, and asked to have these amounts made a charge
the land, these would be proper matters upon whic

could maintain a suit against the plaintiff, and would be the basis for a counter-claim; but when he denies that he purchased for the plaintiff, and alleges that he purchased for himself and is the owner in fee of the land in dispute, he has no ground for setting up a claim for purchase-money for, or improvements on his own land. Suppose, that, instead of the plaintiff bringing this suit, the defendant had sued the plaintiff, alleging that he had purchased the land in question in trust for the plaintiff, and claiming that she should repay him the purchase-money and compensate him for the improvements made thereon by him, and take a deed, and she should answer, denying that he purchased for her, or that she had anything to do with his buying it, it would hardly be contended that she could then set up as a *counter-claim* that he should make a deed to her, and that his use of the place was sufficient to repay him his purchase-money, and for the improvements made thereon.

The claim for damages for cutting and destroying growing timber on the premises is objectionable, on the ground that it could not be maintained against the plaintiff alone, as it appears that she is a married woman, and it would only be ground for an action and not the subject of a suit. The defense of the defendant, that he is the owner in fee of the land in dispute, cannot, we think, be treated as a counter-claim, for the reason that it is not connected with the subject of the suit; it is an entirely separate and distinct matter; has no dependence upon, or in any manner arises out of the subject of the suit. The subject of the suit here is fraud, agency, and trust, and it is difficult to see how Hayden's title to the land in dispute grows out of either. He might, under that allegation, in a complaint founded on § 500 of the code, show that he had a deed from the plaintiff prior in time to the mortgage mentioned in the complaint, or that he held title from the government superior to the title of the plaintiff.

The code, in allowing counter-claims in suits in equity, seems to have adopted substantially the rule in regard to filing cross-bills. Under the former chancery practice, the cross-bill could only relate to matter touching the matters

in the original bill. It could not embrace new and distinct matters not embraced in the original bill; and if it did, no decree could be founded upon such new matter. (8 Cowen, 361.)

The judgment of the court below is affirmed.

J. W. TRUTCH, Appellant, v. D. D. BUNNELL, Guardian of MEZALDUS, FRED., MALVERN, OCEANA, and ROBERT SCOTT and others, Minors, Respondents.

GUARDIAN MAY MORTGAGE WARD'S ESTATE.— Under subdivision 6, § 869 of the Civil Code, which confers upon County Courts jurisdiction "to order the renting, sale, or other disposal of the real and personal property of minors," the County Court is authorized to order the mortgaging of a minor's real estate.

IDEM — MANNER IN WHICH NOTE AND MORTGAGE MAY BE EXECUTED.—In proceedings to foreclose a mortgage against a minor's real estate, the fact that the note and mortgage sued upon are not executed by signing the minor's name thereto, but by signing the name of the guardian as such, is no defense.

ADVERSARY PARTIES — WHEN MINORS ARE NOT.—In proceedings before the County Court, by a guardian, to obtain an order to sell or mortgage the estate of minors, such minors are not adversary parties to their guardian, but they appear by him, and the proceedings are upon their application.

APPEAL from Multnomah County.

This is a suit to foreclose a mortgage for twelve thousand dollars in gold coin, executed by D. D. Bunnell, as guardian of certain minors, against the real estate of such minors. The mortgage was executed in pursuance of an order of the County Court, duly made. The court below dismissed the appellant's complaint on the ground that the County Court had no authority to order the mortgaging of a minor's estate.

Page, Yocum & Robb, for Appellants.

C. Beal, guardian ad litem, and counsel, for minor Respondents.

By the Court, BONHAM, C. J.:

The appeal in this case presents, for the consideration of this Court, two principal questions. First. Do the statutes of Oregon invest our County Courts, sitting in probate, with authority to order the mortgaging by a guardian of the real estate of his ward. Second. If such power is vested in the County Courts, does the record evidence in this case, offered by appellant, show that the County Court of Multnomah County had acquired jurisdiction to make the order authorizing Bunnell, the guardian of the minor respondents, to mortgage the real estate in question.

The first proposition we think only necessarily involves the construction of certain provisions of our statute defining and limiting the jurisdiction of County Courts and declaring the duties of guardians. Section 869 of the Civil Code declares that "the County Court has the exclusive jurisdiction in the first instance pertaining to a court of probate, that is, * * * * Subdivision 6. To order the renting, sale or other disposal of the real and personal property of minors."

It was suggested by the guardian *ad litem* of the minor respondents, on the argument of this cause, that the provisions of § 869 above referred to were simply abstract declarations of the jurisdiction of the County Court and ought not to be regarded as operative and effective law without further and more specific legislation on the subject. This position we do not think is tenable. While it is true that the statute defining the duties of guardians of the persons and estates of minors makes no reference to the particular manner of proceeding by the guardian to procure an order of the County Court for leave to mortgage his ward's real estate, yet we think the law on this subject, taken altogether, is sufficiently explicit to point out with reasonable certainty the proper manner of proceeding in such a case. The proceedings by Bunnell, the general guardian in this instance, was properly had in analogy to the manner of proceeding provided by chapter 51 of the Miscellaneous Laws to obtain a license to sell the real estate of a minor.

Counsel for appellant in this case urged upon the argument that in addition to the direct authority to mortgage, embraced, as they claimed, in the words "or other disposal," as contained in subdivision 6, § 869 of the Civil Code, the authority there expressly given to sell by necessary implication or fair intendment carried with it the power to mortgage. It was claimed that the power to make an absolute alienation of the fee ought to authorize a conditional sale by mortgage. (Williard's Eq. Juris. 486; 2 Story's Eq. Juris. § 1064; *Palmer v. Forbes et al.*, 23 Ill. 318; 2 Bouv. Inst. 345; Am. Law Reg. 1869, 490; *Lancaster v. Dolan*, 1 Rawle, 248; *Pitcher v. Carter*, 4 Sandford (N. Y.) Ch. 1.) But the authorities upon this subject are not uniform, and we do not deem it necessary for the purposes of this case to pass upon this question, since we conclude that subdivision 6 of § 869 of the Civil Code, which empowers the County Court to order the renting, sale *or other disposal* of the real and personal property of minors, must necessarily embrace the authority to mortgage. To give effect to all the language of the statute, the words "other disposal" must necessarily be construed to mean something other than to rent or sell; and we do not think it could more reasonably be construed to apply to any other change in the condition of the realty of the minor than that which would result from mortgaging the same.

And while it is true that the persons and property rights of minors, who, by reason of their tender age, are incapable of looking after their own interests, should be carefully watched, guarded and protected by the courts intrusted with that important duty, yet it is easy to conceive of many cases which might arise where it would be greatly to the interests of the minor to have his real estate mortgaged for a time rather than be compelled to part with the title altogether. The facts in this case, as disclosed by the pleadings and testimony, render it very probable that it was much better for the pecuniary interests of these minors that their guardian, under the authority and supervisory control of the County Court, should have secured the loan and executed the mortgage in question. It is shown by the

testimony that the buildings upon the lots mortgaged—the lots being lots 1, 2, 7 and 8, in block 8, in the city of Portland—were wholly destroyed by the great fire of August 2, 1873, and that the sidewalks were also destroyed, and that this property, which was favorably situated in the business part of the city, was thus left not only wholly unproductive, but subject to assessments for the rebuilding of the sidewalks abutting thereon. By mortgaging these lots, funds were secured to rebuild upon them, and thus render them again productive. We mention the facts in this case, as disclosed by the order of the County Court, licensing the guardian, Bunnell, to mortgage the premises in question, not because the merits of said guardian's application for such order is a subject for review here, but simply to illustrate the necessity of the power in the County Court to authorize the mortgaging of the real estate of minors under such circumstances. We think it must have occurred to the minds of the Legislature, when they were authorizing the renting and sale of the real estate of minors, that it might also become necessary under certain circumstances to mortgage the same, and that they had this in mind when they added the words, "or other disposal," to the language of the statute above quoted.

This brings us to the consideration of the second proposition, as to whether the record evidence offered by appellant before the referee in the court below, is sufficient to show that the County Court acquired jurisdiction to make the order authorizing the general guardian of the minor respondents to mortgage the lots in question.

The minor respondents herein, by Mr. Beal, their guardian *ad litem*, after denying all the material allegations of the complaint, by suggesting a lack of knowledge, or information sufficient to form a belief, and for the protection of such minors demanding proof, allege as new matter, and as a further and separate answer and defense:

"1. That said pretended note and mortgage, set out in the complaint, was made and executed by one D. D. Bunnell, who claimed to be the guardian of these minors, in his own name; that said pretended note and mortgage are

not made or executed in the name of the minors; that the execution of said note and mortgage is not the act of these minors, and that they are therefore not liable thereon.

"2. That the proceedings to obtain said pretended order for the making of said note and mortgage, were not made adversary; that no notice was served on these minors of the application of the same; that for the aforesaid and other reasons, the court had no jurisdiction of these minors, and that said pretended order was void and of non-effect."

The third and last count in the new matter pleaded as a defense, denies the authority of the County Court in any event, or under any circumstances, to make an order for the mortgaging of a minor's real estate, and embraces the objection interposed by the guardian *ad litem*, already passed upon.

As to the objection that the note and mortgage sued upon were signed by one D. D. Bunnell, professing to act as guardian for the minor respondents instead of signing the names of his wards by himself as their guardian, we think at most it could only be regarded as an irregularity which could not vitiate the transaction, as it is substantially and in effect the same, whether the guardian of these minors signed his own name to the note and mortgage in his official capacity as such, or signed the names of his wards by himself as their guardian.

The only other objection interposed by the guardian *ad litem* to appellant's right to a decree of foreclosure, is, that the proceedings of Bunnell, as general guardian of the minor respondents, before the County Court, was not made adverse to such minors, and that no notice of the application for leave to mortgage said lots was given to said minors. We do not think that the wards of a guardian, in a proceeding like this, are adversary parties to their guardian; but that they appear by their guardian.

In the case of *Mason v. Wait et al.* (4 Scammon, Ill.), the court upon this subject say: "It was not necessary that the ward should have a day in court. The proceeding was not adverse to her interest nor against her. It is her own application, by her legally constituted guardian. She is in court

by her guardian. No summons to her was necessary, nor could she have any other day or guardian *ad litem* in court, unless upon suggestion as *amicus curia* it should appear that the guardian was about to abuse the trust, or was seeking power to injure and misapply the estate. I think it altogether an erroneous view of such cases to regard them as proceedings against the heir to divest her of her interest or property. It is an application by her, or on her behalf, for power and authority to do acts for her benefit and interest. The law, however jealous it may be of the conduct of guardians, or watchful of the interests of wards, would never tolerate the absurdity of appointing a guardian for infants, incapable of consenting or acting for themselves, and then treat every act of such guardian, in disposing of the ward's property and managing the estate, as a proceeding against the ward to deprive her of her property."

The decree of the court below should be reversed, and a decree of foreclosure, in accordance with these views, entered.

NEIL MONROE et al., Respondents, v. THE NORTHERN PACIFIC COAL MINING COMPANY, Appellant.

PLEADINGS —AMENDMENTS MAY BE MADE ON APPEAL WHICH DO NOT CHANGE THE ISSUES TRIED IN THE LOWER COURT.— An amendment may be allowed in the appellate court which changes the allegations of the complaint, where such changes only serve to present upon the complaint and answer the same questions that were presented in the lower court upon the answer and reply; but an amendment which presents a defense not presented or suggested in the pleadings in the court below, will not be allowed.

CONTRACT — EFFECT OF BREACH OF, UPON DEFERRED PAYMENTS.—Payments that are to be made on the completion of certain work, become due by operation of law whenever a breach of the contract by the party liable therefor operates to prevent the other party from complying with the contract, and completing such work.

APPEAL from Coos County.

This action was brought in the County Court of Coos County to recover seven hundred and eighty dollars, alleged to be the reasonable value of work done in running a tunnel

in a coal mine, less three hundred and thirty-three dollars and thirty-three cents, already paid. The defendant denied an indebtedness, and alleged a contract, by the terms of which, in substance, plaintiff was to run a tunnel, of dimensions and length described, and at the rate of not less than one hundred feet per month, the defendant to furnish lumber, and provide tools and the use of a certain blacksmith shop, and to pay for the tunnel at the rate of twenty dollars per foot in length—one half upon the completion of each one hundred feet, and the remainder upon the shipment of the first cargo of coal after the mine was reached. The defendant further alleged that the required length of the tunnel was about three hundred and seventeen feet, and that the plaintiffs, after completing one hundred and seventeen feet thereof, abandoned the work, to the defendant's damage in the sum of five hundred dollars. Plaintiffs replied, admitting the contract, but alleging that defendant failed to provide tools and the use of the blacksmith shop, and that, by reason of such failure, plaintiffs were unable to complete the work. A trial was had in the County Court, and a judgment rendered in favor of plaintiffs for four hundred and forty-six dollars and sixty-six cents, the amount claimed, from which judgment the defendant appealed to the Circuit Court. Upon the appeal, plaintiff, after leave obtained, amended his complaint, so as to set out the contract referred to, with the alleged breach by defendant, with an allegation to the effect that the defendant is a foreign corporation, and that the contract in question was made through its authorized agent, D. R. Dale. Defendant, answering, denied the alleged breach, but alleged that plaintiff first violated the contract, to defendant's damage, etc., and alleging, further, that it had never executed a power of attorney, appointing an agent, as required by law, in order to authorize it to engage in business in this State, and that the contract, executed through Dale, was for that reason void. So much of the answer as related to the power of attorney was, on motion, stricken out. Plaintiffs obtained judgment for the amount claimed, and defendant appealed to this Court. The errors relied upon in the appeal are stated in the opinion of the Court.

J. F. Watson, for Appellant.

W. R. Willis, for Respondents.

By the Court, BONHAM, C. J.:

The first objection urged by counsel for appellant is, that the Circuit Court erred in allowing plaintiffs to amend their complaint by setting out the special contract enered into by the parties, and charging upon defendant a breach thereof, and by setting up a claim to recover for the labor performed by plaintiffs at the rate of compensation stipulated for in said contract; whereas the original complaint, in the County Court, showed a cause of action, based upon implied assumpsit, for the recovery of the reasonable value of the labor performed, and made no reference to the express contract set up and relied upon in the amended complaint.

The original complaint, filed in the County Court, ignored the existence of any special or express contract, and only tendered an issue so far as the price for the labor performed by plaintiffs was concerned, upon the *quantum meruit,* and, upon an issue joined on that allegation by a simple denial thereof, evidence of a fixed contract price would be inadmissible. After a trial in such case in the court of original jurisdiction we do not think that the appellate court would be warranted in allowing an amendment which would change the issue from that of implied assumpsit to that of express contract.

The object of the provision of § 533 of the Civil Code, that the trial in the appellate court shall be upon substantially the issues tried in the court below, is to enable the parties to come into the appellate court with their evidence for trial, and to protect the party, who comes into court with a good pleading, from unnecessary delay and expense in his litigation.

But the defendant in this case comes into the County Court, and by his answer admits that the labor was performed, as charged by plaintiff; but, in a plea by way of avoidance, alleges that it was rendered under a special con-

tract, by the terms of which there was nothing due to plaintiffs, except three hundred and thirty-three dollars and thirty-three cents, which had already been paid to them, as the first installment on the first one hundred feet of the tunnel by them agreed to be constructed. The defendant, after further setting forth in its answer the terms of the special contract, charges that the plaintiffs wrongfully violated and abandoned their said contract, to the damage of the defendant in the sum of five hundred dollars, for which it asks judgment.

By the reply of plaintiffs to this new matter in the answer, an issue was formed in the County Court, between the answer and reply, which is substantially the same as that formed in the Circuit Court between the amended complaint and the answer thereto. While it is doubtless true that the portion of plaintiffs' reply in the County Court which charges upon defendant a breach of the special contract referred to was liable to objection, because inconsistent with the complaint, which makes no mention of a special contract, yet we think, in the absence of any objection on that ground, that the reply ought to be regarded as presenting an issue upon that subject. We think that the court below did not err in allowing the amendment to the complaint, inasmuch as it only served to correct the form of the pleadings by presenting the mutual altercations of the parties in their correct and natural order.

The second objection to the proceedings of the court below is to the effect that the court erred in sustaining plaintiffs' motion to strike out that part of defendant's answer to the amended complaint which alleges substantially, as a matter of defense, that defendant had never complied with the law of this State requiring it, as a foreign corporation proposing to transact business here, to file in the clerk's office of the county where such business was to be carried on, a power of attorney, designating a resident citizen of this State with authority to accept service of process, and on whom process might be served in all legal proceedings against such corporation.

It is claimed by counsel for appellant that in the absence

of a compliance with the law in this respect by defendant (which in this case is conceded to be a foreign corporation), its contracts would be void. And it is further claimed that, inasmuch as plaintiffs were allowed by the Circuit Court to amend their complaint by setting out their express contract with defendant, the defendant ought to be allowed to set up any defense which it might have that would show the invalidity of such contract. This defense was in no way suggested by the pleadings in the County Court; and, aside from the extremely doubtful legality of allowing a foreign corporation, under any circumstances, to come into the courts of this State and plead its own omission to comply with the requirements of our laws, we think that the interposition of this defense in the appellate court, for the first time, would be such a departure from the issues tried in the County Court as could not be allowed under any fair construction of § 533 of the Civil Code. If this plea of the defendant was a good defense against plaintiffs' right to recover of the corporation, it would have been but a simple act of justice on the part of defendant to have notified plaintiffs, at the earliest opportunity, of its intention to rely upon the same, so as to avoid any unnecessary expense of litigation.

The third objection, that the court erred in admitting evidence of the levy on the blacksmith shop and tools of defendant, by Harvey Howard, without proof of the attachment directing the same, we think is not well taken, for the reason that we find nothing in the bill of exceptions showing that the error complained of was committed. The use of the blacksmith shop and necessary tools to prosecute the work of opening the tunnel were to be furnished plaintiffs by defendant. It appears from the bill of exceptions in this case that plaintiffs attempted on the trial to show that, in an action by attachment against the defendant, the tools and blacksmith shop, which defendant had furnished plaintiffs, under the terms of the contract, to use while so at work, were taken from them, and that they were deprived of the means of prosecuting such work further, and for that reason they abandoned the same, and thereafter treated the contract as rescinded. On this subject it appears that a question was pro-

pounded to Wm. Hunter, a witness for plaintiff. The question, as reported in the bill of exceptions, is a little vague, probably from an error in copying the transcript. By supplying the following words, inclosed in brackets, the question will be intelligible, and will read as follows: "State [what you know concerning] the blacksmith shop and tools being levied on, under an attachment against defendant, by Harry Howard, an officer." The "defendant objected to this question, for the reason that no attachment was produced or proven, and that Harry Howard was not shown to be an officer authorized to serve a writ of attachment." "The court overruled the objection and admitted said evidence, and defendant by its counsel then and there excepted to said ruling." The foregoing is all that the bill of exception discloses regarding the subject of the levy on the blacksmith shop and tools in question, to which counsel for defendant objected. The question was objected to; the objection was overruled, and the evidence admitted. But the bill of exceptions gives no intimation as to what the answer of Mr. Hunter to the question was, if, in fact, he knew anything on the subject. A conclusion that the court below erred in this respect could not be predicated upon so vague and indefinite a showing as this.

This brings us to the consideration of the objections made by appellant to certain instructions of the court, and the exceptions taken to the refusal of the court to give certain special instructions asked for by counsel for appellant.

But before proceeding to refer to the instructions given and refused, to which exceptions were taken by appellant, let us see what issues of fact were by the pleadings presented to the jury for trial.

The complaint, as amended in the Circuit Court, shows an action for damages upon a special or express contract for labor to be performed by plaintiffs, and charges a breach of the contract on the part of the defendant, by reason of which the plaintiffs, after having performed a part of the work contracted for, were prevented from completing the same, and on account of which they claim a rescission of the contract and the right to recover from the defendant the full

contract price agreed upon, for the work already performed. The defendant, admitting the terms of the contract, denies the breach thereof on its part, and charges a breach of the same by plaintiffs.

The plaintiffs' right to recover the amount claimed by them in this action only depended upon the finding by the jury in their favor on the issues as to the violation of the contract by defendant. We think that the contract price of twenty dollars per yard in length of the tunnel completed by plaintiffs, is the just measure of damages sustained by them on account of a breach of the contract by defendant. The measure of damages under the pleadings in this case becomes a mere question of law, so far as the plaintiffs' claim is concerned, if the defendant committed a breach of the contract as charged.

The bill of exceptions shows the following instructions asked for by counsel for appellant, and refused by the court:

1. "The plaintiffs can only recover in this action what the evidence shows to be due them on the contract set up in the pleadings."

This instruction, we think, was not sufficiently qualified, and was calculated to mislead the jury, for the reason that, by the literal terms of the contract referred, one half, or ten dollars per yard for the work done by plaintiffs, would not become due until after the completion of the tunnel and the shipment of a cargo of coal from the mine had been made. We think it is fairly to be inferred from the terms of the contract set out in the complaint that defendant's coal mine had not been opened so that coal could be procured for shipment, and that it was the understanding of the parties that the cargo of coal referred to in the contract was not to be shipped until after the completion of the tunnel which plaintiffs agreed to construct. Although, by the literal terms of the contract, without reference to its violation by defendant, plaintiffs had already been paid all that was due them thereon, yet by operation of law the deferred payments became due as soon as defendant committed a breach of the same so as to prevent plaintiffs from completing the work.

To hold otherwise would be to say that plaintiffs, without any fault of theirs, should lose one half of the price of their labor as agreed upon. (*Hale v. Trout*, 35 Cal. 229.)

It was urged by counsel for appellant that it would not be just to allow plaintiffs to recover the same price for the first one hundred yards of the tunnel as for the second and third one hundred yards, for the reason that the construction of the first one hundred yards would be less difficult and expensive than the second and third. It is an answer to this that there was no issue made by the pleadings as to the relative cost of the different parts of the tunnel; the contract makes no distinction in this respect, and the court we think could not make any.

The second and third instructions refused by the court are as follows:

2. "By the terms of that contract, upon the completion of the first one hundred feet of the tunnel, but one half of the price became due, to wit, three hundred and thirty-three dollars and thirty-three cents."

3. "The remainder of the price for said one hundred feet did not and cannot become due until the first cargo of coal can be shipped."

In view of the conclusion already arrived at as to the just measure of damages in a case like this, the correctness of the court in refusing to give the last two instructions we think is sufficiently apparent. Other instructions, embraced in the bill of exceptions, requested to be given by counsel for appellant and refused by the court, we do not deem it necessary to take time to here set forth or refer to further than to say that we think they come clearly within the purview of the rules by which those already enumerated were properly refused.

The following instruction was given by the court, to which counsel for appellant excepted, and which is assigned as error, to wit:

"There has been something said by counsel in this argument about the form of the action in this case. Under our statute, the distinction heretofore existing between forms of

actions at law is abolished, and all that is required is that the complaint shall contain a plain and concise statement of the facts constituting the plaintiff's cause of action; and in this case, if you believe from the evidence that the plaintiffs complied with the contract mentioned in the pleadings in running the first one hundred feet of the tunnel, and that the defendant first violated the contract so as to render it impossible for the plaintiffs to comply with it in further prosecuting the work, then they have a right to recover in this action for the value of the work they have done, and that value must be ascertained from the evidence."

The concluding portion of this instruction we think was technically incorrect, for the reason that this is not an action by plaintiffs to recover the value of their services rendered, as upon a *quantum meruit*, but is an action to recover the price agreed to be paid by the terms of the contract between the parties. It does not appear from the bill of exceptions that there was any testimony given at the trial as to the reasonable value of the services of plaintiffs, and it was not necessary, under the pleadings, that any should have been given to entitle them to recover, if the jury found that the contract was broken by the defendant. The court might properly have said to the jury, "If you find from the evidence that the terms of the contract, set up in the complaint, were violated by defendant on its part, so as to prevent plaintiffs from going on and completing the tunnel in question, then you will find for the plaintiffs in the sum of four hundred and forty-six dollars and sixty-six cents, as claimed by them."

The jury must have found that the contract was broken by defendant in order to have found for the plaintiffs in any sum; and as they only returned a verdict for four hundred and forty-six dollars and sixty-six cents, the error complained of could not have operated to the prejudice of any substantial right of appellant.

The judgment of the court below should be affirmed.

THOMAS B. ENGLISH and LA FAYETTE G. ENGLISH, an Infant, by GEORGE A. EDES, his Guardian, Appellants, v. ORAN G. SAVAGE, L. B. CAVANAUGH and LEVIN N. ENGLISH, Respondents.

DECREE AGAINST INFANT, WHEN BINDING.—In a suit where the court has complete jurisdiction of the subject and of the parties, a decree against infant defendants, where there is no evidence of fraud or collusion, is as valid and effectual as if taken against adults.

GUARDIAN AD LITEM — POWER OF, TO BIND INFANT PARTY BY ADMISSIONS.— Under the statutes of this State, a guardian *ad litem* has full power to bind an infant defendant by admissions, even to the confession of judgment.

PAROL DEMURRER — DOCTRINE OF, NOT RECOGNIZED IN THIS STATE.—The doctrine of "parol demurrer" is not recognized in this State.

APPEAL from Marion County.

In 1858, Levin N. English, one of the defendants, as guardian of the plaintiffs, who were minors, made sale of certain real property described in the complaint, of which O. G. Savage, another of the defendants, became the purchaser. At the February term, 1873, of the Circuit Court for Marion County, Oregon, O. G. Savage brought suit against the plaintiffs to quiet his title to the premises, alleging that the guardian's sale before referred to had been conducted in substantial conformity with the law; that the bond required of the guardian by § 10, chapter 51, Miscellaneous Laws, had been duly given, but that said bond had been lost or destroyed, and that its absence from the record of the proceedings constituted a cloud upon his (Savage's) title. In that suit G. W. Lawson was appointed guardian *ad litem* for the infant defendants (plaintiffs here), and filed an answer admitting the allegations of the complaint. There was a decree in accordance with the prayer of the complaint. The present suit was brought to set aside the guardian's sale above referred to, and also the decree of the Circuit Court of February, 1873. It is claimed in the complaint that the guardian's sale was void because the guardian did not give the bond required by § 10, chapter 51, of the Miscellaneous Laws, and that the decree of the Circuit Court quieting the

title of Savage was also void because it was obtained by fraud and collusion. The answer denies all the material allegations of the complaint, and sets up as a separate defense the payment of the purchase-money by the defendant Savage at the guardian's sale, and also certain expenditures made for permanent improvements upon the premises in question, and asks to have the same charged as a lien upon the land in case the sale is set aside. The decree of the court below was that the sale, and also the decree of 1873, be set aside as void, and that the purchase-money and money expended for improvements by defendant Savage be made a lien upon the land, as prayed in the answer. From this decree the plaintiffs appealed to this Court.

Knight & Lord, for Appellants.

R. P. Boise and W. W. Thayer, for Respondents.

By the Court, BURNETT, J.:

Upon the first point appellant's counsel seem to rely with confidence on the case of *Cooper v. Sunderland* (3 Iowa, 114). In that case an objection was made to a guardian's sale, under a statute similar to ours, on the ground that it did not appear that the guardian took the oath required by the statute before fixing on the time and place of the sale; and the court says, in passing on the case made: "There is no evidence, either in the record or in the papers, nor is any brought to our knowledge *aliunde,* that this oath was taken. The guardian makes a report of her sale but does not state it. There is a judgment confirming the sale, but this goes no farther than to say (in allusion to the report), 'which, having been examined by the court here, and the court having been fully advised of and concerning the premises, it is ordered,' etc. * * * The above record does not answer the call of the statute."

It will be seen that there is a material difference between the Iowa case and the one at bar. Here the judgment of confirmation recites that: "And it further appearing to the court that said sale had been legally made and fairly con-

ducted," which—in addition to the following part of the order granting the license to sell the real estate in question, to wit, "It is therefore ordered by the court that upon the said guardian filing a good and sufficient bond and taking the oath by law required, that license issue to said guardian to sell the real estate described in his petition,"—shows a different record altogether from that in the case last referred to. There is also the evidence of J. C. Peebles, county judge, G. W. Lawson, Seth Hammer, and O. G. Savage, that tends to establish the fact that a bond was given. True, this oral evidence is contradicted by the witnesses for the plaintiff, and conceding that oral evidence can be admitted to impeach the record made by the County Court in this case, and that the question depended upon the recollection of the witnesses as testified to by them, the matter would no doubt be in a state of uncertainty.

In the case of *Blackman v. Rauman* (28 Wis. 611), the record itself showed affirmatively that the statute had not been complied with, for the oath of the guardian found in the record was made on the *day* of the sale, and not before fixing on the time and place of the sale as required.

In the case of *Manton v. Purdy et al.* (11 Minn. 400), the objection to the sale was founded on an insufficient notice of the sale; and as the notice itself was with the papers and was considered a part of the record, it showed on its face that it did not comply with the statute. The case in 2 Sawyer is similar to the one in 3 Iowa, and in the case in 38 Maine it was one of the agreed facts that no bond had been filed. But the view we have taken of the case makes it unnecessary for us to decide whether the record of the County Court, together with the evidence offered in connection with it, establishes the fact that the guardian did give the bond required by the statute before the sale was made; for we think the whole matter was settled by the Circuit Court in the decree made March 12, 1873.

The court had full and complete jurisdiction of the case and of the parties, and there is no evidence to sustain the allegation of fraud and collusion between the guardian *ad litem*, in that case, and O. G. Savage. It was insisted that

the admissions in the answer filed by the guardian *ad litem* in the case in the Circuit Court, before referred to, did not bind the defendants in that suit (plaintiffs in this case), for the reason that they were infants; and a number of authorities were cited to sustain that view. Mr. Freeman, in his work on Judgments, § 513, says: "A judgment against an infant is not void. The usual practice is to insert a provision allowing an infant a day after he comes of age to show cause against a decree procured against him. And except where the practice has been changed by introducing a modification of the common law in this respect, the omission of this clause is an error which will undoubtedly be corrected on appeal. According to some of the authorities, the right to show cause against a decree is the absolute right of every infant defendant; a right which is not taken away by the omission to provide for it in the decree, and which may be enforced by a bill of review or by original bill showing that upon the facts the original decree is improper." And here the author refers to a number of authorities, in a foot-note, and some of them are the same cited by counsel for appellants. Quoting from Daniell's Chancery Practice, he goes on then to say: "But the better opinion is, that an infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it, such as fraud, collusion or error." But whatever view might be taken of the case independent of the statute, it appears that under the provisions of the Code, page 156, the doctrine of *"parol demurrer"* is not recognized in this State, and that a guardian *ad litem* has full power to bind an infant defendant by admissions, even to the confessions of a judgment.

Decree: That the decree of the court below be reversed and plaintiff's complaint dismissed.



EXTRA ANNOTATION

TO

PRECEDING VOLUME

EXTRA ANNOTATION

TO

PRECEDING VOLUME

NOTES

ON THE

OREGON REPORTS.

CASES IN 5 OREGON.

5 Or. 17–21, PITMAN v. BUMP.

Limitation of Action.—Causes Accruing After Passage of amendatory act are not included in its provisions, p. 19.

Cited in Ireland v. Mackintosh, 22 Utah, 309, 61 Pac. 904, holding that a new act cannot renew a cause of action already barred. Cited in note in 45 L. R. A. 612, on vested right in defense of statute of limitations.

5 Or. 22–24, COGSWELL v. HAYDEN.

Bills and Notes.—One Indorsing Before Negotiation by Payee is prima facie liable as a second indorser, p. 23.

Cited in Cornett v. Hafer, 43 Kan. 61, 22 Pac. 1015, holding indorsers before maturity and negotiation by payee liable only as ordinary indorsers; Deering v. Creighton, 19 Or. 120, 20 Am. St. Rep. 800, 24 Pac. 199, discussing liability of person indorsing note before delivery; Wade v. Creighton, 25 Or. 459, 36 Pac. 290, holding indorser before delivery prima facie liable as second indorser; Kealing v. Vansickle, 74 Ind. 537, 39 Am. Rep. 101, refusing to attempt to harmonize the conflicting authorities.

5 Or. 24–29, HENDERSON v. MORRIS.

Appeal.—Discretion will be Reviewed Only for Abuse, p. 27.

Cited in Garrison v. Goodale, 23 Or. 310, 31 Pac. 710, Foster v. Henderson, 29 Or. 214, 45 Pac. 900, Davis v. Hannon, 30 Or. 193, 46 Pac. 786, Nunn v. Bird, 36 Or. 518, 59 Pac. 809, and State v. Richardson, 48 Or. 315, 85 Pac. 228, 8 L. R. A., N. S., 362, all reaffirming and applying the rule.

Appeal.—Error not Affecting Substantial Rights is no ground for reversal, pp. 27, 28.

Cited in Stokes v. Brown, 20 Or. 533, 26 Pac. 562, applying the rule to variance not prejudicial to appellant.

5 Or. 29–36, SALEM WATER CO. v. SALEM.

Municipal Corporations.—Effect of Charter Provision Limiting city indebtedness, p. 36.

Cited in Murphy v. East Portland, 42 Fed. 309, and City Council v. Dawson Waterworks Co., 106 Ga. 718, 32 S. E. 916, applying the rule in a similar case; Brockway v. City of Roseburg, 46 Or. 82, 79 Pac. 336, applying the rule to a contract to pay an indebtedness in valid warrants; Hagan v. Commissioner's Court, 160 Ala. 563, 49 South. 423, holding that the aggregate amount of the contract determines whether debt limit is exceeded; Municipal Sec. Co. v. Baker County, 33 Or. 350, 54 Pac. 177, discussing constitutional limit on county debts; City of Denver v. Hubbard, 17 Colo. App. 356, 68 Pac. 996, upholding city lighting contract covering a period of ten years; Walla Walla v. Walla Walla Water Co., 172 U. S. 19, 19 Sup. Ct. Rep. 77, 43 L. ed. 349, pointing the weight of authority in favor of contracts for gas or water payable annually, though aggregate rentals exceed the limit; McBean v. City of Fresno, 112 Cal. 166, 53 Am. St. Rep. 191, 44 Pac. 360, 31 L. R. A. 794, holding that the limitation does not invalidate a contract for five years where the yearly payments do not exceed the authorized debt; Little v. City of Portland, 26 Or. 246, 37 Pac. 913, holding that a contract providing that the cost of any improvement shall be paid out of any fund expressly created therefor is valid notwithstanding charter limits city's indebtedness. Cited in notes in 59 L. R. A. 615, on effect of limitation of municipal indebtedness upon acquisition of water supply or sewer system; 23 L. R. A. 403, on what constitutes "indebtedness" of municipality within constitutional and statutory restrictions.

5 Or. 36–40, TRULLENGER v. TODD.

Appeal.—No Appeal Lies from a Default Judgment, p. 38.

Cited in State v. Leasia, 45 Or. 411, 78 Pac. 329, Clendenning v. Crawford, 7 Neb. 476, and Andrews v. Mullen, 14 Neb. 249, 15 N. W. 217, all approving the rule.

Distinguished in Baier v. Hempall, 16 Neb. 128, 20 N. W. 108, where party appeared below but offered no affirmative proof in defense.

Process.—Requisites of Valid Service, p. 39.

Cited in White v. Johnson, 27 Or. 288, 40 Pac. 513, defining due service.

Process.—Return of Constructive Service must State the Fact that the party could not be found, p. 39.

Cited in McFarlane v. Cornelius, 43 Or. 519, 74 Pac. 327, Mickey v. Stratton, Fed. Cas. No. 9530, 5 Saw. 475, Swift v. Meyers, 37 Fed. 42, 13 Saw. 583, and Settlemier v. Sullivan, 97 U. S. 447, 24 L. ed. 1111, all approving the rule; Hall v. Stevenson, 19 Or. 157, 20 Am. St. Rep. 803, 23 Pac. 889, applying the rule to return of service of writ of attachment; Venner v. Denver Union Water Co., 15 Colo. App. 505, 63 Pac. 1064, to point that existence of condition on which substituted service may be made must appear affirmatively.

Appeal.—Courts will Entertain Appeals from Void Judgments for the purpose of reversing and purging the records of them, p. 39.

Cited in William Deering & Co. v. Creighton, 26 Or. 558, 38 Pac. 710; Henrichsen v. Smith, 29 Or. 480, 44 Pac. 496; Aspren v. Squire, 29 Or. 232, 45 Pac. 779; Spicer v. Simms, 6 Ariz. 350, 57 Pac. 611, and Hoover v. Hoover, 39 Or. 460, 65 Pac. 797, all reaffirming the rule.

5 Or. 40–44, HOLLADAY v. DAVIS.

Contracts.—Agents' Contracts in Derogation of Interests of Principal are void, p. 43.

Distinguished in Buchtel v. Evans, 21 Or. 314, 28 Pac. 69, holding that invalidity of contract must be specially pleaded. Cited in notes in 36 Am. Rep. 216, on validity of contract as to erection of railroad depot; 21 L. R. A., N. S., 803, on validity of contract made to influence location of railroad.

Parties.—Trustee of Express Trust may Sue in own name, p. 43.

Cited in Wright v. Conservative Inv. Co., 49 Or. 179, 89 Pac. 388, approving the rule. Cited in note in 25 L. R. A. 270, on right of third party to sue upon contract made for his benefit.

5 Or. 44–46, SMITH v. FOSTER.

Novation.—Agreement to Substitute Anything for the Original Obligation is void unless executed, p. 46.

Cited in Bush v. Abraham, 25 Or. 342, 35 Pac. 1068, approving and applying the rule.

5 Or. 46–48, STATE v. CORNELIUS.

Attachment.—Levy Creates Lien from Time it is made, p. 47.

Cited in Bank of California v. Cowan, 61 Fed. 872, holding that lien attaches though judgment has not been entered on the lien docket. Cited in note in 21 Am. Dec. 679, on essentials to attachment of personalty.

5 Or. 48–62, GASTON v. STOTT.

Public Lands.—The Swamp Land Act of 1850 was a grant in presenti to the states, p. 59.

Cited in Miller v. Tobin, 16 Or. 542, 16 Pac. 162; Wells v. Pennington County, 2 S. D. 9, 39 Am. St. Rep. 758, 48 N. W. 307, and Wright v. Roseberry, 121 U. S. 505, 7 Sup. Ct. Rep. 985, 30 L. ed. 1043, all reaffirming the rule.

Public Lands.—Proviso in First Section of Swamp Land Act of 1860 did not limit the grant, p. 61.

Cited in Miller v. Tobin, 16 Or. 556, 16 Pac. 170, concurring opinion, criticising the holding.

Public Lands.—Officers of Land Department could not entertain preemption application to land admitted to be swamp, p. 62.

Overruled in Small v. Lutz, 41 Or. 571, 579, 69 Pac. 827, holding question controlled by contrary decision of federal court to effect that land department's decision as to nature of land is conclusive.

5 Or. 62–65, McCRACKEN v. SWARTZ.

Scire Facias.—Pleas Which may be Interposed, p. 64.

Cited in First Nat. Bank v. Hamor, 47 Fed. 37, to point that general denial is equivalent to non tiel record.

Divorce.—Scire Facias on Judgment for Alimony payable in installments, p. 63.

Cited in Knapp v. Knapp, 59 Fed. 644, holding that plaintiff in scire facias can only recover installments due at date of filing complaint; Davis v. Davis, 29 App. D. C. 263, to point that decree for alimony may be enforced like other judgments.

5 Or. 65–68, GOODMAN v. MYRICK.

Boundaries.—Line Actually Run by Original Surveyors is the true line, p. 68.

Cited in Van Dusen v. Shivaly, 22 Or. 65, 29 Pac. 77; Kanne v. Otty, 25 Or. 537, 36 Pac. 539, Albert v. City of Salem, 39 Or. 474, 65 Pac. 1071, and Miller v. White, 23 Fla. 307, 2 South. 617, all approving and applying the rule; Weiss v. Oregon etc. Co., 13 Or. 497, 11 Pac. 256, holding that meander lines are controlled by actual water edge; King v. Brigham, 19 Or. 566, 25 Pac. 152, holding that actual lines control courses and distance; Killgore v. Carmichael, 42 Or. 624, 72 Pac. 639, holding that line actually run controls distance; Washington Rock Co. v. Young, 29 Utah, 121, 110 Am. St. Rep. 666, 80 Pac. 386, holding that junior survey cannot enlarge or change senior one. Cited in note to 110 Am. St. Rep. 678, on conclusiveness of established boundaries.

5 Or. 68–72, 20 Am. Rep. 734, STATE v. BRUCE.

Indictment.—Reason of Disqualification of Voter must be alleged, p. 70.

Cited in State v. Fiske, 66 Vt. 437, 29 Atl. 633, applying rule where indictment did not allege manner in which prohibited writing was made public. Cited in note to 90 Am. St. Rep. 467.

Indictment.—Objections Waived by Failure to Demur, p. 71.

Cited in State v. Doty, 5 Or. 493, 494, and State v. Bloodsworth, 25 Or. 89, 34 Pac. 1024, reaffirming the rule; State v. Carlson, 39 Or. 28, 62 Pac. 1019, and State v. Lee, 33 Or. 508, 56 Pac. 416, both to point that failure to demur waives duplicity; Gaines v. State, 146 Ala. 23, 41 South. 867, to point that omission to aver means employed must be taken advantage of by demurrer.

Distinguished in State v. Mack, 20 Or. 236, 25 Pac. 639, holding that fact that indictment does not state a crime may be raised for first time on appeal.

5 Or. 73–86, STATE v. GLASS.

Criminal Law.—Reasonable Doubt Defined, pp. 81, 83.

Cited in State v. Morey, 25 Or. 257, 36 Pac. 577; Buel v. State, 104 Wis. 154, 80 N. W. 86, and State v. Aiken, 109 Iowa, 646, 80 N. W. 1074, all approving the definition.

Explained in Neppach v. Oregon etc. R. Co., 46 Or. 395, 80 Pac. 486, sustaining oral agreement extending time of performance.

Criticised in House v. Jackson, 24 Or. 98, 32 Pac. 1029, admitting parol evidence to aid description. Cited in note to 94 Am. St. Rep. 293, on what constitutes a transaction a sale.

5 Or. 119–121, STATE v. BROWN.

Appeal.—To be Appealable an Order must not Only Affect substantial right but, in effect, must determine the action, p. 120.

Cited in Wolfer v. Hurst, 47 Or. 158, 80 Pac. 420, approving the rule; Basche v. Pringle, 21 Or. 25, 26 Pac. 863, holding that no appeal lies from order refusing to dissolve temporary injunction. Cited in note in 19 L. R. A. 348, on right of state to appeal in a criminal case.

5 Or. 121–125, TAYLOR v. PATTERSON.

Statute of Frauds.—Complaint Need not Allege that contract for gold was in writing, p. 123.

Cited in Russell v. Swift, 5 Or. 234, approving and following the rule.

Distinguished in Corbitt v. Salem Gaslight Co., 6 Or. 408, 25 Am. Rep. 541, where the plaintiff alleged the writing. Cited in note to 86 Am. Dec. 685, on pleading statute of frauds.

5 Or. 125–129, SHATTUCK v. SMITH.

Trial.—Instructions Having No Reference to the Facts are properly refused though correct in the abstract, p. 129.

Cited in State v. Brown, 7 Or. 202, applying the rule in a criminal case.

5 Or. 130–131, MYER v. BEAL.

Mortgages.—The Premises may be Subjected to the Debt though the note is barred by statute, p. 130.

Cited in Gray v. Holland, 9 Or. 514, Browne v. Browne, 17 Fla. 629, Allen v. O'Donald, 28 Fed. 26, and Hickox v. Elliott, 22 Fed. 17, 10 Saw. 415, all reaffirming the rule. Cited in note in 21 L. R. A. 553, on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust.

Limitation Laws.—The Statute Merely Suspends the Remedy, it does not extinguish the debt, p. 131.

Cited in Goodwin v. Morris, 9 Or. 324, approving the rule.

Distinguished in Parker v. Mitzger, 12 Or. 409, 7 Pac. 519, holding that adverse possession for statutory period extinguishes the right.

5 Or. 132–135, RAYMOND v. COFFEY.

Boundaries.—Parol Evidence to Aid in Ascertaining, p. 134.

Cited in Ramsey v. Loomis, 6 Or. 374, and House v. Jackson, 24 Or. 98, 32 Pac. 1029, both approving the rule; King v. Brigham, 19 Or. 566, 25 Pac. 152, holding that actual lines control courses and distance; Albert v. City of Salem, 39 Or. 474, 65 Pac. 1071, holding that steps of

original survey must be followed; Byrd v. Phillips, 120 Tenn. 23, 111 S. W. 1111, completing description by reference to another conveyance. Cited in note to 30 Am. Dec. 736, on inconsistency or uncertainty in description or boundaries of land.

Deeds.—Where Parts of Description are Inconsistent, effect must be given to intelligible portions which carry out the intention of the parties, pp. 134, 135.

Cited in Board of School Land Commrs. v. Wiley, 10 Or. 89, and McIntyre v. Kamm, 12 Or. 260, 7 Pac. 30, both approving and applying the rule. Cited in notes to 35 Am. Dec. 373, on construction of uncertain description in deed by subsequent acts of parties; 111 Am. St. Rep. 777, on repugnant clauses in deeds.

5 Or. 136–140, BAILEY v. FRUSH.

Costs.—Meaning of Constitutional Provision that justice shall be administered without purchase, p. 138.

Quoted in Northern Counties Investment Trust v. Sears, 30 Or. 404, 41 Pac. 936, 35 L. R. A. 188, upholding cost statute.

5 Or. 143–147, SOUTHWELL v. BEEZLEY.

Statute of Frauds.—Agreement Which Might be Performed within a year is not within the statute, p. 145.

Cited in Biest v. Ver Steeg Shoe Co., 97 Mo. App. 150, 70 S. W. 1085, following the rule. Cited in note to 93 Am. Dec. 90, on contracts to be performed within a year.

Sale.—Necessity for Separating and Counting to complete delivery of sheep, p. 145.

Cited in State v. Hughes, 22 W. Va. 752, to point that where goods are of uniform value and quality severance is necessary to pass title. Cited in note in 26 L. R. A., N. S., 23, on sufficiency of selection or designation of goods sold out of larger lot.

5 Or. 147–151, EVARTS v. STEGER.

Reformation.—Complaint must Show That Mistake was that of the parties and that it was mutual, p. 151.

Cited in McCoy v. Bayley, 8 Or. 198, Epstein v. State Ins. Co., 21 Or. 181, 27 Pac. 1045, and Thorton v. Krimbel, 28 Or. 274, 42 Pac. 995, all reaffirming the rule.

Pleading.—Objection to Jurisdiction or That Complaint does not state cause of action is not waived by answering over, pp. 149, 150.

Cited in Wyatt v. Henderson, 31 Or. 52, 48 Pac. 791, Willits v. Walter, 32 Or. 414, 52 Pac. 24, W. W. Kimball Co. v. Redfield, 33 Or. 301, 54 Pac. 218, Byers v. Ferguson, 41 Or. 81, 68 Pac. 6, Moore v. Halliday, 43 Or. 250, 99 Am. St. Rep. 724, 72 Pac. 803, and Kohn v. McKinnon, 90 Fed. 625, all approving and applying the rule; Kalyton v. Kalyton, 45 Or. 128, 78 Pac. 332, holding that jurisdiction of the subject matter cannot be conferred by waiver.

5 Or. 152–156, FLEISCHNER v. CHADWICK.

Statutes.—Later Inconsistent Act Repeals Former by implication, p. 155.

Cited in Little v. Cogswell, 20 Or. 347, 25 Pac. 728; State v. Rogers, 22 Or. 360, 30 Pac. 76, Smith v. Day, 39 Or. 536, 64 Pac. 814; Sandys v. Williams, 46 Or. 332, 80 Pac. 644, and Hall v. Dunn, 52 Or. 488, 97 Pac. 816, 25 L. R. A., N. S., 193, all following the rule.

Statutes.—Repeal by Implication is not Obnoxious to section 22, article 4 of the constitution, p. 155.

Cited in Grant County v. Sels, 5 Or. 246; Stingle v. Nevel, 9 Or. 63, and Warren v. Crosby, 24 Or. 568, 34 Pac. 664, all approving the rule; Quinlan v. Houston etc. Ry. Co., 89 Tex. 371, 34 S. W. 741, applying the rule in construing a similar provision in Texas; The Glaramara, 10 Fed. 681, 8 Saw. 22, holding the rule inapplicable where later law amends the former.

Distinguished in Dolan v. Barnard, 5 Or. 393, where the act attempted to amend another without setting it out.

Disapproved in Mayer v. Cahalin, Fed. Cas. No. 9340, 5 Saw. 355, but following the rule on the ground of stare decisis.

5 Or. 156–160, STATE v. GARRAND.

Cited in notes in 13 Am. Dec. 458, on liability of subscribers; 22 L. R. A., N. S., 844, on criminal responsibility for wound resulting in death as affected by negligence or lack of skill in treatment or care; 14 L. R. A., N. S., 735, 737, on evidence of specific instances to prove character.

5 Or. 160–164, PORTLAND v. DENNY.

Judges.—Legislature may Make Police Judge of City ex-officio justice of the peace, p. 161.

Cited in Multnomah County v. Adams, 6 Or. 115, and Clemmensen v. Peterson, 35 Or. 51, 56 Pac. 1016, sustaining the rule; Chadwick v. Earhart, 11 Or. 393, 4 Pac. 1182, to point that office of justice is appurtenant to that of recorder.

5 Or. 164–169, GLAZE v. WHITLEY.

Trial.—Instructions Need not be Given, Though Correct in principle, if not pertinent to the facts, p. 167.

Cited in State v. Birchard, 35 Or. 492, 59 Pac. 471, following the rule.

Witnesses.—Where Witness is Impeached by Showing Contradictory statements, his character for truth and veracity may be shown in rebuttal, p. 167.

Cited in Mercer v. State, 40 Fla. 233, 74 Am. St. Rep. 135, 24 South. 159, stating when evidence is admissible to sustain or corroborate witness.

Overruled in Sheppard v. Yocum, 10 Or. 413, 414, and First Nat. Bank of Portland v. Commercial Union etc. Co., 33 Or. 48, 52 Pac.

1052, both following the contrary rule and excluding the evidence. Cited in notes to 82 Am. St. Rep. 65, on evidence to show credibility or bias of witness; 26 Am. St. Rep. 148, 149, on malicious prosecution of criminal charge.

5 Or. 169–177, LEWIS v. LEWIS.

Reformation of Instruments.—Requisites of Complaint, p. 172.

Cited in Meier v. Kelly, 20 Or. 94, 25 Pac. 76, Epstein v. State Ins. Co., 21 Or. 181, 27 Pac. 1045, Osborn v. Ketchum, 25 Or. 356, 35 Pac. 974, Thornton v. Krimbel, 28 Or. 274, 42 Pac. 995, Mitchell v. Holman, 30 Or. 284, 47 Pac. 617, Jenkins v. Jenkins University, 17 Wash. 173, 49 Pac. 251, Sellwood v. Henneman, 36 Or. 577, 60 Pac. 13, King v. Holbrook, 38 Or. 461, 63 Pac. 654, and Stein v. Phillips, 47 Or. 549, 84 Pac. 794, all sustaining the rule and placing burden on plaintiff to prove the facts required to be alleged; Soule v. Bacon, 150 Cal. 497, 89 Pac. 325, to point that negligence does not bar relief if it did not prejudice the adverse party; Citizens' Nat. Bank v. Judy, 146 Ind. 241, 43 N. E. 285, reforming mortgage for mistake. Cited in notes to 65 Am. St. Rep. 497, on reformation of contracts; 45 Am. Dec. 638, on avoidance of contracts for mutual mistake of facts.

5 Or. 177–184, HOLLADAY v. PATTERSON.

Railroads.—Contract to Locate Depot at Certain Place is void as inducing breach of trust in favor of the public, pp. 179–184.

Cited in Pueblo etc. R. R. Co. v. Taylor, 6 Colo. 10, 45 Am. Rep. 512, Florida etc. R. Co. v. Mayor etc., 31 Fla. 510, 34 Am. St. Rep. 40, 13 South. 107, 20 L. R. A. 419, Williamson v. Chicago etc. R. Co., 53 Iowa, 137, 140, 36 Am. Rep. 206, 4 N. W. 880, 882, Louisiana Ry. etc. Co. v. Railroad Commission, 121 La. 859, 46 South. 888, Reed v. Johnson, 27 Wash. 53, 67 Pac. 385, 57 L. R. A. 404, McGuffin v. Coyle, 16 Okl. 679, 85 Pac. 961, 6 L. R. A., N. S., 524, Beasley v. Texas & P. Ry. Co., 115 Fed. 955, 53 C. C. A. 434, reaffirming and applying the rule; Beasley v. Texas etc. Ry. Co., 191 U. S. 497, 24 Sup. Ct. Rep. 164, 48 L. ed. 276, not deciding validity of contract to locate depot; Oregon etc. R. R. Co. v. Potter, 5 Or. 231, 232, not in point; Edwards v. City of Goldsboro, 141 N. C. 70, 53 S. E. 655, 4 L. R. A., N. S., 589, holding contract inducing location of public building at certain place illegal; Chicago & E. I. R. Co. v. People, 222 Ill. 406, 78 N. E. 787, stating duty of railroad in locating depots; First Nat. Bank v. Hendrie, 49 Iowa, 405, 31 Am. Rep. 153, holding notes given to induce construction of road to a given point valid; People v. Chicago & A. R. Co., 130 Ill. 184, 22 N. E. 860, compelling location of depot where public convenience required it.

Distinguished in Herzog v. Atchison T. & S. F. R. Co., 153 Cal. 499, 95 Pac. 899, 17 L. R. A., N. S., 429, specifically enforcing contract to locate depot at certain place; McCowen v. Pew, 153 Cal. 744, 96 Pac. 897, 21 L. R. A., N. S., 800, holding that where there is no law requiring road to locate along certain route it may contract to locate at a particular point; Pixley v. Gould, 13 Ill. App. 568, holding contract

valid when entered into directly with the corporation; Berryman v. Trustees of Cincinnati etc. Ry., 14 Bush (Ky.), 761, upholding contract for location of road through certain locality; Texas etc. R. R. Co. v. Rohards, 60 Tex. 549, 48 Am. Rep. 268, upholding contract between railroad and hotel keeper. Cited in notes in 18 Am. Dec. 404, 36 Am. Rep. 216, on contracts as to location of depots; 117 Am. St. Rep. 514, on contracts consideration for which has partly failed or is partly illegal; 21 L. R. A., N. S., 802, 803, on validity of contract made to influence location of railroad.

5 Or. 185–186, DRAY v. MAYER.

Appeal.—Assignment of Judgment Does not Carry Right to sue on appeal bond, p. 186.

Cited in Chilstrom v. Eppinger, 127 Cal. 327, 78 Am. St. Rep. 46, 59 Pac. 697, reaffirming the rule.

5 Or. 186–186, SMITH v. SMITH.

This case has not been cited.

5 Or. 191–215, DOLPH v. BARNEY.

Affirmed in 97 U. S. 652, 24 L. ed. 1063.

Public Lands.—Donation Act is Grant in presenti, p. 202.

Cited in Love v. Love, 8 Or. 28, reaffirming the rule.

Overruled in Quinn v. Ladd, 37 Or. 268, 59 Pac. 459, following the decision of the federal supreme court to effect that grant gives bare right of possession.

Public Lands.—Title Vests on Making Proof before issue of patent under donation act, p. 203.

Cited in Ramsey v. Loomis, 6 Or. 378, reaffirming the rule; Farris v. Hayes, 9 Or. 83, to point that death of settler terminates his estate.

Acknowledgment.—Certificate cannot be Impeached by parol, p. 205.

Cited in Hitz v. Jenks, 123 U. S. 305, 8 Sup. Ct. Rep. 143, 31 L. ed. 159, applying the rule.

Public Lands.—Presumption in Favor of Deed of school superintendent, p. 209.

Quoted in Salem Imp. Co. v. McCourt, 26 Or. 103, 41 Pac. 1106, approvingly.

Appeal.—Error must be Shown affirmatively, p. 209.

Cited in Tenny v. Mulvaney, 9 Or. 410, reaffirming the rule.

Judgment is Only Void When Court is without jurisdiction, p. 211.

Cited in Morrill v. Morrill, 20 Or. 102, 23 Am. St. Rep. 95, 25 Pac. 364, 11 L. R. A. 155, applying the rule.

Execution.—Rule Requiring Several Parcels to be Sold separately is directory, p. 211.

Cited in Bays v. Trulson, 25 Or. 116, 35 Pac. 28, holding the matter in discretion of sheriff; Balfour v. Burnett, 28 Or. 76, 41 Pac. 3, to the same effect.

Execution.—After Confirmation Regularity of Sale cannot be questioned, p. 212.

Cited in Ebner v. Heid, 2 Alaska, 605, Leinenweber v. Brown, 24 Or. 553, 34 Pac. 477, and McRae v. Daviner, 8 Or. 65, all approving the rule.

Execution.—Sheriff's Deed as Evidence of Title, p. 212.

Cited in Willamette Real Estate Co. v. Hendrix, 28 Or. 493, 52 Am. St. Rep. 800, 42 Pac. 516, reaffirming the rule.

Taxation.—Certificate of Purchase Conveys No Title; it is mere evi dence of title, p. 213.

Cited in Gabel v. Williams, 42 Misc. Rep. 477, 87 N. Y. Supp. 241, Territory v. Perea, 6 N. M. 546, 30 Pac. 931, and Abraham v. Chenoweth, 9 Or. 355, all following the rule.

Tenancy in Common.—One Tenant may Recover entire premises in ejectment, p. 215.

Cited in Mather v. Dunn, 11 S. D. 200, 74 Am. St. Rep. 788, 76 N. W. 923, reaffirming the rule.

Distinguished in Mattis v. Boggs, 19 Neb. 703, 28 N. W. 327, holding that tenant may recover his separate share only. Cited in note in 6 L. R. A., N. S., 715, on extent of recovery in ejectment by tenants in common against stranger.

Ejectment.—Where Answer Sets Up Complete Legal defense, cross-bill in equity cannot be filed, p. 215.

Reaffirmed in Schealnd v. Erpelding, 6 Or. 262.

Distinguished in Hill v. Cooper, 6 Or. 187, the rule being changed by statute; South Portland Land Co. v. Munger, 36 Or. 467, 60 Pac. 7, on the facts; Fire Assn. v. Allesina, 45 Or. 161, 77 Pac. 126, allowing right to file cross-bill together with answer setting up defense at law. Cited in notes in 11 Am. Dec. 781, on presumption that courts know the law; 89 Am. Dec. 665, 666, on judicial notice; 49 Am. Dec. 231, for estoppel to claim after-acquired title.

5 Or. 216–228, STATE v. GARRAND.

Criminal Law.—What Declarations are Part of the res gestae, p. 217.

Cited in State v. McCann, 43 Or. 157, 72 Pac. 138, Lambright v. State, 34 Fla. 582, 16 South. 587, Collins v. State, 46 Neb. 43, 64 N. W. 434, Gosa v. Southern Ry., 67 S. C. 361, 45 S. E. 816, and Marler v. Texas etc. Ry. Co., 52 La. Ann. 731, 27 South. 178, all discussing the principles of res gestae. Cited in notes to 95 Am. Dec. 53, 86 Am. St. Rep. 647, on admissibility of declarations.

Homicide.—Dying Declarations as Evidence, p. 217.

Cited in State v. Fuller, 52 Or. 46, 96 Pac. 458, a similar case. Cited in note in 56 L. R. A. 354, 369, 370, 383, 404, on dying declarations as evidence.

Homicide.—Instructions on Lesser Degrees of Crime, p. 220.

Cited in State v. Magers, 35 Or. 534, 57 Pac. 201, holding that judge is bound to instruct on manslaughter if there be any evidence tending to show want of malice.

Criminal Law.—Evidence of Good Character of Accused, p. 221.

Cited in State v. Porter, 32 Or. 159, 49 Pac. 970, holding such evidence admissible; State v. McGrath, 35 Or. 114, 57 Pac. 322, approving the rule.

Homicide.—Degrees of Crime, p. 225.

Cited in State v. Ellsworth, 30 Or. 156, 160, 47 Pac. 202, 203, discussing degrees of murder in poison cases. Cited in notes in 18 Am. Dec. 782, 783, on statutory division of murder into degrees; 87 Am. Dec. 102, on jury as judges of facts and weight of evidence.

5 Or. 228–232, OREGON & C. R. CO. v. POTTER.

Cited in note to 60 Am. Dec. 524, on forbearance to sue as consideration to support promise.

5 Or. 233–234, RUSSELL v. SWIFT.

Cited in note to 86 Am. Dec. 685, on pleading statute of frauds.

5 Or. 235–242, KNOTT v. STEPHENS.

Contracts.—Time as Essence, pp. 239, 240.

Cited in Wright-Blodgett Co. v. Astoria Co., 45 Or. 229, 77 Pac. 599, and Cosby v. Honaker, 57 W. Va. 518, 50 S. E. 612, both applying the rule. Cited in notes to 50 Am. Dec. 598, on time as of essence of contract; 104 Am. St. Rep. 266, on time as of essence of contract for sale of lands; 15 L. R. A. 737, on making time of the essence of a contract by demand or notice.

Vendor and Purchaser.—When Time is not Essence of contract, it may be made so by demand, p. 241.

Cited in Coles v. Meskimen, 48 Or. 57, 85 Pac. 69, holding tender of deed and demand for payment necessary to put purchaser in default; Frink v. Thomas, 20 Or. 269, 25 Pac. 719, 12 L. R. A. 239, holding offer to perform necessary to put opposite party in default.

Vendor and Purchaser.—Necessity for Tender of Return of purchase money to rescind contract to convey, p. 241.

Cited in Dundee Mortgage etc. Co. v. Goodman, 36 Or. 456, 60 Pac. 4, Sievers v. Brown, 36 Or. 221, 56 Pac. 171, Vaughn v. Smith, 34 Or. 57, 55 Pac. 100, and Frink v. Thomas, 20 Or. 271, 25 Pac. 719, 12 L. R. A. 239, all to point that party rescinding contract must put other party in statu quo.

5 Or. 243–253, GRANT COUNTY v. SELS.

Counties.—Recovery of Money Illegally Paid to officers for services, pp. 243–249.

Cited in State v. Brown, 10 Or. 226, 229, applying the rule.

Distinguished in Klamath County v. Leavitt, 32 Or. 439, 52 Pac. 21, involving sufficiency of complaint in action by county.

Statutes.—Repeal by Implication is not Prohibited by the constitution, and later inconsistent act repeals former, p. 246.

Cited in Stingle v. Nevel, 9 Or. 63, State v. Chadwick, 10 Or. 533, 537, appendix, Little v. Cogswell, 20 Or. 347, 25 Pac. 728, State v.

Rogers, 22 Or. 360, 30 Pac. 76, Smith v. Day, 39 Or. 526, 64 Pac. 814, and Sandys v. Williams, 46 Or. 331, 80 Pac. 644, all supporting the rule.

Disapproved in Mayer v. Cahalin, Fed. Cas. No. 9340, 5 Saw. 355, and The Glaramara, 10 Fed. 681, 8 Saw. 22, both following the rule on the ground of stare decisis. Cited in note in 14 Am. Dec. 210, on repeal by implication.

Statutes.—Statute cannot be Amended by Implication, p. 247.

Cited in Dolan v. Barnard, 5 Or. 393, reaffirming the rule.

5 Or. 253-254, **CHRISTIAN v. EVANS.**

Appeal.—Requisites of Notice of Appeal, p. 254.

Cited in Luse v. Luse, 9 Or. 149, Mendenhall v. Elwert, 36 Or. 379, 52 Pac. 23, and State v. Preston, 30 Nev. 305, 95 Pac. 920, all approving the decision.

Explained in Lancaster v. McDonald, 14 Or. 266, 267, 12 Pac. 376, modifying the rule; Broback v. Huff, 11 Or. 395, 4 Pac. 1130, holding that writ of review will not lie after time for appeal has expired.

5 Or. 255-260, **ELFELT v. HINCH.**

Husband and Wife cannot Contract with each other, p. 257.

Cited in Collinson v. Jackson, 14 Fed. 308, 8 Saw. 357, holding promise by wife to husband void. Cited in note to 90 Am. St. Rep. 516, on attacks by creditors on conveyances made by husbands to wives.

Fraudulent Conveyances.—Voluntary Conveyance is Fraudulent as to existing creditors, p. 259.

Cited in Jolly v. Kyle, 27 Or. 101, 39 Pac. 1001, and Holmes v. Wolfard, 47 Or. 102, 81 Pac. 822, both holding that debtor in failing circumstances may prefer certain creditors; Seed v. Jennings, 47 Or. 468, 83 Pac. 874, holding voluntary conveyance good as to subsequent creditors; Flynn v. Baisley, 35 Or. 271, 76 Am. St. Rep. 495, 57 Pac. 909, 45 L. R. A. 645, upholding conveyance by father to son in consideration of money previously loaned.

5 Or. 260-264, **HUMPHREYS v. TAYLOR.**

Executors and Administrators.—Executor's Right to Sue for possession of lands of decedent, p. 262.

Cited in Aiken v. Aiken, 12 Or. 206, 6 Pac. 684, Haynes v. Whitsett, 18 Or. 455, 22 Pac. 1073, Gossage v. Crown Point etc. Min. Co., 14 Nev. 158, and Kohn v. McKinnon, 90 Fed. 627, all approving the rule; Clark v. Bundy, 29 Or. 195, 44 Pac. 284, holding that mere appointment of administrator does not suspend statute barring heir's right to recover land.

5 Or. 265-273, **SPRINGFIELD MILLING CO. v. LANE COUNTY.**

Municipal Corporations.—The Law will not Imply an agreement to do that which the city is restricted from agreeing to do, p. 267.

Cited in Portland Lumber etc. Co. v. City of Portland, 18 Or. 46, 22 Pac. 543, 6 L. R. A. 290, dissenting opinion, majority discussing power of city of Portland to improve streets.

Distinguished in Portland etc. Co. v. City of East Portland, 18 Or. 14, 22 Pac. 540, 6 L. R. A. 290, on the facts. Cited in notes to 81 Am. Dec. 107, on municipal liability on ground of beneficial use of property or labor; 27 L. R. A. N. S., 1120, on liability of municipality or other public corporation on implied contract.

Bridges.—Law of 1865 is still in force, pp. 269, 270.

Cited in Eastman v. County of Clackamas, 32 Fed. 35, 12 Saw. 613, and Pacific Bridge Co. v. Clackamas County, 45 Fed. 219, both referring to the statute as still in force.

Municipal Corporations.—When Clothed With Power to do an act which concerns public interest, its execution is a duty and peremptory though the language of the law be permissive, pp. 271, 272.

Cited in Rankin v. Buckman, 9 Or. 251, and Arnold v. Mayor of Pawtucket, 21 R. I. 18, 41 Atl. 578, both approving the rule.

Courts.—When a Statute Confers a Power on an inferior tribunal, and prescribes a mode of exercising it, the mode becomes the measure of the power, and must be strictly followed, p. 272.

Cited in Bank of British Columbia v. City of Portland, 41 Or. 5, 67 Pac. 1114, approving and applying the rule.

5 Or. 273–275, SELLERS v. CORVALLIS.

Appeal from Recorder to Circuit Court, concurrent with review, pp. 274, 275.

Cited in Ramsey v. Pettingill, 14 Or. 211, 12 Pac. 441, and Paulson v. City of Portland, 16 Or. 457, 19 Pac. 455, 1 L. R. A. 673, approving the rule; Bartom v. City of La Grande, 17 Or. 580, 22 Pac. 112, holding that appeal does not lie from city tribunal unless given by charter; City of Corvallis v. Stock, 12 Or. 391, 7 Pac. 524, reluctantly following the rule as stare decisis; School Dist. No. 116 v. Irwin, 34 Or. 435, 56 Pac. 414, to point that appeal for removal of cause for trial de novo is only allowed when statute provides for it; Harbert v. Monongahela River R. Co., 50 W. Va. 256, 40 S. E. 379, criticising previous decisions and holding main case overruled in 9 Or. 225.

5 Or. 275–279, HURST v. HAWN.

Statutes.—Repeal by Implication of Prior Conflicting Laws, p. 279.

Cited in Grant County v. Sels, 5 Or. 246, Little v. Cogswell, 20 Or. 347, 25 Pac. 728, State v. Rogers, 22 Or. 360, 30 Pac. 76, Smith v. Day, 39 Or. 536, 64 Pac. 814, and Sandys v. Williams, 46 Or. 332, 80 Pac. 644, all to point that law may be repealed by implication; Mayer v. Cahalin, Fed. Cas. No. 9340, 5 Saw. 355, reluctantly following the rule on the ground of stare decisis.

5 Or. 280–285, CANYONVILLE & G. RD. CO. v. DOUGLAS COUNTY.

Highways.—Jurisdiction of County Court in Proceedings to lay out, p. 281.

Cited in Bewley v. Graves, 17 Or. 282, 20 Pac. 325, State v. Myer, 20 Or. 444, 26 Pac. 307, Cameron v. Wasco County, 27 Or. 321, 41 Pac. 161, Grady v. Dundon, 30 Or. 336, 47 Pac. 916, and Sime v. Spencer, 30 Or. 341, 342, 47 Pac. 919, all to point that, in such proceedings, county court has inferior jurisdiction.

Review.—Assimilation to Certiorari, p. 283.

Cited in McAnish v. Grant, 44 Or. 61, 74 Pac. 397, upholding the statement.

Highways.—Persons Entitled to Question proceedings in county court, p. 283.

Explained in Gaines v. Linn County, 21 Or. 432, 28 Pac. 134, holding that any person whose lands are directly affected by road proceedings may have them reviewed.

Review.—Writ Does not Bring Up Evidence, p. 283.

Distinguished and explained in Douglas County Road Co. v. County of Douglas, 5 Or. 409, holding that affidavit of facts are part of the record on writ of review.

5 Or. 285–291, SIMONS v. BROWN.

This case has not been cited.

5 Or. 292–296, ADKINS v. LEWIS.

Mortgages.—Mortgagee in Possession, Questioning Title of mortgagor, p. 293.

Cited in Parkinson v. Hanbury, 18 Eng. Rul. Cas. 432, not accessible. Cited in note to 4 Am. St. Rep. 70, on duties and liabilities of mortgagees in possession.

5 Or. 296–299, LADD v. HIGLEY.

Judgment.—Effect of Recital of Due Service of process on defendant, p. 299.

Cited in Northcut v. Lemery, 8 Or. 322, reaffirming the rule.

5 Or. 299–301, CHAPMAN v. WILBUR.

This case has not been cited.

5 Or. 301–311, FINK v. CANYON RD. CO.

Corporations.—Authority of Officers and Agents, p. 310.

Cited in Luse v. Isthmus Transit Ry. Co., 6 Or. 131, 25 Am. Rep. 506, discussing the authority of the business and financial agent of a railroad corporation.

Trial.—Findings of Court must Cover material issues, p. 310.

Cited in Drainage Dist. No. 4 v. Crow, 20 Or. 537, 26 Pac. 846, Wheeler v. Burckhardt, 34 Or. 508, 56 Pac. 645, and Louie Chung v. Stephenson, 50 Or. 248, 89 Pac. 806, all approving and applying the rule; Philomath College v. Hartless, 6 Or. 162, 25 Am. Rep. 510, holding that only the material issues need be found; Miller v. Head Camp, 45 Or. 195, 77 Pac. 84, and Moody v. Richards, 29 Or. 285, 45 Pac. 778, both holding that facts admitted by the pleadings need not be found;

Reade v. Pacific Coast Home Supply Assn., 40 Or. 65, 66 Pac. 445, to point that where the facts are not put in issue no findings are necessary. Cited in notes in 23 Am. Dec. 744, on evidence of authority to affix corporate seal; 99 Am. Dec. 337, sale of entire corporate assets and its effect.

5 Or. 311-313, CAMPBELL v. BRIDWELL.

Animals.—Injuries by Animals Running at Large and effect of fence laws, p. 312.

Cited in Bilen v. Paisley, 18 Or. 51, 21 Pac. 936, 4 L. R. A. 840, discussing the validity and effect of laws requiring land owners to fence against stock at large; Moses v. Southern Pac. R. Co., 18 Or. 398, 23 Pac. 508, 8 L. R. A. 135, involving liability of railroads for injuries to animals on unfenced tracks; Walker v. Bloomingcamp, 34 Or. 392, 43 Pac. 175, holding that uninclosed lands are common pasturage; Strickland v. Geide, 31 Or. 376, 49 Pac. 982, construing fence law to exclude sheep; Oliver v. Hutchinson, 41 Or. 447, 69 Pac. 1024, applying the rule to fenced lands lacking division fence.

Distinguished in French v. Creswell, 13 Or. 422, 11 Pac. 63, holding rule inapplicable to Umatilla county as it was exempt from the operation of the fence law; Pacific Livestock Co. v. Murray, 45 Or. 106, 76 Pac. 1079, holding rule inapplicable to trespassing sheep. Cited in notes to 49 Am. Dec. 250, on liability for injuries by trespassing animals; 81 Am. St. Rep. 447, on liability of owners of stock herded or ranging on lands of another without lawful fence; 22 L. R. A. 107, on sufficiency of fences; 22 L. R. A. 57, on liability of owner for trespass of cattle.

5 Or. 313-318, 20 Am. Rep. 737, MUSGROVE v. BONSER.

Acknowledgment.—Certificate to Foreign Acknowledgment must Show authority of officer taking it, pp. 315, 316.

Cited in Fleschner v. Sumpter, 12 Or. 167, 6 Pac. 511, and Lynch v. Murphy, 161 U. S. 254, 16 Sup. Ct. Rep. 523, 40 L. ed. 690, discussing same point; Hughes v. Wright, 100 Tex. 513, 123 Am. St. Rep. 827, 101 S. W. 790, 11 L. R. A., N. S., 643, sustaining certificate showing substantial compliance with the law. Cited in notes in 9 Am. St. Rep. 504; 18 Am. St. Rep. 893; 108 Am. St. Rep. 541, as to when defects in certificates of acknowledgment are fatal.

Deeds.—Unrecorded Deed Carries Title Against Every One with notice, p. 317.

Cited in Jennings v. Kiernan, 35 Or. 361, 55 Pac. 446, Security Savings etc. Co. v. Loewenberg, 38 Or. 168, 62 Pac. 649, Advance Thresher Co. v. Esteb, 41 Or. 474, 69 Pac. 449, Goodenough v. Warren, Fed. Cas. No. 5534, 5 Saw. 494, and Gest v. Packwood, 34 Fed. 372, 13 Saw. 202, all approving and applying the rule.

Deeds.—Recorded Deed not Entitled to Record may impart actual notice, p. 317.

Cited in Mandamus v. Mann, 14 Or. 452, 13 Pac. 449, defining actual notice; Brown v. Moss, 53 Or. 522, 101 Pac. 208, discussing generally

the effect of record of instrument not entitled to record; Doran v. Dazey, 5 N. D. 170, 57 Am. St. Rep. 550, 64 N. W. 1024, applying the rule where mortgage was recorded out of the chain of title; Walters v. Hartwig, 106 Ind. 128, 6 N. E. 7, approving and applying the rule. Cited in note in 14 Am. Dec. 513, on unauthorized recording of instruments.

Vendor and Purchaser.—Notice of Facts putting on inquiry, p. 317.

Cited in Hyland v. Hyland, 19 Or. 57, 23 Pac. 813, McDougal v. Lame, 39 Or. 214, 64 Pac. 864, Williams v. First Nat. Bank, 48 Or. 574, 87 Pac. 891, all approving and applying the rule; Gale v. Shillock, 4 Dak. 196, 29 N. W. 667, holding that possession of part of land is sufficient to put purchaser on inquiry; Brinkman v. Jones, 44 Wis. 521, holding that knowledge of facts putting on inquiry is equivalent to actual notice.

Distinguished in Ritchie v. Griffiths, 1 Wash. 440, 23 Am. St. Rep. 155, 25 Pac. 344, 12 L. R. A. 384, on the facts. Cited in note in 45 Am. Rep. 189, on constructive notice.

5 Or. 318–325, DOUGLAS COUNTY RD. CO. v. ABRAHAMS.

Highways.—Dedication of Roads and Agreements Relating to appropriation of them by private road companies, pp. 321–323.

Cited in Douglas County Road Co. v. County of Douglas, 5 Or. 374, involving the same facts and upholding the decision; Douglas County Road Co. v. County of Douglas, 6 Or. 300, involving the same facts, not in point; Douglas County Road Co. v. Canyonville etc. Road Co., 8 Or. 104, to sustain position that the road involved herein is a public road; State v. Douglas County Road Co., 10 Or. 199, to point that the road company is a private corporation; Ridings v. Marion County, 50 Or. 33, 91 Pac. 23, holding highway acquirable by prescription.

5 Or. 325–328, MOORE v. PACKWOOD.

Courts.—Terms of Supreme Court, p. 326.

Miscited in McWhirter v. Brainard, 5 Or. 430, 431, discussing location of county seat.

5 Or. 328–334, 20 Am. Rep. 741, WHITLEY v. MURPHY.

Criminal Law.—Appeal Does not Vacate Judgment of court a quo, p. 330.

Cited in State v. Armstrong, 45 Or. 27, 74 Pac. 1025, to same effect.

Criminal Law.—Death of Defendant Does not Abate judgment for costs, p. 332.

Distinguished in United States v. Mitchell, 163 Fed. 1017, holding that a judgment for a fine abates on death of defendant.

5 Or. 334–342, BUFORD v. NEW YORK L. INS. CO.

Insurance.—Warranties must be Strictly Complied With, p. 339.

Cited in Beard v. Royal Neighbors, 53 Or. 108, 110, 99 Pac. 85, 86, 19 L. R. A., N. S., 798, discussing effect of warranty and breach thereof.

5 Or. 343–352, CLARK v. BAYLEY.

Public Land.—Exemption of Government Homestead from Liability for debts contracted before issue of patent, p. 348.

Cited in Springer v. Young, 14 Or. 280, 12 Pac. 405; Faull v. Cooke, 19 Or. 466, 20 Am. St. Rep. 832, 26 Pac. 664, Adams v. Church, 42 Or. 272, 95 Am. St. Rep. 740, 70 Pac. 1037, 59 L. R. A. 782, and Stark Bros. v. Glaser, 19 Okl. 512, 91 Pac. 1044, all approving and applying the rule; McCorkell v. Herron, 126 Iowa, 329, 111 Am. St. Rep. 201, 103 N. W. 990, applying the rule to land purchased under commutation act.

Distinguished in Struby Estabrook Mercantile Co. v. Davis, 18 Colo. 95, 36 Am. St. Rep. 266, 31 Pac. 496, holding homestead liable for debts contracted after issue of receiver's receipt.

Public Lands.—Contracts Creating Trust in Entry or selling interest before issue of patent are void, p. 352.

Cited in Pacific Live Stock Co. v. Gentry, 38 Or. 293, 65 Pac. 598, Horseman v. Horseman, 43 Or. 93, 72 Pac. 701, Cox v. Donnelly, 34 Ark. 765, and Armstrong v. Henderson, 16 Idaho, 76, 102 Pac. 364, all applying the rule.

Distinguished in Frink v. Hoke, 35 Or. 23, 56 Pac. 1095, reviewing other cases, on the facts; Church v. Adams, 37 Or. 363, 61 Pac. 641, holding that one entering a "timber claim" may contract to sell it prior to making final proof.

5 Or. 353–355, HOWE v. PATTERSON.

Appeal.—In Equity Case must be Tried Anew upon the transcript and evidence, p. 354.

Cited in Nessley v. Ladd, 29 Or. 360, 45 Pac. 904, Wyatt v. Wyatt, 31 Or. 534, 49 Pac. 856, and In re Morrison's Estate, 48 Or. 514, 87 Pac. 1044, all reaffirming the rule.

5 Or. 356–360, RICHARDS v. PLANNING.

This case has not been cited.

5 Or. 360–362, OLIVER v. HARVEY.

Appeal.—Service and Filing of Notice is indispensable to jurisdiction, p. 361.

Cited in Seattle L. S. & E. Ry. Co. v. Simpson, 19 Wash. 633, 54 Pac. 31, and Rodman v. Manning, 50 Or. 508, 93 Pac. 366, both reaffirming the rule; Shirley v. Burch, 16 Or. 9, 18 Pac. 348, to point that notice of appeal is in the nature of a process; Taylor v. Lapham, 41 Or. 480, 69 Pac. 439, holding failure to file notice fatal to the appeal; Dowell v. Bolt, 45 Or. 91, 75 Pac. 715, holding that appellate court acquires jurisdiction at time of service of notice; State v. Preston, 30 Nev. 306, 95 Pac. 920, holding notice failing to sufficiently describe judgment fatally defective.

Appeal.—Filing of Notice of Appeal cannot be waived, p. 361.

Cited in Wolf v. Smith, 6 Or. 74, holding that appearance does not waive filing of transcript.

5 Or. 362-369, PORTLAND v. KAMM.

Eminent Domain.—Verdict must State Sum of damage and benefits separately, p. 367.

Cited in City of Portland v. Lee Sam, 7 Or. 402, reaffirming and applying the rule.

5 Or. 373-374, DOUGLAS COUNTY RD. CO. v. DOUGLAS COUNTY.

Courts.—Remedy for Failure of Court to Record Proceedings is by mandamus, p. 374.

Cited in Douglas County Road Co. v. County of Douglas, 6 Or. 301, to same point. Cited in note in 51 L. R. A. 65, on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal.

5 Or. 375-381, 20 Am. Rep. 746, STATE EX REL. CHURCH v. DUSTIN.

Officers.—Offer to Waive Part of Salary if elected, as bribe of voters, p. 377.

Cited in Bush v. Head, 154 Cal. 283, 97 Pac. 515, where candidate promised not to fill the office and to save the county the expense; Carrothers v. Russell, 53 Iowa, 350, 36 Am. Rep. 222, 5 N. W. 503, holding that promise to pay portion of salary of office into county treasury is a bribe; People v. Thornton, 25 Hun, 466, a bribery case. Cited in notes to 97 Am. Dec. 717, on bribery; 37 Am. Rep. 422, on remedies of parties in pari delicto.

5 Or. 382-385, RICHARDS v. NYE.

Execution.—A Sheriff has No Right to be Wiser than his process, p. 384.

Cited in Tierney v. Frazier etc. Co., 57 Tex. 441, to point that officer may safely obey all process fair on its face. Cited in note in 21 Am. Dec. 195, on justification of officers by their process.

5 Or. 385-390, SNIDER v. LEHNHERR.

Vendor and Purchaser.—Rescission of Contract for Default where time is the essence, p. 389.

Cited in Holbrook v. Investment Co., 30 Or. 265, 47 Pac. 922, and Maffet v. Oregon etc. R. Co., 46 Or. 454, 80 Pac. 493, both applying the rule. Cited in notes to 50 Am. Dec. 598, 599, on time as of essence of contract; 11 Am. St. Rep. 758, on burden of proof as to fraudulent conveyances.

5 Or. 390-393, DOLAN v. BARNARD.

Statutes.—Amended Section must be Set Out and published in full as amended, p. 392.

Cited in State v. Wright, 14 Or. 370, 12 Pac. 710, and The Glaramara, 10 Fed. 681, 8 Saw. 22, both approving the rule; Mayer v. Cahalin, Fed. Cas. No. 9340, 5 Saw. 355, discussing power of repeal by implication and reviewing Oregon cases.

Distinguished in David v. City of Portland, 14 Or. 111, 12 Pac. 179, approving the rule but holding it inapplicable to the law in question.

5 Or. 397–399, CARTWRIGHT v. SAVAGE.

Execution.—Purchaser is Entitled to Possession, p. 399.

Cited in Bank of British Columbia v. Harlow, 9 Or. 341, holding that undertaking on appeal from order confirming sale cannot affect this right.

Execution.—Effect of Redemption from Sale, p. 399.

Cited in Flanders v. Aumack, 32 Or. 28, 67 Am. St. Rep. 504, 51 Pac. 450, holding that redemption by grantee of judgment debtor subjects lands to resale for balance due on judgment; Brand v. Baker, 42 Or. 437, 71 Pac. 324, holding that sale cannot be vacated after redemption; Kaston v. Storey, 47 Or. 153, 114 Am. St. Rep. 912, 80 Pac. 218, applying the rule to redemption by successor in interest of judgment debtor; Jacobson v. Lassas, 49 Or. 473, 90 Pac. 905, applying the rule to redemption of mortgaged premises. Cited in note to 67 Am. St. Rep. 517, on effect of redemption from execution sales.

Execution.—Redemptioner is Entitled to Crop that was on land at time of sale, p. 399.

Cited in Balfour v. Rogers, 64 Fed. 927, holding that the usufruct of the land must be accounted for to the redemptioner. Cited in notes in 19 Am. Dec. 754, on passing of crop by execution sale; 23 L. R. A. 467, on sale or mortgage of future crops.

5 Or. 400–405, ROLFES v. RUSSEL.

Fraud.—Requisites of Complaint for False Representation, p. 402.

Cited in Grangers' Market Co. v. Vinson, 6 Or. 175, Dunning v. Cresson, 6 Or. 242, Nicolai v. Lyon, 8 Or. 58, Britt v. Marks, 20 Or. 227, 25 Pac. 637, Schoellhamer v. Rometsch, 26 Or. 398, 38 Pac. 345, Cawston v. Sturgis, 29 Or. 336, 43 Pac. 657, Martin v. Eagle Creek etc. Co., 41 Or. 455, 69 Pac. 218, and Anderson v. Adams, 43 Or. 627, 74 Pac. 217, all approving and applying the rule.

5 Or. 406–411, DOUGLAS COUNTY RD. CO. v. DOUGLAS COUNTY.

Review.—Writ Only Brings Up Record upon which reviewing court decides jurisdiction. It cannot try facts, p. 407.

Cited in Smith v. City of Portland, 25 Or. 301, 35 Pac. 666, Tyler v. State, 28 Or. 241, 42 Pac. 518, Oregon Coal etc. Co. v. Coos County, 30 Or. 309, 47 Pac. 852, and Meinert v. Harder, 39 Or. 619, 65 Pac. 1058, all approving the rule.

Counties.—Agreement Between County Court and Road Company set forth, p. 409.

Cited in Douglas County Road Co. v. County of Douglas, 6 Or. 301, 303, 305, merely referring to the decision and matters decided in it, being the same case on another appeal; Canyonville etc. Road Co. v. Stephenson, 8 Or. 269, involving the validity of the same contract in issue herein.

Judgment.—Discretion of Court as to Entry of Order nunc pro tunc, p. 410.

Cited in Cochran v. Baker, 64 Or. 556, 52 Pac. 528, holding that court has inherent power to amend its records by a nunc pro tunc entry.

5 Or. 411–418, BARRETT v. BARRETT.

Fraudulent Conveyances.—Right of Divorced Wife to Question husband's conveyance and when it accrues, p. 413.

Cited in Seed v. Jennings, 47 Or. 468, 83 Pac. 874, to point that one having a right of action for tort is a creditor within the meaning of the fraudulent conveyance law; Twell v. Twell, 6 Mont. 27, 9 Pac. 542, holding judgment for alimony sufficient to give wife right as "creditor" to set aside conveyance of husband.

Distinguished in Barrett v. Failing, 111 U. S. 529, 4 Sup. Ct. Rep. 593, 28 L. ed. 507, holding that wife obtaining divorce in another state acquires no title to husband's land in Oregon. Cited in notes to 65 Am. Dec. 359, on effect of valid decree of divorce; 16 L. R. A., N. S., 1150, on right of wife to relief against transfer made or contemplated by husband in fraud of her support.

Parent and Child.—Law Does not Imply Agreement to pay child wages for ordinary services such as housekeeping, p. 417.

Cited in Murphy v. Murphy, 1 S. D. 325, 47 N. W. 145, 9 L. R. A. 820, holding that contract to pay grandson for his services must be proved by direct and positive evidence.

5 Or. 420, GOLDSMITH v. BROWN.

This case has not been cited.

5 Or. 420–422, SNIPES v. BEEZLEY.

This case has not been cited.

5 Or. 423–425, ESPY v. FENTON.

Use and Occupation.—Assumpsit for Use and Occupation will not lie where there is no contract, express or implied, p. 424.

Cited in Adsit v. Kaufman, 121 Fed. 356, 58 C. C. A. 33, reaffirming the rule. Cited in notes to 46 Am. Dec. 289, on action for use and occupation; 14 L. R. A. 156, on liability of assignee of leasehold for rent.

5 Or. 426–431, McWHIRTER v. BRAINARD.

Statute.—Object of Provision Requiring Subject to be expressed in title, p. 429.

Cited in Lawrey v. Sterling, 41 Or. 521, 69 Pac. 461, and State v. Richardson, 43 Or. 316, 85 Pac. 229, 8 L. R. A., N. S., 362, approving the rule.

Counties.—Law Locating County Seat takes effect by vote of electors interested, p. 430.

Distinguished and explained in Baker County v. Benson, 40 Or. 221, 66 Pac. 821, holding vote of people not necessary to give effect to local law.

Counties.—Whether Canvass of Vote on Location of County Seat was correct can only be tried by mandamus, not by injunction, p. 431.

Cited in Parmeter v. Bourne, 8 Wash. 60, 35 Pac. 590, reaffirming the rule.

Denied in Parmeter v. Bourne, 8 Wash. 55, 35 Pac. 758, sustaining injunction against removal of county seat; Marsden v. Harlocker, 48 Or. 98, 99, 120 Am. St. Rep. 786, 85 Pac. 331, 332, intimating that injunction would lie in local option election contest.

5 Or. 432–436, CHAPMAN v. STATE.

Chattel Mortgage Simply Creates a Lien and does not vest title without foreclosure, p. 435.

Cited in Ayre v. Hixson, 53 Or. 31, 133 Am. St. Rep. 819, 98 Pac. 519, reaffirming the rule.

Qualified in Marquam v. Sengfelder, 24 Or. 10, 32 Pac. 677, Mayes v. Stephens, 38 Or. 516, 63 Pac. 761, 762, Backhaus v. Buells, 43 Or. 574, 73 Pac. 346, and J. I. Case etc. Co. v. Campbell, 14 Or. 465, 13 Pac. 326, 327, all holding that after condition broken mortgage acquires a special property in the chattel. Cited in note to 42 Am. St. Rep. 706.

5 Or. 436–438, KUBLI v. MARTIN.

This case has not been cited.

5 Or. 438–442, LONG v. SHARP.

Appeal.—Judgment Rendered for Want of an Answer is not appealable but may be reviewed on certiorari, p. 441.

Cited in State v. Superior Court of Jefferson Co., 12 Wash. 551, 41 Pac. 896, and Clendenning v. Crawford, 7 Neb. 476, both approving the rule; Moore v. Rennick, 1 Alaska, 174, holding certiorari proper remedy where amount in controversy is less than two hundred dollars; Everton v. Smith, 1 Alaska, 424, applying the rule where defendant answered but did not appear.

Distinguished in Baier v. Hempall, 16 Neb. 128, 20 N. W. 108, holding that party who appears may appeal though he offered no affirmative proof; Leavenworth, T. & S. W. Ry. Co. v. Forbes, 37 Kan. 453, 15 Pac. 599, holding default judgment appealable in Kansas; Kearns v. Follansby, 15 Or. 597, 598, 16 Pac. 479, holding judgment on demurrer appealable.

Review.—Errors of Law may be Corrected on certiorari, p. 441.

Questioned in Gibson v. Langdon, 2 Alaska, 168, holding that writ of review brings up only question of jurisdiction.

Appeal.—Where Court Acquires No Jurisdiction because order brought up is nonappealable it has no authority except to dismiss, p. 442.

Cited in State v. McKinnon, 8 Or. 486, Whipple v. Southern Pacific Co., 34 Or. 375, 55 Pac. 976, Andrews v. Mullen, 14 Neb. 249, 15 N. W. 217, and Wimsey v. McAdams, 12 S. D. 511, 81 N. W. 885, all approving and applying the rule.

5 Or. 442–447, WHITNEY v. DARROW.

Bail.—Undertaking is a Simple Contract between the sureties and the state, p. 444.

Cited in Malheur County v. Carter, 52 Or. 626, 98 Pac. 493, to point that bail bond is simply a statutory contract; Smith v. Smith, 19 Neb. 714, 28 N. W. 300.

5 Or. 447–450, MOSER v. JENKINS.

Replevin.—Statutory Action for Recovery of Personal Property is replevin, p. 448.

Cited in Guille v. Wong Fook, 13 Or. 585, 11 Pac. 280, and W. W. Kimball Co. v. Redfield, 33 Or. 294, 54 Pac. 216, approving and applying the rule.

Replevin.—Where Taking or Detention is Wrongful, demand is not necessary, p. 449.

Cited in Surles v. Sweeney, 11 Or. 23, 4 Pac. 469, approving the rule.

Replevin.—Facts Alleged in Affidavit are No Part of the issues, p. 449.

Cited in Crawford v. Furlong, 21 Kan. 701, reaffirming the rule.

Pleading.—Conjunctive Denials Raise No Issue, p. 449.

Cited in Rock Springs Coal Co. v. Salt Lake etc. Assn., 7 Utah, 162, 25 Pac. 743, McCormick Harvesting Mach. Co. v. Hovey, 36 Or. 260, 59 Pac. 189, Miller v. Tobin, 18 Fed. 614, 9 Saw. 401, all approving and applying the rule.

Appeal.—Amendments in Pleadings on Appeal from Justice Court must not tender new issues, p. 450.

Cited in Waggy v. Scott, 29 Or. 391, 45 Pac. 776, holding that where a demurrer was overruled below but sustained on appeal, defendant is not entitled to answer.

5 Or. 450–455, TIPPIN v. WARD.

Nonsuit.—Case Should be Submitted to the Jury unless there is an entire lack of evidence tending to sustain the issues or it appears upon the whole case that plaintiff has no right to recover, p. 453.

Cited in Ferrera v. Parke, 19 Or. 144, 23 Pac. 884, Vanbebber v. Plunkett, 26 Or. 564, 38 Pac. 708, 27 L. R. A. 811, Rose v. Wollenberg, 31 Or. 285, 44 Pac. 387, Haines v. McKinnon, 35 Or. 582, 57 Pac. 906, Perkins v. McCullough, 36 Or. 148, 59 Pac. 182, Smitsen v. Southern Pacific Co., 37 Or. 77, 60 Pac. 909, and North Pacific Lumber Co. v. Spore, 44 Or. 474, 75 Pac. 895, all approving and applying the rule.

Contracts.—When There is a Total Breach of Contract, plaintiff may recover damages for future as well as past, p. 454.

Cited in Sax v. Detroit etc. Ry. Co., 125 Mich. 257, 84 Am. St. Rep. 572, 84 N. W. 316, applying the rule on breach of contract employing plaintiff for life.

5 Or. 455–458, NOYES v. STAUFF.

Landlord and Tenant.—Lease must Describe Premises, p. 457.

Cited in Bingham v. Honeyman, 32 Or. 132, 51 Pac. 736, holding that premises must be described with reasonable certainty.

5 Or. 458–463, SOUTHWELL v. BRIZEE.

Nonsuit.—Cause must be Submitted to Jury unless there be an entire lack of evidence to establish the issues, p. 460.

Cited in Ferrera v. Parke, 19 Or. 144, 23 Pac. 884, Vanbebber v. Plunkett, 26 Or. 564, 38 Pac. 708, 27 L. R. A. 811, Haines v. McKinnon, 35 Or. 582, 57 Pac. 900, and Perkins v. McCullough, 36 Or. 148, 59 Pac. 182, all approving and applying the rule.

Contracts.—Whether Contract is Entire or Separable is a question of intention, p. 461.

Cited in Chicago I. & L. Ry. Co. v. Southern Indiana Ry. Co., 38 Ind. App. 246, 70 N. E. 847, reaffirming the rule. Cited in note in 26 L. R. A., N. S., 23, on sufficiency of selection or designation of goods sold out of larger lot.

Contracts.—Where There is No Imputation of Malum in Se, bad parts of separable contract do not vitiate the good, p. 462.

Cited in Potter v. Potter, 43 Or. 153, 72 Pac. 703, approving and applying the rule. Cited in notes to 59 Am. St. Rep. 278, on complete performance as essential to cause of action on entire contract; 93 Am. Dec. 90, on contract to be performed within a year.

5 Or. 463–464, BLACHLEY v. BUTLER.

This case has not been cited.

5 Or. 464–469, GARRETT v. CLARK.

Landlord and Tenant.—Parol Lease for Indefinite Time or for life is taken to be a tenancy from year to year, p. 467.

Cited in Williams v. Ackerman, 8 Or. 406, Arbenz v. Exley etc. Co., 52 W. Va. 480, 44 S. E. 150, 61 L. R. A. 957, and Rosenblat v. Perkins, 18 Or. 159, 162, 22 Pac. 600, 601, 6 L. R. A. 257, all approving the decision. Cited in note to 42 Am. Dec. 126, on notice to quit.

5 Or. 469–472, WETMORE v. WETMORE.

Divorce.—Duty of Court to Award One-third of Real Estate to party obtaining decree, p. 471.

Cited in Senkler v. Berry, 52 Or. 215, 96 Pac. 1071, to point that decree should describe property with certainty; Barrett v. Failing, 3 Fed. 473, 6 Saw. 473, upholding the rule but holding that a decree obtained in another state cannot affect lands in Oregon; Barrett v. Failing, 111 U. S. 528, 4 Sup. Ct. Rep. 598, 28 L. ed. 507, affirming the last citing case.

Overruled or modified in Hall v. Hall, 9 Or. 456, reversing decree following the rule when there was no allegation in the pleadings as to the existence of such property; Ross v. Ross, 21 Or. 11, 26 Pac. 1007, 1008, holding that decree cannot affect property when pleadings are silent as to it; Huffman v. Huffman, 47 Or. 617, 114 Am. St. Rep. 943, 86 Pac. 594, holding that court could not grant wife possession of land entered by husband as government homestead. Cited in note in 34 L. R. A. 111, on allowance to husband from property held by wife in divorce cases.

5 Or. 472–478, SCHOOL LANDS COMMRS. v. BABCOCK.

Records.—Index is No Part of Record, p. 475.

Cited in Nicklin v. Nelson, 11 Or. 411, 50 Am. Rep. 477, 5 Pac. 54, approving and applying the rule.

Distinguished in Advance Thresher Co. v. Esteb, 41 Or. 473, 69 Pac. 449, on the facts. Cited in notes to 96 Am. St. Rep. 404, on effect of defective recording of legal instruments on rights of third persons; 91 Am. Dec. 107, 109, on effect of defects in registration of conveyances; 45 Am. Rep. 189, 190, on constructive notice.

5 Or. 478–480, HUME v. NORRIS.

Sheriffs and Constables.—The Word "Sheriff" Used in a Statute comprehends the entire class of executive officers, including constables, p. 480.

Cited in Huhn v. Lang, 122 Mo. 606, 27 S. W. 347, approving but not applying the rule.

5 Or. 480–482, WILSON v. MADDOCK.

Evidence.—Common Reputation as Evidence of ownership, p. 482.

Cited in Bartel v. Lope, 6 Or. 327, and Meyers v. Dillon, 39 Or. 583, 65 Pac. 867, approving and applying the rule.

Qualified in Raymond v. Flavel, 27 Or. 248, 40 Pac. 167, holding that common reputation of ownership cannot impute notice to persons residing without the community where land is situated.

5 Or. 482–485, KNOTT v. SHAW.

Criminal Law.—Lien of Judgment of Conviction on Property sold by the convict affects the property in the inverse order of its alienation, p. 485.

Cited in State v. Munds, 7 Or. 82, stating mode of enforcing lien for fine and costs; Oliver v. Wright, 47 Or. 327, 83 Pac. 872, approving and applying the rule.

Criticised and modified in Bower v. Holladay, 18 Or. 494, 499, 500, 22 Pac. 554, 556, stating that lien may be enforced only in mode pointed out by statute. Cited in note in 61 L. R. A. 368, 375, on effect of death of party after judgment upon remedy by execution.

Marshaling Assets.—Where Debtor Disposes of Part of His Land, purchaser has the right to have the judgment discharged first out of the residue, p. 485.

Distinguished in Dickson v. Back, 32 Or. 235, 51 Pac. 732, holding rule inapplicable to land mortgaged after the judgment became a lien.

5 Or. 485–490, JOHNSON v. ARRIGONI.

Cited in note in 29 L. R. A. 308, on necessity of new consideration to support waiver of failure to give notice of dishonor, or subsequent promise by indorser.

5 Or. 491–495, STATE v. DOTY.

Homicide.—Indictment for Assault With Intent to kill upheld, p 494.

Cited in State v. Lynch, 20 Or. 390, 392, 26 Pac. 219, in main and concurring opinion, upholding a similar indictment; State v. Kelly, 41 Or. 22, 68 Pac. 2, indictment need not allege that act was done purposely and maliciously.

Indictment.—Objections Waived by Failure to Demur, p. 494.

Cited in State v. Bloodsworth, 25 Or. 89, 34 Pac. 1024, objection that indictment does not allege false token used must be made by demurrer; State v. Carlson, 39 Or. 28, 62 Pac. 1019, and State v. Lee, 33 Or. 508, 56 Pac. 416, both to point that duplicity is waived by failure to demur.

5 Or. 496–500, STRONG v. BARNHART.

Judgment.—Statute of Limitations Does not Apply to statutory proceeding to enforce domestic judgment, p. 499.

Disapproved in Citizens' Nat. Bank v. Lucas, 26 Wash. 422, 90 Am. St. Rep. 748, 67 Pac. 254, 56 L. R. A. 812, reviewing authorities and holding the contrary rule best supported; Bowman v. Holman, 53 Or. 459, 99 Pac. 425, 426, not deciding the question.

5 Or. 500–504, DOVE v. HAYDEN.

Setoff and Counterclaim.—Requisites of Counterclaim, pp. 501, 502.

Cited in Burrage v. Bonanza etc. Co., 12 Or. 173, 174, 6 Pac. 768, holding that in suit in equity defendant cannot plead unliquidated demand triable by jury as setoff.

Setoff and Counterclaim.—Defendant Pleading Counterclaim must Assume that plaintiff has a cause of action against him, p. 502.

Cited in Le Clare v. Thibault, 41 Or. 608, 69 Pac. 555, holding that pleading counterclaim admits at least a part of the adversary's demands.

Distinguished in Merrill v. Hexter, 52 Or. 143, 94 Pac. 974, holding that calling an answer a cross-complaint is not material error.

5 Or. 504–509, TRUTCH v. BUNNELL.

Guardian may Mortgage Ward's Estate, p. 506.

Overruled in Trutch v. Bunnell, 11 Or. 59, 60, 50 Am. Rep. 456, 4 Pac. 588, 589, holding that county court has no jurisdiction to authorize guardian to mortgage ward's estate.

5 Or. 509–517, MONROE v. NORTHERN PAC. COAL MIN. CO.

Appeal.—Amendment of Pleadings on Appeal from county to circuit court, p. 512.

Cited in Dixon v. Johnson, 44 Or. 46, 74 Pac. 395, and McMahan v. Whelan, 44 Or. 407, 75 Pac. 716, both approving and applying the rules.

5 Or. 518–521, ENGLISH v. SAVAGE.

Infants.—Conclusiveness of Judgment Against, p. 521.

Cited in Savage v. McCorkle, 17 Or. 48, 49, 21 Pac. 446, upholding judgment against infant; Harding v. Harding, 46 Or. 180, 80 Pac. 97,

holding that an infant may be proceeded against to determine adverse claim to real estate; Kromer v. Friday, 10 Wash. 641, 39 Pac. 234, 32 L. R. A. 671, holding infant bound by acts of guardian ad litem. Cited in notes to 89 Am. Dec. 185, 188, 190, on judgments against infants; 32 L. R. A. 674, on admissions and waivers by fiduciaries in actions.






ANN

EXTRA ANNOTATED EDITION.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

From December Term, 1876, to December Term, 1877.

C. B. BELLINGER,
REPORTER.

VOLUME 6.

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JUSTICES

OF

THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

P. P. PRIM (Chief Justice.)

R. P. BOISE.

E. D. SHATTUCK.

L. L. McARTHUR.

J. F. WATSON.

ROLL OF ATTORNEYS

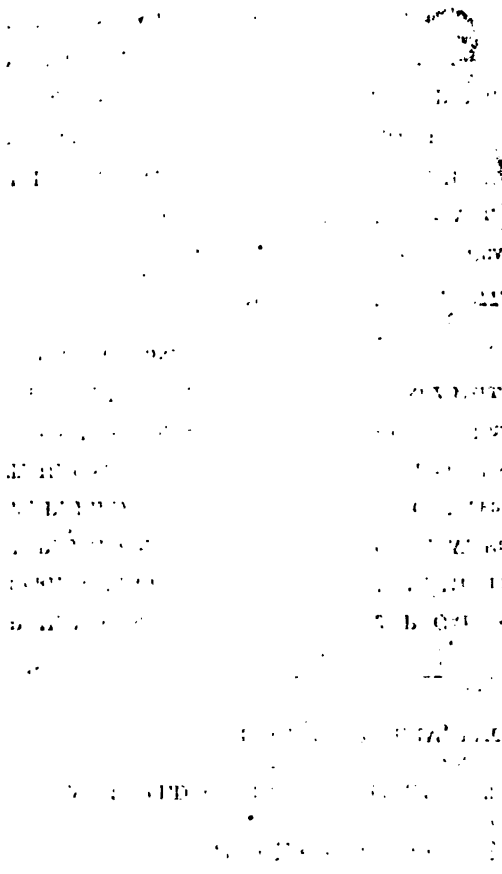
ADMITTED DURING THE TERM OF THESE REPORTS.

DECEMBER TERM, 1876.

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T. H. CRAWFORD.
LOYAL B. STEARNS.
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C. B. WATSON.
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JNO. J. BALLEEY.



RULES

OF THE

SUPREME COURT OF OREGON.

1. Attorneys and counselors at law, and solicitors in chancery, of the several district courts of this territory, shall, on notice in open court, be admitted to practice in the supreme court; but all the preliminary steps necessary to bring a cause to this court, and prepare the same for trial, may be taken by any attorney, solicitor or counselor of any of the district courts.

2. The attorneys and guardians *ad litem* of the several parties in the court below, shall be deemed the attorneys and guardians of the same parties in this court until others shall be retained, or appointed, and the appointments placed on file, and notice thereof served on the adverse party, or his attorney.

3. No private agreement, or consent, between the parties, or their attorneys, in respect to the proceedings in a cause shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered with the clerk; or, unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

4. If the party applying for the writ of error or appeal is a minor, and no next friend or guardian has been appointed for him in the court below, the court, or any of the justices of this court in vacation, shall, upon a petition duly verified,

appoint some suitable person as a next friend for such minor, who shall be liable for the costs in this court; which said petition and appointment shall be filed with the clerk of this court.

5. The clerk of this court may, upon application and payment of his fees, issue blank writs of error under the seal of the court; which writs, when suitably filled up and subscribed by an attorney of this, or of a district court, shall be effectual to bring up all causes properly removable to this court; and it shall be the duty of the clerk of any district court, immediately upon being served with a writ of error, and upon being paid his legal charges, to note upon the back of said writ the date of its receipt, and to make up a complete transcript of his record of the process, pleadings, orders, proceedings and judgment in the cause, in the order in which they occurred; and after certifying the same, under his hand and seal of office, to return the same to the clerk of this court, by mail, postage paid, or by some other safe mode of conveyance.

6. The clerk of a district court, returning the transcript of a record to this court, pursuant to an appeal, or in obedience to a writ of error, shall distinctly number and mark each folio in the margin thereof. Each folio shall be deemed to consist of one hundred words. Such transcript shall be fairly and legibly written; otherwise, the clerk of this court shall not file the same, but shall return it to the clerk transmitting it, with a statement of the reason why it is not received and filed.

7. A printed or legibly written copy of Rules Nos. 5 and 6 shall be attached to, and accompany each writ of error issued by the clerk of the supreme court; for which he shall be allowed the sum of fifty cents.

8. In all cases where the defendant in error resides out of the territory, and has no attorney therein, the plaintiff in error shall cause publication of the cause to be made in some weekly newspaper, printed in the territory, for four consecutive weeks; the last insertion of which notice shall be at least four months prior to the first day of the term of the supreme court at which said cause is set for trial; and in all cases where it shall be practicable so to do, it shall be

the duty of the said plaintiff to ascertain the residence of the said defendant; and, immediately after the first publication of the notice, send by mail a certified copy of said notice, directed to him at said place of residence, postage paid. If sufficient time shall not have elapsed for the publication, as aforesaid, of said notice, prior to the first day of the term, and subsequent to the filing of the writ of error with the clerk of the district court, then such cause shall stand continued until the next term of the supreme court, unless the defendant shall voluntarily enter his appearance at said first term; *provided*, it shall be discretionary with either of the justices of the supreme court, upon application, to direct in writing, to be placed upon the files of this court, such other mode of publication as may to them seem proper in the particular case.

9. In all causes coming up on a writ of error, errors shall be assigned, and a copy thereof furnished to the adverse party, or his attorney, if in attendance upon the court, by twelve o'clock on the first day of the term; and if the party shall fail to comply with this rule, the judgment of the court below shall be affirmed, or the cause continued at the costs of the plaintiff in error, or his attorney, as the court shall direct.

10. The defendant shall file his pleadings by four o'clock in the afternoon of the first day of the term, and furnish a copy thereof to the adverse party, or his attorney, if in attendance upon the court; and, in case he shall fail to comply with this rule, the judgment of the court below shall be reversed, or the cause continued, at the costs of the defendant, or his attorney, as the court shall direct; *provided*, the plaintiff shall have complied with Rule No. 9.

11. Assignments of error shall be specific, and no error will be noticed by the court that is not specifically assigned, unless, for good and sufficient reasons, the court shall otherwise determine.

12. Whenever error in fact shall be assigned, the pleadings shall be accompanied by an affidavit of the party, or of some person cognizant of the matters therein set forth, that it is true in substance and in fact; otherwise the court, on motion of the opposite party, will strike the pleadings from

the files of the court. Whenever an issue of fact is made up, the court may send the case down for trial to the district court, in which the judgment was rendered, unless it shall otherwise direct.

13. Before the cause is called on for trial, the counsel for the affirmative shall furnish the opposite counsel a note of the points made and authorities cited, with an abstract of the argument; after receiving which, a like note of points and authorities, with an abstract of the argument in answer, shall be furnished to the affirmative counsel; and in all cases before the argument is commenced, the counsel, holding the affirmative, shall furnish each of the judges with an abstract of the case, and a brief of the points and authorities relied upon, printed or written in a legible hand; and the opposing counsel shall furnish a like brief of the points and authorities relied upon on the negative; for which the sum of twenty-five cents per folio shall be allowed to the respective parties, to be taxed in the bill of costs.

14. Within twenty days of the commencement of any term of the court, the clerk shall make up a docket of the causes brought up to this court by appeal or writ of error, and shall arrange the causes thereon in the order of time in which the appeal was completed, or writ of error filed with the clerk of the court below, and he shall specify in said docket the respective counties from which the causes were removed. He shall also make out a copy of the docket for each of the justices of the court.

15. In all cases where, under the law or rules of court, a written notice is required to be served on the adverse party, such notice may be served by some sheriff or deputy sheriff; or, if the case shall belong to the United States side of this court, then by the marshal or his deputy; and the return of such officer, that he has served an attested copy of such notice, shall be sufficient proof of such service. The party himself, or any other competent person, may make service of a copy of said notice, and the affidavit of the party making the service shall be sufficient *prima facie* evidence of the same. In all cases such proof shall be filed with the clerk on the first day of the term; *provided*, that in all cases not otherwise specially provided for by law, the agreement of the

parties, or their attorneys, in writing, shall answer in the place of notice.

16. Motions shall be noted for the second day of the term, or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, except when otherwise allowed by law, unless sufficient cause be shown and contained in the affidavits, or papers served, for not giving notice for the second day. The moving party shall give at least one day's notice of all motions, except when, from absence or other cause, service of notice cannot be made, when depositing the papers with the clerk of the court shall be sufficient.

17. In all causes where the judgment of the district court is affirmed, interest at the rate of six per cent. per annum shall be computed on said judgment up to the time of the rendition of judgment in this court, and shall be included therein, and the party shall be authorized to collect interest at the same rate on the judgment of this court until the same is satisfied, and this shall in all cases be exclusive of the statutory damages, if any, for the delay.

18. In all cases not otherwise specially provided for, where judgment may have been, or shall be rendered in this court, a full and correct transcript of such judgment shall be made by the clerk, and a mandate shall issue from this court to the district court from which the cause came, commanding the district court to cause the same to be entered upon the record of the proceedings of said court and to proceed to the enforcement of the same in like manner as if the said judgment had been rendered therein which said transcript, and the mandate, the said clerk shall make out under the seal of the supreme court, and deliver to the party interested upon demand, and the payment of the costs which have accrued in this court; and the party advancing such costs shall have the same remedy for the collection thereof against the party condemned in costs, as in other cases where costs are advanced.

19. All causes upon the docket which shall not otherwise be disposed of at any term of this court shall stand continued until the next term of this court.

20. Whenever a justice, or other officer, approves of the security to be given in any case, it shall be the duty of said justice, or other officer, to require each of the sureties to justify; and unless the sureties shall together justify that they are worth, over and above all debts and responsibilities they may owe or have incurred, a sum equal to twice the amount named in the penalty of the bond, such security shall not be deemed sufficient; *provided*, that if such justice, or other officer, shall then be of opinion that such security is insufficient, he may require other and additional security.

21. No papers or records filed in court, or in the clerk's office, shall be taken therefrom, unless by leave of the court, or upon the written order of one of the justices thereof.

22. No attorney of this court, or the clerk, shall be received as bail or security in any case in court.

23. All chancery cases, brought up on appeal, shall stand for hearing upon the same pleadings and evidence as in the district court, unless the court shall otherwise direct.

24. (As amended at the September term, 1872.) That the clerk be authorized to tax, as a part of the costs, against the losing party, the sum of five dollars in each cause, as fees for recording the opinion of the court therein.

25. That the second day of each term of this supreme court be set apart as the time when persons desiring admission to practice as attorneys and counselors in the courts of this state, may appear and present their applications; and having been examined, in open court, touching their qualifications for admission to practice, if found duly qualified, may be admitted; and that such admission shall entitle such attorney and counselor to practice in all the courts of this state; and that application for admission as such officers can only be made in this court.

26. That the fee for such admission be fixed at five dollars, which shall entitle the attorney to a certificate of admission.

27. That the examination of applicants for admission as attorneys shall be conducted by the justices, and that the examination be divided into the following branches, viz.: Pleadings, evidence, contracts, real property and equity,

and that each applicant must be prepared for examination in the following books, viz.: Chitty on Pleadings, Wharton's Criminal Law, Greenleaf on Evidence, Blackstone's Commentaries, Kent's Commentaries, Story's Equity Jurisprudence, or Willard's Equity Jurisprudence. Each applicant must produce the affidavit of some attorney in good standing, as to the time the applicant may have been engaged in the study of the law; and also the affidavit of two attorneys as to the applicant's moral character.

28. That in all cases heard in this court the counsel on both sides shall present a printed brief containing an abstract of the pleadings, the points relied on by counsel, references to the authorities cited, arranged under the proper heads, and shall serve copies of such briefs on the opposite counsel at least one day before the hearing, and at the hearing shall furnish a copy of such brief to each of the judges, and file a copy with the papers in the case.

29. (As amended at the July term, 1875.) The causes from each judicial district shall be docketed together and heard in the order in which they stand; those from the first district, first; those from the fifth district, second; those from the second district, third; those from the third district, fourth; and those from the fourth district, fifth.

30. Rule 27th is amended, and the last clause made to read as follows: "That each applicant must produce the affidavit of some attorney in good standing in this court that such applicant, if a graduate of a literary institution, has read law at least two years. If not such graduate, then at least three years, and has been critically examined in the books prescribed in Rule 27.

31. An applicant, producing proper evidence of graduation at law school, by the laws and customs of the state in which such school is situated, entitling him to admission in its courts of equal jurisdiction with this court, may be admitted without further examination.

32. All business except motions to dismiss appeals, motions to perfect transcripts and motions to affirm judgments in cases where appeals have been abandoned, shall be taken up when the district is reached.

33. The argument upon a motion for any other purpose than the perfection of transcripts or dismissals of appeal for causes apparent on the transcript, will not be heard until the case is called in which the motion is filed.

36. All motions for rehearing shall be upon petition in writing, presented and filed within two days after the judgment, order or decision of the court is announced, and within the same term. No argument will be heard thereon.

37. The page of the printed briefs required by Rule 28, must be eight and one half inches in length, and five and one half inches in width, and the outer blank margin of each page must be one and one fourth inches in width.

38. When exception is taken, and the point thereof particularly stated and presented in writing to the judge at the trial, or entered in his minutes, the formal bill setting forth the exception or exceptions, if a formal bill is desired, should be presented to the judge as soon thereafter as practicable and in no case will the circuit judge be expected to recognize such bill, unless the same is presented without unnecessary delay and within the term or within a time specified by an order made during the term and entered in the journal.

39. Upon the argument of all motions, counsel shall be limited to fifteen minutes on each side, unless upon special order extending the time, to be applied for and made before commencing the argument. Counsel in such case may furnish the court with written briefs.

40. All transcripts and testimony filed in this court, must be paged by numbering the leaves from one consecutively to the end, on the bottom of the leaf near the left hand corner, and the transcript must likewise have the name of each paper therein written on each leaf of such paper near the bottom of the left margin of such leaf. Each leaf of the testimony must have, written on the left hand margin near the bottom, the name of the witness whose testimony is on such leaf.

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DECEMBER TERM, 1876.

DECEMBER TERM, 1876.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

DECEMBER TERM, 1876.

THOMAS MURRAY, Appellant, v. MARY ANN MURRAY, JOHN MURRAY and MARIA DODGE, Respondents.

PRACTICE—EXCEPTIONS.—When any part of a charge given is sound, a general exception to the charge as a whole cannot be sustained. To maintain an exception to a refusal to charge an entire series of propositions, each one of the propositions must be sound. An exception to such portions of a charge as are variant from disrequests made by a party, not pointing out the variance, cannot be sustained.

FOREIGN JUDGMENT—MAY BE ATTACKED COLLATERALLY, WHEN.—When a party seeks a benefit under a judgment or decree of a superior court of another state, in an action where such judgment or decree cannot be pleaded, he may offer such judgment or decree in evidence, and the adverse party having had no opportunity to attack it by a direct proceeding in the home tribunal, may attack it and impeach it by evidence of want of notice to the party, and by evidence of fraud in procuring it, notwithstanding such decree or judgment may by its recitals appear regular and show jurisdiction.

INSTRUCTIONS—PRESUMPTIONS OF LIFE.—The legality of a marriage between A. and M. having become material, and such marriage having been attacked on the ground that a former husband of A. was living when it took place; the court instructed the jury, that in case of the two conflicting presumptions, namely, the presumption of life and that of innocence, the latter presumption ought ordinarily to prevail, and that if they believed certain testimony tending to prove the death of the first husband at the time of the marriage in question, they ought to presume that such first husband was dead at that time: *Held*, that this instruction was error; that its effect was to declare that a conclusive presumption of death existed upon the testimony; that the jury should have been instructed to consider all the evidence bearing upon the question, and then, preferring to find innocence rather than guilt, to find whether or not the first husband was dead when the second marriage took place.

APPEAL from Lane County.

This is an action by Thomas Murray to recover the possession of certain real estate of which he claims to own an undivided one-third, as tenant in common with his two sisters, Ellen and Jane. Thomas Murray and his sisters named, are the children of John Murray, deceased, by a first marriage — Winnifred Murray being their mother. Thomas claims as the heir at law of John Murray. The property in dispute is the latter's half of a donation under the act of congress known as "The donation act." The respondent, Mary Ann Murray, is the alleged second wife of John Murray, deceased, and the respondents John Murray and Maria Dodge are the children of such alleged marriage. It is claimed on behalf of the appellant that Winnifred was the lawful wife of John Murray at the time of this alleged marriage between him and Mary Ann; that Mary Ann had a husband living at the same time; and that respondents John Murray and Maria Dodge are not the legitimate children of said John Murray, deceased.

On the trial in the court below, the testimony of Mary Ann was secured to the effect that in 1849 one Allen, the husband of said Mary Ann, went away to Missouri; that in the latter part of the same year a friend who had accompanied him returned and gave her a ring which Allen owned and took away with him, and at the same time told her that Allen was dead, and that she never heard of him thereafter.

The decree of an Indiana court divorcing John and Winnifred was also received in evidence. The decree was rendered in 1852. Winnifred was living in Illinois when this decree was rendered, having moved and lived there with her husband prior to this time. She had no notice of the divorce proceedings. The court below gave instructions to the jury which are fully set out in the opinion, and which involve the error relied upon in the appeal. Under these instructions the jury found that the appellant was the owner of one-fifth of the premises in question, and judgment was rendered accordingly.

F. A. Chenoweth, for appellant:

Jurisdictional inquiry in domestic judgments is confined to the record. This is not the rule as to judgments of sister states. (Freeman on Judgments, secs. 131-133; 13 Ohio, 446; 30 Ill. 109; 5 Wend. 148; *Harris v. Hardman,* 6 Barb. 613; 14 How. U. S. 334; 5 Wall. 305.)

The decree of the Indiana court at most could have only been evidence, the weight of which the jury was the sole judge. This decree not having been pleaded as defense was not at bar. If the court should have admitted it at all, he should have instructed the jury that it was only evidence, and that if the jury believe that John Murray was, at the time he filed his bill, a citizen of Illinois and not of the state of Indiana, the court had no jurisdiction of either the parties or subject-matter. The instruction as to the legal effect of the decree of divorce read in evidence assumed one of the very questions in controversy. This was error. (27 Cal. 319; 3 Pick. 288.)

The court erred in the second instruction by telling the jury in substance that they "ought to presume that defendant's husband was dead at the time she married John Murray." Whereas the court ought to have submitted to the consideration of the jury the testimony, and should have left them the sole judges as to the credibility of the witnesses and the fact to be established. (Civ. Code, secs. 673, 198.)

The court erred in telling the jury "that the question of fraud in procuring the divorce by John Murray against Winnifred Murray was not a question before the jury. (Freeman on Judgments, sec. 580; also sec. 250 of Freeman; 4 Lansing, 388; 14 Mass. 224; 12 N. H. 200; 2 Gray, 369; 20 Cal. 442; *Hanover v. Turner,* 14 Mass. 227; 2 Kent's Com., 109; 5 Johns. 37; 1 N. H. 242; 4 Conn. 380.) Every party is at liberty to show that the court was imposed on by collusion. (*Thompson v. Whitman,* 18 Wallace, 457. Same doctrine affirmed, 19 Wallace, 61.) Proof of jurisdiction allowed — judgment may be attacked collaterally. (11 How. U. S. 437; 14 Id. 334; 15 John. 141; 5 Wend. 156.)

The court erred in instructing the jury "that all the matters stated in the complaint were found by the court, and that the record imported verity. The fact of *bona fide* residence and the testimony on that point is here taken from the jury. This is a jurisdictional matter, and is open to inquiry upon judgments of sister states. (41 N. Y. 272; 46 N. Y. 30; 25 Mich. 247; 51 Mo. 69; 16 Id. 102; 5 Wallace, 290, 305; 14 How. U. S. 334; 5 Wend. 156; 9 Wisc. 328; 22 Iowa, 328; 2 Kent's Com., tit. Foreign Divorce; 18 Wallace, 457; 19 Wallace, 58.)

The respondents could have pleaded this decree of divorce as a defense, and as a bar if they had desired to rely upon it, but not having done so, it is not for them now to say this is a collateral attack. The authorities may not be perfectly clear in ejectment cases, but it seems to me under the code such matters must be specially pleaded if relied upon as a defense. (Van Santvoord's Pleading, 209, Moak's edition; page 272 of old edition, and note 2.)

J. M. Thompson and R. S. Strahan, for respondents:

I. A party excepting must make his objections specific, and must point out the exact nature and extent of the objection relied on, to be available for review. (*Thomas v. Fleury,* 26 N. Y. 26; *Buck v. Remsen,* 34 N. Y. 383; *Mallory v. Perkins,* 9 Bosw. 424, 572; *Varnum v. Taylor,* 10 Bosw. 148; *Van Amrige v. Barnett,* 8 Bosw. 357-671; *Hotchkins v. Hodge,* 38 Barb. 117, 413, 445; *Graham v. Chrystal,* 1 Abb. P. N. S. 121.)

II. Exceptions to the charge of the court should point out the specific portions of the charge excepted to, and should be made at the time of trial. (*Hicks v. Coleman,* 25 Cal. 123.)

III. A general exception to the charge to the jury will not be sustained if any part of the charge is correct. (*Lincoln v. Chaflin,* 7 Wall. 132.)

IV. A general exception to the whole charge will not lay ground for review in detail, even when taken to each and every ruling, severally, separately and distinctly. (*Newell v. Doty,* 34 N. Y. 89, 93; *Magee v. Badger,* 34 N. Y. 247;

Chamberlain v. Pratt, 33 N. Y. 47, 53; *Mershon v. Ins. Co.,* 34 Iowa, 88; *Willetts v. Howland,* 5 Selden, 171; *Elton v. Markham,* 20 Barb. 346; *Cronk v. Canfield,* 31 Barb. 172; *McCabb v. Smith,* 24 Iowa, 591; *Hubbell v. Welden,* Hill & Denio, 145; *Goodwin v. Perkins,* 39 Vt. 605; *Gilman v. Thiess,* 18 Wis. 528; *Hicks v. Coleman,* 25 Cal. 146.) But if the court shall be of a different opinion as to any of said attempted exceptions, we claim:

V. That the objections to the two records from the state of Indiana are frivolous. Possibly those objections might raise a question as to the legal effect of those records; but being authenticated in the manner provided by law, they were clearly admissible. (Sec. 1, act of congress, 1790: Code, sec. 730.)

VI. The effect of a judicial record of a sister state is the same in this state as in the state where it was made. (Civil Code, sec. 728.)

VII. That the court properly declared the effect of the judicial record offered in evidence. (*McQuigg v. McQuigg,* 13 Ind. 294; *Noel v. Ewing,* 9 Ind. 52; 12 Ind. 665; 2 Am. Lead. cases, 638, 5 ed.; *Lewis v. Lewis,* 9 Ind. 105; *Rourke v. Rourke,* 8 Ind. 430; *Tolen v. Tolen,* 2 Black. 407; *Wilcox v. Wilcox,* 10 Ind. 486; *Rindge v. Rindge,* 22 Ind. 35; *McFarland v. McFarland,* 40 Ind. 458; *Cheever v. Wilson,* 9 Wal. 108.)

VIII. The law as laid down by the court as to the presumptions of life, death, innocence and legitimacy was correct. (1 Greenleaf's Ev. sec. 35.)

By the Court, SHATTUCK, J.:

The view taken by the court in this case renders it unnecessary to consider any of the matters inserted by the bill of exceptions, excepting those presented by the instructions asked by the defendants and given by the court. These instructions were in these words: "The legal effect of the decree read in evidence in the cause of *John Murray v. Winnifred Murray* was to dissolve the marriage relation then existing between them. It left both of them free to contract other marriage relations if they saw proper to do so."

"In a case of two conflicting presumptions, namely, the presumption of life and the presumption of innocence, the latter presumption ought ordinarily to prevail. And although you may believe from the evidence that in 1849, the defendant, Mary Ann Murray, was then the wife of one Allen; if you further find that about that time said Allen went away to Missouri from the state of Illinois, where he then resided, and that a friend accompanied said Allen to Missouri, and returned in the latter part of the year 1849, and delivered to said Mary Ann a ring which Allen owned and had with him at the time of his alleged death, and at the same time told her that Allen was dead, and that she never heard of him being alive thereafter; and that sometime in 1852, said Mary Ann intermarried with John Murray, and that said Mary Ann and John Murray thereafter lived together as husband and wife, and had children born to them. Then, in such case, you ought to presume that the first husband of Mary Ann (Mrs. Allen) was dead at the time of said second marriage; and in such case the law raises such a presumption in favor of the legitimacy of children born of such marriage."

"If you believe from the evidence that said Mary Ann and John Murray were married in the state of Indiana, about the year 1852, and the defendants, John Murray, jun., and Maria Dodge were born to them of said marriage, then said John and Maria are lawful heirs to said John Murray, sen., and would be entitled to share his estate equally with any other lawful heirs or children said John Murray, sen., may have left surviving him."

"The jury is not at liberty to review the question of divorce between John and Winnifred Murray. That question is settled by the decree read in evidence, and it is the duty of the court to declare to you the legal effect of that decree, and of the jury to take the law as given you by the court."

"The question of fraud in procuring the divorce by John Murray against Winnifred Murray is not a question before the jury; all those questions were settled by the court that rendered the decree, and all the matters stated in the com-

plaint were found by the court, and the record imparts verity, and cannot be contradicted except by showing that the court making the decree had no jurisdiction of the parties to the suit or the subject-matter."

To these instructions the plaintiff excepted generally without specifying any particular proposition to which his exception was directed. The plaintiff then asked the court to give certain instructions, which were embodied in nine distinct paragraphs, which the court refused to give, and the plaintiff again excepted generally to the refusal, not pointing his exception to any particular paragraph refused. This state of the case renders it proper for this court to declare the rules relative to exceptions of this kind, and it is this: 1. When any part of a charge given is sound, a general exception to the charge as a whole cannot be sustained; 2. To maintain an exception to a refusal to charge an entire series of propositions, each one of the propositions must be sound; 3. An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variance, cannot be sustained. (*Beaver v. Taylor,* U. S. Supreme Court, Oct. Term, 1876, Law and Eq. Rep., vol. 2, 648; 11 N. Y. 416; 1 Wallace, 644; 2 Id. 328; 40 N. Y. 556.)

Applying the first of these rules to the instructions given, if any proposition embodied therein is sound as applied to this case, then the exception must fail. If the whole is unsound as applied to this case, then the exception may be sustained. After careful consideration of the whole charge given, we think it embodies three propositions: one as to John Murray's capacity to contract marriage in 1852; another as to Mary Ann's being free to marry in 1852; and another as to the legitimacy of the defendants, Maria Dodge and John Murray, jun. The latter proposition, however, is dependent upon the other two, and results from the law and facts assumed by them.

The proposition relative to John Murray's right to marry in 1852 is based upon the assumption that he was duly divorced from Winnifred by the decree offered in evidence, from the Indiana, Pike county, circuit court. The propo-

sition of the plaintiff was that that decree, if not to be pronounced void on its face, could at least be attacked, and the presumption arising therefrom overcome by evidence of want of notice to the defendant, Winnifred, want of jurisdiction, and fraud practiced on Winnifred in the procuring of the decree. There was evidence given tending to show fraud, want of notice, and want of jurisdiction. The instructions given by the court withdrew all this from the consideration of the jury, and the court virtually decided for the jury the question of John's divorce, and declared that the decree was conclusive, and that the jury must not go any farther on that subject.

This raises a question as to the effect of decrees obtained as this was in a sister state, and it is proper that the rule which we adopt should be clearly stated.

This court has decided, *Tustin v. Gaunt*, 4 Or. 305, that a domestic judgment of a superior court cannot be collaterally impeached by evidence outside the record, but may be impeached by what appears upon the face of the record, if thereby a want of jurisdiction is shown.

It has also decided that a domestic judgment or decree not showing on its face a want of jurisdiction can be impeached by a direct proceeding, wherein the recitals of the judgment or decree apparently showing complete jurisdiction may be denied and put in issue by direct allegations. (*Heatherly v. Hadly*, 4 Or. 1.) It has also decided that whenever the form of action or suit allows, a party seeking the benefit of a judgment or decree must plead it. (*Ellen Murray v. Mary Ann Murray*, suit in equity decided at this term.)

But we think that if a party seeks a benefit under a judgment or decree of a superior court of a sister state, in an action where such judgment cannot be pleaded, as in this case, being an action to recover real property under our statute, he may offer it in evidence; and inasmuch as his adversary has had no opportunity to attack it in our own court by a direct proceeding, and should not be required to go into the foreign state to attack it in the court where it was rendered, he may attack it and impeach it by evidence of want of notice to the party, and by evidence of fraud in

procuring it; notwithstanding such decree or judgment may by its recitals appear regular and show jurisdiction. (*People v. Dowell*, 25 Mich. 247; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.) We therefore hold that it was error in the circuit court to withdraw from the consideration of the jury the evidence tending to show want of notice and fraud in procuring this Indiana divorce.

As to the proposition that Mary Ann Allen was free in 1852 to marry a second time, the charge starts out with the statement of a general rule that, if standing by itself, would probably be held correct, but connected as it is with what immediately follows, we think it involved error. It may be true that innocence is to be presumed, and that when the presumption of life is brought in conflict with the presumption of innocence, the latter should prevail; yet the court here carried this instruction so far as to charge the jury that if they believed certain matters testified to by Mary Ann, mostly hearsay, they ought to presume that Allen, the former husband of Mary Ann, was dead in 1852, when she married Murray, although Allen had not been absent at that time more than three years. Ordinarily the death of a party would not be presumed until after an absence of seven years without being heard from. But if within the seven years the presumption of life is to be overcome by the presumption of innocence, then the entire case and circumstances under which a party claims such force for this presumption of innocence ought to be carefully considered.

We think, therefore, that it was error to instruct the jury that upon the narrow statement of facts set forth in the instruction they ought to presume that Allen was dead; in other words, that Allen's death was a conclusive presumption. The jury should rather have been told to consider all the evidence relating to Allen's going away, and why, and for what reason he went as appearing by the proof, and then preferring to find innocence rather than guilt, say whether or not they believed Allen dead when Mary Ann married the second time.

The correctness of the third proposition, as to the legiti-

macy of John, jun., and Maria, is dependent entirely on the correctness of the other two involved in the charge. Those two being deemed erroneous, the charge as a whole is deemed erroneous, and the exception is therefore sustained.

The judgment below will be reversed and the cause remanded for a new trial.

ELLEN MURRAY, Appellant, v. MARY ANN MURRAY, Respondent.

EVIDENCE—DEPOSITION.—It being material in a suit in equity to prove a marriage, a deposition taken in another proceeding between different parties to prove the same marriage was offered in evidence: *Held*, that such deposition does not come within section 819 of the Civil Code, and is not admissible.

EVIDENCE—MARRIAGE, PRIMA FACIE PROOF OF.— When it is shown by evidence that a man and woman are living together and cohabiting as man and wife, are so reputed in the community, and are received in society as such, it is sufficient *prima facie* to prove the marriage in a civil action or proceeding.

PLEADING—JUDGMENT OR DECREE—MUST BE PLEADED TO BE ADMISSIBLE IN EVIDENCE.—To maintain her suit, plaintiff was required to prove that Winnifred and John were man and wife. To disprove such relation the defendant offered in evidence a decree of divorce between them: *Held*, that such decree, not having been pleaded in the answer, could not be received in evidence; that in a suit in equity any matter which is a defense should be pleaded in the answer when there is an opportunity to so plead it.

WIFE—RIGHTS OF UNDER DONATION ACT, HOW ACQUIRED.—Under the act of congress known as the "Donation Act," the right of the wife in the donation becomes perfected on the completion of the settlement and cultivation. She has nothing to do to secure the donation except to be a wife.

PLEA IN ABATEMENT—WAIVER.—The party by whom the suit was brought having died, and the plaintiff, her legatee, having been substituted for the deceased without objection in the court below, and objection being now made that such substituted plaintiff has not been appointed executrix by a court of this state, and can therefore have no standing in court, it was *held*, that such objection should be taken by plea in abatement, and not having been so taken is waived; 2. That such substituted plaintiff, as the legatee of the deceased is her successor in interest to the subject-matter of the suit, and is therefore authorized under the code to prosecute the suit.

THIS suit was originally brought by Winnifred Murray against Mary Ann Murray, the respondent. During the pendency of the suit Winnifred died, and the suit has been continued in the name of her legatee and executrix, the appellant.

The complaint alleges that on May 1, 1854, and long prior to that time Winnifred was the wife of one John Murray, and that she continued so to be until his death in 1852. That on the first of May, 1854, John Murray, being a citizen, and capable of taking a donation land claim under the act of congress of September 27, 1850, made actual settlement upon a certain described tract of land; that he continued to reside on and cultivate said land for four years or more, and made due final proof of his residence and cultivation, and on March 22, 1870, received a patent certificate therefor; that in such certificate the east half of the land was designated as the part enuring to the husband, John Murray, and the west half as enuring to the wife; that since the issuance of the certificate a patent has been issued thereon. That she, Winnifred, being the wife of John Murray, is the owner of the land so designated as the wife's, and that said patent should have been issued to her. That through the fraudulent acts of Mary Ann, the respondent, who falsely pretended to be the wife of John Murray, the patent was issued in fraud of Winnifred's rights to Mary Ann. The material question is as to which of the parties, Winnifred or Mary Ann, was the wife of John Murray, at the date of the settlement, residence and cultivation.

On the trial in the court below, Mary Ann, the respondent, offered in evidence a decree of divorce procured by John Murray against Winnifred in an Indiana court, prior to the date of the settlement, which was admitted.

The respondent had a decree in her favor, whereupon this appeal was taken.

F. A. Chenoweth, for appellant.

J. M. Thompson and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

The questions presented arise on the evidence and the objection thereto on the trial. To prove the marriage of John and Winnifred Murray, the deposition of said Winnifred is now offered in evidence. Said deposition was taken and used in evidence to prove this same marriage in the case of Thomas Murray against the respondent *et al.*, which was an action of ejectment commenced by said Thomas (who was alleged to be the son of said John Winnifred) to recover his portion of his father's half of this same land claim; though it appears that this deposition was taken as evidence in that case to prove the marriage of John and Winnifred, which was in issue in that case. It was not taken in a suit or proceeding between the parties to this suit, nor are the parties to this suit the representatives of the parties in that action, and it does not come within the provisions of section 819 of the code; and we think this deposition of Winnifred Murray cannot be used as evidence in this suit, and we will therefore disregard it.

We will now consider the other evidence in this case tending to prove this marriage. Thomas Murray testifies that he is a son of John and Winnifred Murray; that his father and mother lived together as man and wife, and recognized each other as such until he grew up, and that there were other children besides himself belonging to the family, and recognized by said John and Winnifred as their children. That about 1849; his father and mother had a difficulty about the intimacy of his father and the respondent, who was then Mary Ann Allen, and that after that and up to about 1852, his father contributed to the support of his mother and the family, who were then living in the city of Chicago. That after about 1852, his father went away, and the next he knew of him was about 1864, when he returned to Chicago, and for a while lived and cohabited with said Winnifred, and recognized her as his wife and the children as his.

Ellen Murray, a daughter of the parties, also testifies to about the same as the last witness to the reputation and cohabitation of John and Winnifred as husband and wife.

Another daughter, Jane McLoughtin, also testified to the reputation and cohabitation of the parties as man and wife for years before 1852, and afterwards for a short time on his return in 1864. Catherine Hamilton, Mary Green and others testify as to John Murray's return to Chicago in 1864; living with and recognizing Winnifred as his wife. Other witnesses testify to facts tending to show that John Murray and Winnifred lived together and were recognized as husband and wife for many years. And as to the reputation of marriage and the long cohabitation of the parties, the evidence is sufficient to establish these propositions.

It also appears that Mary Ann Murray, the respondent, knew John and Winnifred before their separation about 1852, and that they were recognized as married persons, and had a family of children; and she herself so recognized them, and made an affidavit in which she swore that she knew Winnifred Murray as the wife of John, and that said Winnifred was not residing in the state of Indiana. When it is shown by evidence that a man and woman are living together and cohabiting as man and wife, and are in the community reputed and received in society as such, it is sufficient *prima facie* to prove the marriage in a civil action or proceeding. Civ. Code, 262, sec. 30; 1 Bishop on Marriage and Divorce, 436, 438; Reeves's Domestic Relations, 401. But it is claimed by the respondents that if the marriage of John Murray and Winnifred is proved, that the marriage was annulled by the decree of a court of competent jurisdiction in the state of Indiana rendered in August, 1852, and before the marriage of John Murray and Mary Ann, which was found to have been solemnized in 1852. And a copy of such decree of divorce was received in evidence in the court below, and has been offered in this court. This decree is not pleaded in the answer, and the appellant claims that it being a complete defense in this suit, if a valid decree, must be pleaded to be relied on as a defense.

It is a rule that where any matter which is a defense to a suit in equity it should be pleaded in the answer, if there is an opportunity to so plead it. (1 Van Santvoord Pl. 470-475, 496; 2 Estee, 917; Gould's Pl. 316-319.)

If this was a matter within the knowledge of the defendant, and defendant intended to rely on it, she should have pleaded it in her answer, which would have given the plaintiff an opportunity to reply to it, and set up any matter in evidence of it which he might have; such as want of jurisdiction or fraud in obtaining it. We think, therefore, that this decree cannot be received in evidence to prove that John and Winnifred Murray were divorced at the time of the marriage between John Murray and Mary Ann. This view of this question renders it necessary for us to consider in the determination of this case the various other questions argued by counsel with reference to the right of the plaintiff to impeach this decree for want of jurisdiction of the court granting it, as for fraud; unless the same may be considered in determining the equity of the case arising, as claimed by counsel for respondent, from the fact that Mary Ann had thought herself to be the lawful wife of John Murray; and that, while living with her as such, he resided on and cultivated this claim during the time required by the act of congress for securing the title thereto; and that she, and not Winnifred, had borne the privations and hardships of the settlement; and that she and her children, as the heirs of said John Murray, are now occupying it as their inheritance.

The land, by the act of congress, belonged to the wife of John Murray. Her right became perfected on the completion of the settlement and cultivation. She had nothing to do to secure this donation from the government, except to be a wife. (*Otis v. Vandolf*, 1 Or. 153.) Before the patent was issued, her title was perfect in equity, and could not be defeated but by her own act. A court of equity has no power to take by its decree, this land from her, and bestow it on another, because it is an equitable estate; for a valid estate in equity is just as sacred and indefeasable as a legal estate. Being the wife of John Murray, she was the only person who could lawfully take the land, and she or her successors must hold it until legally divested by their own act or deed. It is also claimed that the plaintiff in this case being an executrix of Winnifred, and substi-

tuted since her death, that she can have no standing in this court as a party plaintiff, being appointed such executrix in the state of Illinois, and not in this state. It appears by the record that after the death of Winnifred Murray, the original plaintiff in this suit, it was made to appear to the circuit court that said Winnifred was dead; that this plaintiff, Ellen Murray, was her sole executor and legatee and her successor in interest to this land in dispute. A motion was made to have her substituted for said deceased, and the motion seems to have been allowed by the court without objection by the respondent.

This being an objection that Ellen Murray is not a proper party plaintiff should be taken by a plea in abatement of the suit, and is waived by proceeding with the trial without the interposition of such an objection. But were this not correct, the statute says that suits like this shall not abate, and may be prosecuted in the name of the personal representative or successor in interest of the deceased; and it appears that this plaintiff is not only the executrix but the legatee, and consequently the successor in interest to the subject-matter of this suit. She is, therefore, the person named in the statute, and is authorized to appear and prosecute this suit in her name. (Civil Code, sec. 37.)

From these considerations it follows that the decree in the court below in this case must be reversed, and that the plaintiff have a decree as prayed for in her bill.

JOHN L. HATCHER, Appellant, v. JARVIS BRIGGS, Respondent.

EQUITY JURISDICTION—CROSS-BILL, WHEN ALLOWED IN AN ACTION AT LAW.—When in an action at law the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity, and such facts are material to his defense in the action at law, he may set them out in a cross-bill, although such facts constitute but a partial defense to the action at law, and are not such as could be made the subject of an original bill. In such case the defendant must be without a plain, adequate and complete remedy at law.

LIEN—PURCHASER WITHOUT NOTICE OF DEFECT OF TITLE HAS A LIEN FOR HIS IMPROVEMENTS.—When a purchaser for a valuable consid-

eration without notice of any infirmity of his title has, by his improvements, added to the permanent value of the estate, he is entitled to full remuneration for such added value and the same is a lien and charge upon the estate, which the absolute owner is bound to discharge before he can be restored to his original rights in the estate.

APPEAL from Benton County.

In the month of September, 1875, Jarvis Briggs commenced an action at law in the county court for Linn county against John L. Hatcher, to recover an undivided interest in certain real property, and for damages for the wrongful detention of the same. The defendant in that action appeared and filed his answer, and thereupon as plaintiff filed his complaint, in the nature of a cross-bill in equity against Jarvis Briggs, as defendant.

By the cross-bill it is alleged substantially that in 1866, Jarvis Briggs was the owner of an undivided ninth of the premises in controversy; that one Aurelia Vaughn, with other persons named, each owned an undivided ninth; that an order of partition was made by the county court upon the petition of the said Aurelia Vaughn; that commissioners were appointed to make partition; but afterwards, upon their report that the land could not be divided among the heirs without prejudice to their interests, an order directing sale to be made was issued by the county court, and the premises were sold to Hatcher for two thousand seven hundred and twenty-five dollars. The county court afterwards undertook to confirm this sale, and to direct the commissioners to execute a deed to Hatcher for the premises, which they did. The cross-bill alleges, in effect, that at the time of said sale, and ever since, plaintiff believed that said commissioners had full power and authority to sell said premises, and that he purchased the same in good faith, and paid the full value thereof; and that he was advised by the petitioner's attorney that the commissioners had full power and authority to sell the premises; and that the purchaser at said sale would get a good title; and that if plaintiff had known that the commissioners had no authority, he would not have purchased; that plaintiff imme-

diately took possession of the premises in good faith, and has ever since been in the peaceable possession of them; that while plaintiff has been in such possession under color of title, in good faith, adversely to said claim of defendants, he has expended four thousand two hundred and six dollars in making valuable and permanent improvements on said premises; that at the time said sale was confirmed by the county court, the defendant, by his guardian, received a portion of his share of the purchase-price of said premises, and afterwards the defendant, by his guardian, received from the estate of Aurelia Vaughn, defendant's mother, the balance of defendant's share of said purchase price; that said guardian held said sums of money for the use and benefit of defendant, and from time to time expended portions thereof for defendant's support, and invested seventy-eight dollars and twenty-three cents in real property for the benefit of defendant; that after defendant had arrived at the full age of twenty-one years, he received from his said guardian the possession of said real property, and five hundred and eleven dollars, in full of all claims against said guardian, with full knowledge of all the facts and circumstances concerning the sale; that the legal title to one-ninth of said premises is in the defendant, and plaintiff is the owner of the equitable title to the same; that plaintiff has filed his answer to the action at law, but has not a sufficient and adequate defense to said action, but has a good and sufficient equitable defense thereto.

The prayer asks that the legal title be decreed to the plaintiff, or that one-ninth of the purchase money and one-ninth of the value of the improvements and taxes be decreed to be a lien upon said premises, and for general relief and costs and disbursements.

The answer denies every material allegation of the complaint, and then alleges that plaintiff has been receiving the rents and profits of said premises since 1866, amounting to nine hundred dollars. Also, that during said time plaintiff cut timber on said premises to the amount of five hundred and fifty-nine dollars, and prays that the complaint be dismissed, or if an allowance is made to the plaintiff,

then in like manner defendant be allowed for rents and profits, timber cut, etc.

The case was referred to N. B. Humphrey, to take the testimony and report the same to the court with his findings of fact and conclusions of law. The referee made his report at the October term, 1876, and the place of trial was changed to Benton county.

At the November term, 1876, of the circuit court for Benton county, the plaintiff appeared, by his counsel, and moved for a decree in accordance with the findings of the referee, but the court overruled the motion, and made a decree dismissing plaintiff's complaint and allowing the action at law to proceed to trial. From said decree the plaintiff appeals to this court. The facts established by the evidence are sufficiently set forth in opinion of the court.

Powell & Flynn and E. C. Bronaugh, for appellant:

Appellant is entitled to the relief prayed for because he purchased in good faith and paid for the same, and made his improvements believing he had a good title, and because the respondent, knowing all these facts and his rights in the matter, received the purchase price of the premises, thereby ratifying and confirming the sale. (Rorer on Judicial Sales, 162, 330; *Brewster v. Baker*, 16 Barb. 613; Herman on Estoppel, sec. 461, 464.) If the court should find that the respondent did not ratify the alleged sale, then appellant is entitled to the alternate relief prayed for because his possession was adverse and in good faith. (*Jackson v. Woodruff*, 1 Cow. 284; *Jackson v. Brink*, 5 Cow. 484; *La Frambois v. Jackson*, 8 Cow. 596.)

Appellant's possession was under color of title. (*La Frambois v. Jackson*, 8 Cow. 601, 613, 614; *Briggs v. Prosser*, 14 Wend. 227; *Jackson v. Newton*, 18 Johns. 360; 9 Johns. 178; 24 Wend. 604; 28 N. Y. 41.) A cross-bill under the common law rule was always a defense and sought affirmative relief. (4 Sandf. ch. 210; 1 Stock. (N. Y.) ch. 797.) Even if deed is void the appellant is entitled to purchase-money, interest and value of permanent improvements. (4 Or. 191; Id. 393; Story Eq. J. secs. 385, 388, 656, 1237; 1

Johns. ch. 449; 6 Am. R. 710; 13 Ohio, St. 226; 3 Stock. (N. J.) ch. 16; 3 Id. 797; 1 Cooper, 434; 25 N. J. ch. 51; 2 Johns. ch. 252, 270; Rorer on Judicial Sales, 145; 4 How. 561; Hilliard on Vendors, 388.)

R. S. Strahan, John Burnett and Joseph Hannon, for respondent:

A judgment or deed void upon its face, can never constitute color of title or be set up as a protection for anything done under it. (Tyler on Eject. 870, 871; 11 How. (U. S.) 415, 424; 18 Id. 56; 33 Cal. 676.) And it will not entitle the purchaser to a claim for improvements. (6 Wis. 276.) Judge Story (2 Story Eq. J. secs. 1236, 1237, and note,) has shown in what cases improvements made upon the lands of another may be decreed to be a lien upon the land.

But in all these cases the doctrine rests upon the ground that there is some fraud, or that the aid of a court of equity is required. (2 Story's Eq. Jur. sec. 1238; *Putnam v. Richie,* 6 Paige Ch. 390; *Winthrop, Admr., v. Huntington,* 3 Ohio, 327.) And the improvements made would not constitute any consideration for an express promise to pay for such improvements. (*Frear v. Hardenburgh,* 5 Johns. 271.)

In any event, or any possible view that can be taken of the subject, the improvements must have been placed upon the land without notice of the defect in the title. (2 Story's Eq. Juris. secs. 799 *a* and 799 *b* and note 3.) And this raises the question whether Hatcher knew, or was bound to know, that he had no title. Whatever is sufficient to direct attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry will operate as notice. (2 Leading Cases in Eq.; 1 Story's Eq. Jur. sec. 398, note 1; Id. 371, sec. 400.)

A party will be presumed to be acquainted with everything which appears in the papers which he executes, or which are executed and delivered by others to him in the course of the transaction. (2 Leading Cases in Eq. 142, 161; *Howard Ins. Co. v. Halsey,* 4 Selden, 271.)

Nothing is better established than that a purchaser will

have actual notice of everything which appears in any part of the deeds or instruments which prove and constitute the title purchased, and is of such a nature that if brought directly to his knowledge it would amount to actual notice. (2 Leading Cases in Eq. 169, and authorities there cited; *Morris v. Hogle*, 37 Ill. 150.) And such notice is of the most conclusive nature, and is insusceptible of being explained away or rebutted. (2 Leading Cases in Eq. 169; *Nelson v. Allen*, 1 Yerger, 360, 366, 367, 368, 369; *Graves v. Graves*, 1 A. K. Marsh, 121; Monroe's Exec., Bakewell 6 B. Mon. 67, 73; *Wailes v. Cooper*, 24 Miss. 208; *Harris v. Fly*, 7 Paige Ch. 421; *McAteer v. McMullen*, 2 Barr. 32.)

No laches is imputable to an infant during minority, because he is not supposed to be cognizant of his rights or capable of enforcing them. (Tyler on Infancy, 139.) *Caveat emptor* is the rule at all judicial sales. (9 Wheaton, 616; 24 Cal. 585; *Corwin's Lessee v. Benham*, 2 Ohio N. S. 36; *Owsley v. Smith*, 14 Md. 153; *Mason v. Wait*, 4 Scammon, 127; *Miller v. Boarman*, 13 S. & M. 100; *Bingham v. Maxey*, 15 Ill. 295; *Walden v. Griddle*, 36 Ill. 523; *Miller v. Finn*, 1 Neb. 255; *Creps v. Baird*, 2 Ohio St. 277; 41 Mo. 289.)

The value of improvements placed upon the premises were never allowed at common law. Our code only allows them in a proper case as a set-off to the rents and profits. (Civil Code, sec. 318; *Ford v. Halton*, 5 Cal. 322; *Welch v. Sullivan*, 8 Cal. 511; 35 Cal. 346; 2 Kent's Com. 334.) A purchaser at a void judicial sale cannot maintain an action to recover back purchase-money. (24 Cal. 586; 37 Ill. 150; 16 Cal. 562.) A purchaser is presumed to know the law, and if there is no fraud or misrepresentation on the part of the seller, the purchaser cannot recover money paid. (50 Cal. 337; Benjamin on Sales, 309; 20 Cal. 640.) A purchaser under a void judgment is without title and without redress. (Freeman on Judg. sec. 117; 41 Ill. 45; 7 Bush. 295; 33 N. H. 237-8.) Confirmation may make good a voidable or defeasable estate, but cannot operate upon or aid an estate which is void in law. (24 Cal. 585; 7 Am. R. 718; 33 N. Y. 537; Bingham on Infancy, 7, 9.) To be binding, the new promise or ratification

must be made to the party interested. (7 Bush. 410; 4 Sneed, 120.) In any view it must be shown that Briggs knew of the sale of his land, that it was void, and that he intended by his act to confirm it. (4 Sneed, 120; 7 Bush. 410; 3 Barr. 428.) As to right of infant after coming of age, see 33 Barb. 176. The receipt of purchase-money from a sale upon execution which was void, will not estop the party receiving the purchase money from bringing ejectment. (27 Ill. 209; 30 Id. 85.)

The facts in this case do not constitute a defense to the action at law. The most that counsel for appellant can reasonably claim is that this cross-bill seeks to establish a lien upon the land in controversy for purchase-money, and for improvements and taxes. Those might all be recognized as valid claims, and still Briggs be entitled to recover his land. But the idea that a trespasser can officiously intrude himself upon the land of another, without color of title or right, and without the owner's consent, and thus obtain a standing in a court of equity to charge him with improvements made by the occupant for his own benefit, is certainly a new and startling doctrine. Chancellor Walworth declared he could find no authority, either in England or America, for such a doctrine, and we venture to suggest that this court will not introduce or recognize it without express legislative sanction.

By the Court, MCARTHUR, J.:

This is a suit is equity brought by complaint in the nature of a cross-bill to restrain the respondent from prosecuting an action at law, commenced by him in the circuit court for Linn county, for the recovery of the possession of the one undivided ninth interest in fee-simple of the north half of the donation land of Jarvis Briggs and wife, the same being claim number 83, and notification number 1779, situate in said county, together with one thousand dollars damages for alleged wrongful withholding thereof. Appellant prays the court to declare the title to said premises to be in him, but in case the court does not find the title to be in him, then he prays a decree that he recover from respondent the amount of the purchase price paid for said

premises by him in 1866 at an alleged sale thereof, and received by respondent, with interest thereon from the time of such alleged sale, and for the present value of the permanent improvements placed on said premises since said purchase and for taxes paid.

The case was referred to N. B. Humphrey, esq., who took the testimony, and among other facts found the following: That on March 7, 1866, the county court of Linn county, on the petition of Ann E. Vaughn, who was at that time owner of one undivided ninth of said premises, as tenant in common with said respondent and others, made and entered of record an order directing said premises to be partitioned among said tenants in common, if the same could be so partitioned, and appointed three commissioners to make partition. That said commissioners afterwards reported to said county court that said premises could not be partitioned conveniently and satisfactorily, and thereupon said county court on May 8, 1866, made and entered of record an order directing said commissioners to sell said real estate, and said commissioners did, in accordance with said order, on June 30, 1866, at public auction, sell said premises, and the appellant became the purchaser thereof, for the sum of two thousand seven hundred and twenty-five dollars in gold coin of the United States, which was the full value of said premises. That appellant took immediate possession of the premises, and has up to the commencement of the said action at law been in the peaceable and quiet possession of the same. That appellant paid said two thousand seven hundred and twenty-five dollars, in gold coin, into the county court for the use and benefit of the defendant with the other tenants in common of said premises, and received a deed from said commissioners for said premises on July 3, 1866, in due form of law. That appellant at the time of the purchase had just arrived in this state. That immediately before said purchase he took the advice of two attorneys, N. H. Cranor, esq., and E. F. Russell, esq., as to the title of said premises, and that both of said attorneys advised him that he would get good title if he purchased at said sale. That appellant never

knew or heard that his title was not good until about the time said action at law was commenced. The appellant purchased the premises in good faith and occupied the same, making improvements of a permanent nature thereon of the present value of about three thousand two hundred and ninety-eight dollars, and that he has paid taxes on said premises to the amount of three hundred and forty dollars. That the respondent was a minor at the time of said alleged sale and purchase of the premises by the appellant, and that after he came of age he received from his guardian his proportion of the proceeds of the sale. These facts, as found by the referee, are fully sustained by the testimony. The result of the testimony on the point of respondent's knowledge of his rights at the time of his settlement with the guardian will be considered hereafter.

The first question to be considered is one of pleading and practice. Section 377 of the code is intended to secure several objects. The abolition of bills of revivor, bills of review and exceptions for insufficiency, impertinence or irrelevancy, and the authorization of an original suit to impeach, set aside, suspend, avoid, or enforce a decree. It also abolishes cross-bills, but provides that in an action at law when the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity, and material to his defense, he may, upon filing his answer therein, also as plaintiff, file a complaint in equity in the nature of a cross-bill, which shall stay the proceedings at law. The action at law, if thereafter proceeded with, must follow the requirements of the decree, and a judgment, if rendered, must be rendered upon the conditions contained in the decree.

In virtue of the provisions of this section it is contended that the complaint does not allege any equities of which the court can take cognizance for the reason, that under the principles of pleading and practice, as recognized and adopted by courts of equity, the matters alleged could not be made the subject of an original bill, but could only be submitted to the consideration of the chancellor by way of answer, and much stress is laid upon the words, "in the

nature of a cross-bill" used in the section as sustaining the view that nothing can avail Hatcher in this behalf except that which would entitle him to relief under an original bill.

We do not think that the use of the words "in the nature of a cross-bill" justifies to the extent claimed by counsel, the application of the rules as they existed under the old equity practice to the complaint which the defendant is permitted to file by the provisions of the section under consideration. If he is entitled to relief arising out of facts requiring the interposition of a court of equity, and such facts are material to his defense of the action at law, he may file his complaint in which he must follow the general rules of pleading under the code, which requires simply a plain concise statement of the facts constituting the cause of suit, without unnecessary repetition, and may set forth any facts and circumstances forming a defense, either entire or partial, to the action at law, but they must be such facts and circumstances as show that he has no plain, adequate and complete remedy at law. If an injury has been done or is threatened, and there is no plain, adequate and complete remedy at law, the case must be one of equitable cognizance under our system of practice (Civ Code, sec. 376), and where a complaint in the nature of a cross-bill is filed the plaintiff therein is not restricted to the allegation of merely defensive matter, but may set forth any facts entitling him to affirmative relief.

Notwithstanding the equitable and legal jurisdictions are not so entirely blended and unified in this state as in some others, where what has been appropriately styled the "American system" of procedure obtains, yet we regard section 377 as providing for no more nor less than the equitable answers and cross-petitions allowed by the codes of those states where the distinction between actions at law and suits in equity is abolished. Hence the cases in which rules have been laid down in relation to equitable answers, defenses and cross-petitions under codes of procedure, may without impropriety be regarded as authority here. The general doctrine resulting from the best considered cases is

that the defendant can defeat the action upon equitable principles, and not only defeat the action, but secure affirmative relief; and that as the defendant becomes an actor and the pleading an equity pleading the sufficiency thereof in substance, though not in form, is to be determined by the application of the general rules of equity pleading, and that as an equitable defense may be set up to a legal claim, it would be inconsistent to lay down the doctrine, that because one party is asserting a right under a legal form, that equity will not protect the equitable rights of the other party to the same extent as though the proceeding was under equitable forms. (Pomeroy on Remedies, 116; 31 Ind. 34; 12 N. Y. 156; 21 Id. 581; 7 Bush. 1; 42 Cal. 346; 16 Iowa, 175.) Even under the old equity practice, the equities subsisting between the parties did not depend upon the tribunal in which the relief was sought, and the equities of one party could not be defeated by the other party resorting to law rather than to equity for relief. "The arm of a court of equity was not thereby shortened." (*Mulford v. Brown*, 1 Stock. ch. 800; *Segee v. Thomas*, 3 Black. C. C. 11.) This latter case is in some respects similar to the one under consideration. A guardian sold lands belonging to his ward under an order from a probate court. The full value was paid and a deed executed to the purchasers. The money found its way into the minor's hands through the guardian.

Thereafter the purchaser went into possession of the land with the knowledge, assent and understanding of the minor and guardian, and made valuable improvements. He had exclusive possession, and claimed the property as his own. Afterwards the ward, within five years after she came of age, brought an action of disseisin, which was pending when the plaintiff filed his bill in equity, which, in addition to the facts just stated, alleged that the deed was defective, and prayed that the defects might be cured, that the action at law be enjoined and that defendant be decreed to convey. The jurisdiction of the court seems not to have been questioned, and the case was heard upon its merits. On the authority of *Watson v. Watson*, 10 Conn. 77, the deed

was declared defective for the reason, that the authority of the grantor, appointed by the probate court, did not sufficiently appear on the face thereof, and for the further reason that it had but one witness, the law requiring all deeds to be executed in the presence of two. The court was of opinion that equity should interfere, and after stating the facts, and alluding to the circumstance that the defendant received pay for the land, retained it, never offered to return it, and while so retaining it, sought to recover the land with all the improvements, said that "these facts show a strong equity on the part of the plaintiff, and no equity on the part of the defendant," and took cognizance of the case for the reason that the plaintiff had "no full and adequate remedy at law," and granted the relief prayed. In addition to this case reference to *Bell's Heirs v. Barnett,* 2 J. J. Marshall, 516; *Thomas v. Thomas, Exr.,* 16 B. Mon. 142; *Bright v. Boyd,* 1 Story, 478; S. C. 2 Story, 607; and *Union Hall v. Morrison,* 30 Md. 281, will, we think, settle this question of jurisdiction in the affirmative. As these cases will be fully considered in connection with another question in this case, simple reference to them is deemed sufficient for present purposes.

From the principles stated, and the authorities referred to, we can reach no other conclusion than that the facts stated in Hatcher's complaint in the nature of a cross-bill, are sufficient to give him a standing in a court of equity.

Having disposed of the question of jurisdiction and the sufficiency of the complaint, we pass to the consideration of the other questions presented. The sale made by the commissioners was void, as were also all the orders of the county court in the partition proceedings. That tribunal proceeded in accordance with the provisions of chapter 9 of an act to establish a probate court, and define its duties, passed December 14, 1853, statutes of 1855, p. 383, and which took immediate effect. That act was repealed October 17, 1862, the repealing act taking effect June 1, 1863, (Laws of 1861, pamphlet ed. p. 127.) Thus fell the jurisdiction of the county courts in matters of partition.

There can be no doubt that Hatcher purchased in good

faith and entered into possession of the premises, under the deed executed by the commissioners. The deed is regular on its face, and gave color of title, for the rule is that any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed and apt words for their conveyance, gives color of title to the lands described (3 Wash. R. P. 139); and this rule has been applied even where a grantor purported to convey, as administrator of the estate of a deceased person, the land of the deceased, under a special act of the legislature, which was unconstitutional and void. (*Fagan v. Rosier*, 68 Ill. 84.) It was strenuously insisted that the doctrine of *caveat emptor* should be as rigorously applied to the sale made by the commissioners as to other judicial sales. The general doctrine of *caveat emptor* is too efficacious to be abridged, and while we are not disposed to swell the number of exceptions to the rule, we are convinced that it should have no application in this case. One of the results of the doctrine is to charge the purchaser with the duty of inspecting the records through which title must be derived before he purchases and receives conveyances. This Hatcher did. He found a solemn judgment of a court which both lawyers and layman looked upon as valid and binding, and in the pronouncing of which all parties directly interested acquiesced. Into the judgment and into the prior and subsequent proceedings he looked, and concerning them he took counsel. They disclosed no defect in form.

The price paid was the full cash value of the premises, and the proper proportion thereof was duly paid over to R. W. Calloway, who was the guardian of Jarvis Briggs, then a minor. After entering into possession of the premises, Hatcher proceeded to put things in order, and erected valuable, useful and necessary improvements thereon. The testimony shows that Briggs knew of the purchase by Hatcher, and also of the erection of the permanent improvements. After he attained his majority he had a settlement with his guardian, which eventuated in the guardian paying him his proportion of the money derived from the

sale of the lands in controversy, for which Briggs executed the following receipt:

"ALBANY, OREGON, July 10, 1875.

"Received of W. R. Calloway, my guardian, on settlement made by me with said guardian on this tenth day of July, 1875, the sum of five hundred and eleven dollars in United States gold coin, the same being the proceeds of my undivided interest in and to the north half of the donation land claim of Jarvis Briggs, deceased, it being claim No. 83 and notification No. 1779, in Linn county, Oregon, sold by John Smith, Walter Monteith and G. H. Hughes, as referees to John L. Hatcher, for the sum of two thousand seven hundred and twenty-five dollars in gold coin, and the same being also the proceeds of my interest in the estate of Aurelia Vaughn, my mother, now deceased, after paying the expenses of said sale and the expense of settling said estate, and the expense of said guardianship of the (said) W. R. Calloway, and after further paying the sum of forty-five dollars for me for certain undivided interest in eighty acres of land in the state of Indiana to Mary J. Needham, Aurelia H. Vaughn and Ann E. Vaughn. The said interest in eighty acres of land aforesaid having been deeded to me by said Mary J. Needham, Aurelia H. Vaughn and Ann E. Vaughn, and I now receive the sum of five hundred and eleven dollars, in gold coin, of my said guardian, in full satisfaction and settlement of all my claims against my said guardian [and of all my interest in and to the estate of which he is guardian], and I hereby satisfy and confirm the purchase for me of said real estate in Indiana.

[Signed.] JARVIS BRIGGS."

Standing alone, this receipt raises a strong presumption of knowledge and ratification; but when we take into consideration the evidence in relation to his conduct and utterances at or about the time the receipt was executed, we think his full knowledge is fully proved. Just before that time, July 10, 1875, he called on his guardian's attorney and inquired if he or Mr. Calloway was ready to settle for his interest in the estate, and intimated that he would get his attorney. Subsequently, he and his attorney, and C.

and his attorney, met for the purpose of attending to the matter, and the latter's attorney told the former's attorney—both B. and C. being present—that he desired Briggs to receipt for his part of the purchase-price of the lands sold to Hatcher. Reference was specifically made to the sale made by the commissioners appointed by the county court. B. then signed the receipt above set forth, after insisting upon the words in the brackets—"and of all my interest in and to the estate of which he is guardian"—being stricken out, which was accordingly done. At the time the receipt was given, C. paid over the five hundred and eleven dollars, which included B.'s share of the proceeds of the sale, together with funds arising from other sources. Before the date of the receipt, B. had conversation about the title to the lands with three different attorneys, Mr. Flynn, Mr. Baldwin and Helm, consulting professionally with the two last named; and in his own testimony he states that he knew the character of the sale at the time he signed the receipt, qualifying that statement by saying that his knowledge was derived from others.

Hence we say that there can be no doubt that he had full knowledge of the character of the sale. Whether a minor is bound by his negligence or silence, after reaching an age at which all persons with unimpaired faculties are supposed to have reasonable discretion, comprehension and understanding, is a question which the authorities leave in doubt, but there can be no doubt of the binding force of a ratification after full age and in view of all the facts. Upon this point it has been held that where a party, after arriving at age, settles with his guardian, and receives moneys in the hands of the guardian belonging to him, and derived from a sale of his real estate, it will be presumed that he received the same with a knowledge of the source from whence it came, and that he did the act deliberately. (*Corwin v. Shoup*, 76 Ill. 247); and, further, that where minor heirs whose lands were sold on partition during their minority, after coming of age, with full knowledge of the facts, received their just proportion of the proceeds of the sale when collected, it was held in *Walker v. Mulvean*, 76 Ill. 18,

that they were estopped from asserting title to the lands so sold, and from denying the validity of the sale upon any ground, either as to the jurisdiction of the court to pronounce the decree, or for any irregularity that intervened, and that they were properly restrained from proceeding to assert title.

We have no doubt that the decision in this case might well rest upon the doctrine of ratification, but we prefer to place it upon broader grounds, and to settle, as far as this state is concerned, a more important question, properly presented by the record. Though, of course, in considering the general equities of the case, we shall not fail to bear in mind the testimony relating to the acts and to the knowledge of the respondent.

The most important question in this case is in relation to the character and extent of the relief to be afforded the appellant. And this leads to an examination of the principles of law governing industrial accessions in cases like the present one. The statutes are silent; we must go to the cases.

As near as we can ascertain, the first case in which this question attracted the attention of the court was that of *Bell's heirs v. Barnett,* 2 J. J. M. 516, decided in 1829. The answer was in the nature of a cross-bill, alleging that the defendant had in good faith made improvements of the value of two thousand dollars on the land which the plaintiff sought to recover, and the court, among other things, held that a person acquiring title to land, and entering on it *bona fide,* supposing it to be his own, must be paid for his improvements.

The next is *Putnam v. Ritchie,* 6 Paige, 390, decided in 1837. That case was thus: The plaintiff had taken from the mother of the defendants a release of a lease in fee of the rent of the premises in controversy, of which the defendant's father died seised. She acted upon the supposition that the lease was assets, and that it was for the interest of the children to be released from the payment of rent. After the plaintiff had obtained the release, he entered and made improvements. Subsequently the defendants

recovered the premises in an action of ejectment, and the bill was filed to restrain that suit until they should pay him (plaintiff) for his improvements. Chancellor Walworth dismissed the bill, holding that a person, who, under a misapprehension of his legal rights, had made large and valuable improvements on lands of minors, they were entitled to the improvements, and were not bound to pay for them. He further held that the minors were not chargeable with fraud or acquiescence until they became acquainted with their legal rights. This case has been cited with approval by several courts of New York, though in 38 Barb. 516, it is said that the chancellor's opinion could not be reconciled with the principle of the case of *King v. Thompson,* 9 Pet. 104, and also that it was disapproved by Mr. Justice Story. The next case arose in Maine, and was heard in May, 1841, before Justice Story and Judge Ware. It was the case of *Bright v. Boyd,* 1 Story, 478. The important facts were these: the real estate of a testator had been sold by an administrator with the will annexed to pay the debts of the deceased. The property brought its full value, and the purchaser believing that he had obtained a good title, entered upon the premises, and made large and expensive improvements.

Subsequently it was ascertained that the administrator had not complied with the statute, and the sale was held void and no title passed. The devisee sued in ejectment and recovered upon the strength of his legal title. The purchaser and occupant brought his bill to compel the devisee, before he should be allowed to take possession under his judgment in ejectment, to pay for the improvements, and also for money advanced in buying up outstanding claims. Justice Story hesitated. In 1835, when his work on Equity Jurisprudence was first published, he had intimated that such cases were beyond the reach of the courts of equity, except when the party seeking to recover the estate called for aid from a court of equity, or unless there was some fraud, and that where the party could recover the estate at law a court of equity could not, unless there was fraud, relieve the purchaser. (2 Story Eq. J. 1238.) As has been stated, Chancellor Walworth had

table rights of the appellant whether it appears in the character of complainant or defendant."

Mr. Parsons (3 Con. 22), seems to regard the law as settled by the opinion of Judge Story, for, upon the strength of that opinion, he says that a court of equity will sustain against the actual owner, after recovery of the premises, a bill brought by a *bona fide* possessor for the value of his improvements.

After mature deliberation, we too have concluded to follow the principles announced in *Bright v. Boyd,* and the other cases sustaining the same views as more in consonance with equity and justice than the decisions in *Putnam v. Ritchie.*

It follows that Hatcher having purchased the land in good faith, and having good reason to regard himself as the owner thereof at the time he erected the improvements thereon, should not be ejected therefrom without compensation for those improvements.

As regards the purchase price paid by Hatcher for the land, there is no doubt that it was its full value. Neither is there any doubt that Briggs received his full share and proportion thereof from his guardian. We can perceive no equity in permitting him to retain his share of the purchase price, and also to recover the land. Therefore, in addition to the value of the improvements Hatcher should have his purchase-money and the taxes upon the land, and the improvements should also be refunded to him.

We further think that an equitable adjustment of his case demands that Hatcher should account to Briggs for his proportion of the rental value of the premises in controversy, excluding the use of the permanent improvements during the entire time he has been in possession of the land. We do not think section 318 of the code restricts the power of a court of equity in a suit of this character.

It follows from the foregoing that the decree of the court should be reversed, and a decree entered in accordance herewith.

J. H. COLLINS, Respondent, v. J. K. DELASHMUTT, Appellant.

AGREEMENT TO CONVEY—DEFECTIVE TITLE.—A contract to make a good and sufficient warranty deed of conveyance is not performed by the vendor's tendering a formal deed with convenants of warranty, the title being defective, and there being an incumbrance on the tract of land to be conveyed.

IDEM.—Where a title is derived through a deed which is not recorded or exhibited to the purchaser, the title is defective, and he is not compelled to accept it.

APPEAL from Polk County.

On the thirteenth day of November, 1874, Collins and Delashmutt entered into an agreement in writing, whereby Delashmutt bargained and sold to Collins, for the consideration of two thousand six hundred dollars, in gold coin, a tract of land, situated in Polk county, Oregon. Collins paid Delashmutt at the time the agreement was made four hundred dollars, in gold coin, and made and delivered to him his promissory notes in writing, payable April 1, 1875, for the balance of the purchase-money. The agreement provided that upon the payment of the notes April 1, 1875, Delashmutt should make, execute and deliver to Collins a good and sufficient warranty deed of conveyance of the tract of land. The tract of land was the donation land claim of Delashmutt and Amanda Delashmutt, his wife, who died before the final proof of the claim was made, and her one-half, designated as the south half of the claim, descended to her heirs, who were the legal owners of it at the time the contract was made. Upon the making of the contract, Collins entered into the possession of the land, and remained in possession until after April 1, 1875. Before April 1, 1875, Delashmutt purchased of all the heirs of Amanda Delashmutt their interest in the land, and received from them a quitclaim deed, formally and correctly executed, except that Peter L. Delashmutt, one of the heirs who signed and acknowledged the deed is not named in the body of the deed. On the first day of April, 1875, Delashmutt tendered to Collins a deed formal on its face and

correctly executed. At that time the deed from the heirs of Amanda Delashmutt had not been recorded, nor does it appear that it was exhibited to Collins. At that time there was in force duly entered and docketed in the journal and judgment-lien docket of Polk county a judgment in favor of John Jackson and against Delashmutt for the sum of two hundred and fifty dollars, which was a lien on the tract of land to be conveyed. Collins declined to receive the deed offered, and rescinded the contract, and brought this action in the court below to recover back the four hundred dollars advanced by him and for damages caused him by Delashmutt's failure to comply with his contract. Some minor issues are joined in the pleadings.

J. J. Daley, for appellant.

W. W. Upton, Ben. Hayden and W. H. Holmes, for respondent.

By the Court, WATSON, J.:

The first error assigned is that the court erred in admitting the certified copy of the judgment in favor of John Jackson and against appellant. In support of this assignment it is claimed by counsel for appellant that appellant's contract being merely to make, execute and deliver to respondent a good and sufficient warranty deed of conveyance of the tract of land described in the complaint, was fully performed upon his part when he did make, execute and tender to respondent such a deed; and that the existence of an incumbrance as a judgment-lien did not prevent the deed tendered from being a good and sufficient deed, or from passing to respondent a good title subject to the incumbrance; and that the incumbrance was sufficiently provided against in the covenant against incumbrances contained in the deed.

This theory is in accordance with the strict literal construction of the agreement; but the law requires something more than a bare literal compliance. It is now a settled principle of law governing all executory contracts for the sale of real property, that there is an implied warranty on the part of

the vendor that he will convey a good title. A contract to make a good and sufficient deed is not satisfied by the execution of a merely formal conveyance, which, on account of defects in the vendor's title, fails to pass a good title to the vendee. This whole question is ably reviewed and the leading authorities examined in the case of *Burwell v. Jackson,* reported in 9 N. Y. 335; and the court of appeals came to the conclusion that a contract by the vendors that they would on a certain day execute to the purchaser a good and sufficient deed of conveyance, bound the vendors to convey to the purchaser a good title to the premises, and their title having been extinguished before conveyance by a sale under a mortgage which was in existence and recorded at the time the contract was made, the purchaser had the right to treat the contract as rescinded; and the court further held that the purchaser in that case "was not bound to take a title to the lot subject to the incumbrances upon it, notwithstanding those incumbrances were upon record. We think the case just cited is a correct exposition of the law. No purchaser should be compelled to take a defective or incumbered title. It would be unjust to require him to take a bad title and to remit him to the doubtful chances of an action on the covenants in his deed, with the risk of the possible insolvency of his vendor. We are, therefore, of opinion that the transcript of the judgment was properly admitted.

The first, second, third, seventh, ninth, and eleventh instructions are all substantially to the same effect. They state the law to be that Collins was not bound to accept a defective, doubtful or incumbered title, and that it was the duty of Delashmutt to cause the conveyance to him from the heirs of Amanda Delashmutt to be recorded, and that Collins could not be required to accept a conveyance from him until the conveyance to him from the heirs should be recorded. We think these instructions were in accordance with the law as declared in the case of *Burwell v. Jackson,* and were correct. The laws of this state provide for the recording of all conveyances of real estate, so that the validity of titles may appear from the inspection of the records, and no purchaser

can be required to go forward, and complete a purchase when the title of his vendor does not appear from an inspection of the records. The presumption is that all conveyances are duly recorded, and the fact that the record fails to show a conveyance of real property would give rise to the presumption that no such a conveyance is in existence. This presumption would certainly render a title doubtful when such a conveyance is neccessary to its validity. Respondent having ascertained that the title to a part of the land was in the heirs of Amanda Delashmutt, and having made search in the office where a conveyance from those heirs to appellant should have been recorded, and having found no record of such conveyance, would be justified in coming to the conclusion that no such conveyance existed, and in rescinding the contract on that account. This is the extent to which the instructions referred to go.

The fourth and fifth instructions seem to be founded upon a state of the evidence not disclosed by the bill of exceptions. As legal propositions they are correct. They charge the jury that if appellant intentionally induced respondent to believe the title bad, and to rescind the contract, respondent ought to recover. They but state the principle of law contained in section 765, sub. 4, of the code of civil procedure, that whenever a party has, by his own declaration, act or admission, intentionally and deliberately led another to believe a particular thing to be true, and to act upon such belief, he shall not, in any litigation arising out of such declaration, act or admission, be permitted to falsify it. The sixth instruction goes merely to the measure of damages, and while we are satisfied that it correctly states the law, the jury having found a verdict only for repayment of the four hundred dollars of the purchase-money advanced, we are relieved from the necessity of examining it more closely.

Defendant below, by his counsel, requested the court to give to the jury the following instruction, which was refused: "If there was a lien on the hand for two hundred and fifty dollars, by reason of a judgment lien, and Collins,

plaintiff, did not insist on this as a reason for rescinding the contract, then he waived this objection." At first view this instruction would seem to be a correct statement of the law, but on examining it as applied to the facts in this case we cannot give it our assent. If Collins had the right to rescind the contract on account of its violation by Delashmutt, it was not necessary that in his notice of rescission he should specify breaches which were as much in the knowledge of Delashmutt as in his own. If he had gone on and received a deed, or had done any act towards affirming the contract, with full knowledge of the facts, it would have been a waiver, but on the facts assumed by the instruction he did nothing of the kind. He gave notice of his rescission of the contract. He was required to do no more. To insist that he waived every violation on the part of appellant of the contract which he did not specify, would go so far as to deny to a party refusing to comply with a contract every defense not specified in his refusal.

There was no error in the modification added to the second instruction requested by counsel for defendant. The court gave the instruction as asked, and added to it a clause, which was correct as a legal proposition, and applicable to the facts in evidence.

The judgment of the court below is affirmed.

LUCIAN EVARTS, Adm'r, Appellant, v. G. W. STEGER, et al., Respondent.

REFORMING WRITTEN INSTRUMENT.—A court of equity will make a valid contract operate according to the intent of the parties; but will not give effect to that which is void on its face.

AN administrator's bond failing to express any sum for which the obligors were bound, and no blank being left in such bond: *Held*, that such bond is not a binding instrument, and that the sureties therein are not liable.

APPEAL from Umatilla County.

This is a suit brought by appellant in the circuit court of Umatilla county.

A demurrer was sustained in the court below to plaint-

iff's complaint, and from that judgment this appeal is taken. Plaintiff alleges that Jacob Yarlett died intestate April 20, 1871, and that defendant Steger was appointed administrator of his estate. That in pursuance of such appointment, Steger, as principal and the other defendants as his sureties, signed an instrument in writing, of which the following is a copy.

"Know all men by these presents, that George W. Steger as principal, and John T. Davis, William Penland, Nelson Jones and John T. Hinton, as sureties, are held and firmly bound unto whom it may concern, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twelfth day of June, 1871.

"The conditions of the above obligation is such that whereas the above bounden George W. Steger has been appointed administrator of the estate of Jacob Yartell, deceased, by the order of the county judge of Umatilla county, Oregon. Now, therefore, if the said George W. Steger shall faithfully perform the duties of his trust according to law, then this obligation to be null and void; otherwise to be and remain in full force and effect."

Lucian Evarts, for appellant:

In reforming a written contract, where an omission has been made in writing by mistake, the court does not extend its terms. It merely inserts into the writing one or more provisions which are a part of the actual contract, but which the parties, or their draftsman, have omitted therefrom by mistake. The writing is not the contract itself, but merely the evidence of its terms, and it is only *prima facie* evidence at that. (Civ. Code, sec. 682.) The doctrine that courts of equity will reform mistakes against sureties is well settled. (51 Mo. 98; 1 John. ch. 607; 6 Id. ch. 302, 307, 309; 7 Conn. 549; 41 N. Y. (2 Keyes) 530; Prec. in Ch. (Eng.) 309; 3 Abb. (N. Y.) App. Dec. 654, cited in 4 Abb. U. S. Dig. (N. S.) 459, secs. 4 and 5; 24 Vt. 187, cited in 13 U. S. Dig. 226, sec. 46; 2 Haywood (N. C.) cited 2 U. S. Eq.

Dig. 287, sec. 78; 3 Iredell Ch. (N. C.) 589, cited in 2 U. S. Eq. Dig. 284, sec. 18; 11 Gill & J. (Md.) 457, cited in 2 U. S. Eq. Dig. 284, sec. 15.)

The complaint clearly shows that the mistake was mutual, so far as it is necessary that such a mistake should be mutual in order to give a court of equity jurisdiction to reform it. "Where a party who is to execute papers in consummating a contract, draws or causes or procures them to be drawn erroneously, and palms or puts them off upon the opposite party in that shape, without apprising him of the error or alteration, he commits a fraud, and relief in equity in reforming the instrument may be had on the ground either of mistake or fraud." (45 Barb. 478; 1 Peters, 13; 48 N. Y. 424; 11 Geo. 159, cited in 14 U. S. Dig. 211, secs. 41-50; Willard's Eq. Jur., 617; 19 Cal. 672.) And courts of equity will sometimes assume jurisdiction to enforce defective instruments without reforming them. (5 Johns. Ch. 225, 228; 15 La. Ann. 551, cited in 23 U. S. Dig. 264, sec. 189.)

Parties to a fraud are entitled to no favor in a court of equity, and if the sureties, or any of them acted in a fraudulent manner, as is alleged in the tenth paragraph of plaintiff's complaint, that fact furnishes an additional reason why they should be held liable for Steger's misconduct. Plaintiff therefore claims that the court erred in striking out said tenth paragraph. (7 Conn. 544, 549; 3 Sand., S. C. 671.) The form of the bond or undertaking is immaterial provided it substantially meets the requirements of the statute. (15 Peters, 290; 42 Barb. 528; Code of 1862, sec. 1056.) Where words of inheritance are omitted in a deed by the ignorance or mistake of the draftsman, a court of equity will supply them. (3 Jones Eq., N. C., 96.) Where both parties intend to execute an instrument which shall accomplish a certain object, but which, through the ignorance or want of skill of the draftsman, fails to do so, equity will reform the mistake, no difference whether it be called a mistake of fact or of law. (48 N. Y. 424; 1 Peters, 13; 11 Geo. 159, cited in 14 U. S.

Dig. 211, sec. 31; 11 Ohio, 480; 8 Wheat. 211; 1 Story's Eq. Jur., secs. 136, 168, 172.)

Where a surety signs a bond in which the amount of the penalty is omitted, that amount may afterwards be inserted by an agent, and his authority for so doing may be either express or implied. (53 Maine, 89; 31 Iowa, 272; Code, sec. 743.) A bond in which the amount of the penalty was omitted perfected and set up in equity. (2 Hill Ch., S. C., 6.)

Dolph, Bronaugh, Dolph and Simond, for respondents.

It is held by the courts that such an instrument of writing as that described in the complaint in this cause is void; that an intended bond in a blank penal sum is a nullity. (*Church v. Noble,* 24 Ill. 291; *Case v. Pettee,* 5 Gray, 27; *Lindley v. Smith,* 58 Ill. 250; *Drury v. Foster,* 2 Wall, 33, 34; 1 Ab. Nat. Dig. 332, sec. 8.)

So it is held that where a sheriff's bond was signed by himself and sureties the amount of the penalty not being inserted, and afterward by order of the court of common pleas the words "fifteen thousand" were inserted in the blank space left for that purpose, that without the sum inserted the bond is of no validity, and that such blank could not be filled. (*State of Ohio v. Boring,* 15 Ohio, 507; *Famulener v. Anderson,* 15 Ohio St. 473; *Preston v. Hull,* 23 Grattan, 602.)

An agreement to answer for the debt, default or miscarriage of another, must, by the provisions of the statute of frauds, be reduced to writing, and if one intending to bind himself as surety for another, execute a writing which is invalid, or so imperfect as to fail of the object intended, a court of equity cannot reform such contract, or compel such surety to execute a valid or perfect agreement, upon the ground that he has attempted to do so, but has failed of accomplishing his object by mistake or inadvertence. (*Ontario Bank v. Mumford,* 2 Bart. Ch. 613; *Phelps v. Garrow,* 8 Paige Ch. 322; Code, p. 264, sec. 775, sub. 2; *Wing v. Terry,* 5 Hill, 160; 3 Pars. on Cont. 397.)

By the Court, BOISE, J.:

It is alleged in the complaint that in making said writing, by mistake immediately after the word "concern," the words "in the sum of ten thousand dollars, payable" to whom it may concern, were omitted, or other apt words expressive of the amount which the parties to said writing attempted and intended to become bound; and the complaint alleges that said defendants intended to insert said words in said instrument, and to have them remain therein at the time of the execution, delivery and filing by them; and further alleges that said sureties did justify under oath in the aggregate in the sum of ten thousand dollars. The question presented is: 1. Whether a court of equity can reform this instrument by inserting the penalty. The appellant's counsel cites 51 Mo., which maintains the proposition that a court of equity may reform a bond by inserting the penalty, but that case did not directly involve that point, as it was not the point in the case, as in that case there was a blank left unfilled in the bond. The case of *Wight v. Harris,* 31 Ind., and all the other cases cited, were cases where there was a blank left in the bond, which must have been seen and recognized when the bond was signed. The court held that the blank was filled by the authority of obligors, and the decisions were placed on the ground that the obligors knew that something was to be added.

The writing sought to be reformed in this case has no open blank left to be filled, but is written without a blank opening on its face, but leaving out certain words usually inserted in a bond, and which words so left out are vital to its validity as a bond. It was an attempt to make a bond, but a failure to create such an instrument as much so as it would be a failure to make a promissory note by a writing a promise to pay any sum of money.

The bond, as it is now, is not a binding instrument, rendering the sureties liable for the default of the principal. Courts of equity will enforce written instruments where by the mutual mistake of the parties in a matter of fact the instrument cannot be enforced as the parties intended; but

such courts have generally refused relief when an obligation not named in the contract to be reformed is sought to be added; or where the original contract is void, and consequently of no binding force. (Smith's Lead. Cases in Eq., vol. 2.)

That is, a court of equity will make a valid contract operate according to the intent of the parties, but will not give validity to that which is void on its face. Contracts can be reformed by courts of equity to carry out the mutual understanding of the parties, but there must be a contract to reform.

In this case, if there be a contract it is in parol, for the writing set out in complaint is no contract. (Pars. on Cont. 397; *Church v. Noble,* 24 Ill. 291; *Case v. Patton,* 5 Ga. 27, 250; *Lindley v. Smith,* 58 Ill. —; *State of Ohio v. Boring,* 15 Ohio, 507; Id. 473.)

The court is asked to reform this parol agreement and make it a written contract over the signatures of defendants, and thereby make them obligors to a written instrument which they never signed, for the alleged reason that they intended to sign such an instrument. If the court assumes this authority in this case, it would be a precedent by which the court can be asked to fill up and insert in a promissory note in which no sum of money is agreed to be paid, such sum as was agreed by parol should be inserted so as to attach liability to a surety. To illustrate: Suppose A. wishes to borrow money of B., and it is agreed by parol that B. will loan A. one thousand dollars on his, A.'s, note, with C. as surety, and A.'s note is attempted to be drawn, but no sum of money is agreed to be paid in said note, and it is signed by B. as principal and C. as surety. It is clear that a court of equity cannot give this void writing validity by inserting in it the sum of one thousand dollars, and make it a good note against the surety. If a court of equity can do this it can charge a surety on his parol agreement, which would annul the statute of frauds.

In the case of *Preston v. Hill* (23 Gratton), the name of the obligor of the bond was blank when the bond was signed by the surety, and the name of the obligee was inserted by

the principal, and money obtained on it, and the bond was held void as against the surety, for the reason that the instrument when he signed it was not a bond, and it is then asserted that to fill such blanks would be in effect to write a new contract over the signature of the surety. It is claimed by the appellant that the defendants were guilty of a fraud in imposing this imperfect instrument on the county court.

It was the duty of the court to examine and approve the bond. Until that was done it was not accepted and no liability attached. The county judge is supposed to have understood its contents and decided on its validity and sufficiency, and if he did so examine it and pronounce it a good bond, then it was an error in his judicial judgment, and was an error of law and not of fact.

If the county judge had decided this paper was not a good bond, and still had granted letters of administration to Steger, the same evils would have ensued to the estate that are now complained of, and there would be the same justice in reforming this instrument as now.

But suppose the judge had discovered the invalidity of this instrument and called the attention of the sureties to it, and they had then promised him that if he appointed Steger administrator they would execute a bond good in form, could a court of equity compel them to do it by inserting in this instrument the words asked to be inserted? Such a principle would not be contended for; for that would be clearly turning the parol promise of the parties into a written contract, and a court of equity has no such power. To reform this instrument would be extending the reformatory powers of a court of equity beyond any precedent that has been mentioned by counsel, and there seems to be much doubt as to the power of a court of equity to reform a bond by filling a blank when the blank was open on the face of the instrument, and must have been known to the obligors when they signed it. And the authorities are not uniform on that subject, and when it has been maintained it has been on the ground that such authority was given by the obligors. In this case no

such authority can be implied from the instrument, there being no blank in it or allegation that anything was to be added to it.

We think that the decree of the court below dismissing the bill should be affirmed.

CITY OF EAST PORTLAND, Appellant, v. COUNTY OF MULTNOMAH, Respondent.

ACT OF LEGISLATURE—CONSTITUTIONALITY OF, AFFIRMED.—The amendment to the city charter of East Portland, approved October 25, 1872, is not unconstitutional.

HIGHWAYS—LEGISLATIVE CONTROL OVER.—The paramount and primary control of highways in a state, and of streets in cities is vested in the legislature.

IDEM—CONTROL OVER HIGHWAYS MAY BE DELEGATED.—The state may transfer its control of streets to a municipal corporation by act of the legislature.

TAX—UNIFORM, WHEN.—A tax is not unconstitutional when it is equal and uniform throughout the taxing district.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

W. W. Thayer, for the appellant.

Raleigh Stott, District Attorney, and C. A. Ball, for the respondent.

By the Court, MCARTHUR, J.:

By an amendment to the act incorporating the city of East Portland, which amendment was approved October 25, 1872, it was provided, among other things, as follows: That the territory within the limits of the city of East Portland should be thereby excepted out of the jurisdiction of the county court of Multnomah county upon the following subjects, viz.: To divide the same, or any part thereof, into road districts, or to appoint supervisors of road districts, or to lay out, open, or work any highway therein. The amendment also exempts the inhabitants of said city from road taxes, and from assessment for road work, providing that the board of

trustees shall assess and collect annually from each male inhabitant, over twenty-one and under fifty years of age, the sum of four dollars, to be applied in repairing the streets.

Notwithstanding this, the county court of Multnomah county, at the January term, 1876, did by its order lay off and establish certain road districts, which included within their limits the territory lying within the city limits of East Portland.

On the application of the appellant a writ of review was granted by the court below. This writ was duly returned with a full and complete record of all the orders and journal entries in that behalf made and entered by the county court, which show that the said county court established certain road districts, extending their boundaries and jurisdiction over the limits of the city of East Portland. After argument had the court below affirmed in all respects the action of the county court, and rendered judgment dismissing the writ at appellant's cost. From this judgment the city of East Portland appeals to this court.

It is claimed upon the part of the respondent that the amendment referred to, which excepts the territory of the city of East Portland out of the jurisdiction of the county court of Multnomah county, for the purposes enumerated, is invalid for that it conflicts with the constitution of the state, which inhibits the passage of special or local laws for laying, opening and working on highways for the election or appointment of supervisors; for vacating roads, town plats, streets, alleys and public squares, and for the assessment and collection of taxes for state, county, township, or road purposes. (Art. IV, sec. 23. subds. 7, 8, 10.) And also that the authority vested in the trustees to assess and collect the annual sum of four dollars from each male inhabitant of said city between the ages and for the purposes designated, is violative of the provision of the constitution which declares that the legislative assembly shall provide uniform and equal rate of assessment and taxation. (Art. IX, sec. 1.)

In order to decide this question we are obliged to look further into the constitution to ascertain whether there be

not some other provision bearing upon this case and touching these matters; and if so, to construe the applicable clauses with reference to each other, so that all may operate within their respective spheres to accomplish their ascertained purposes.

The first then that challenges attention and consideration is the one declaring that corporations may be formed under general law, but shall not be created by special laws except for municipal purposes. (Art XI, sec. 2.) Acting under the authority of this section the legislative assembly in 1870, by special act, erected the municipality of East Portland, and in 1872 passed the amendment now claimed to be unconstitutional.

Having the very highest authority for the erection of the municipality, we need look no further into the matter of its creation. The question that meets us after passing the threshold of the case is, what powers could the legislature repose in the municipality, and over what matters, if any, could it give exclusive authority. It admits of no controversy that under the most general acts of incorporation cities are armed with the amplest authority over matters pertaining to police and public health. By special legislative enactment the municipality is vested with power to impose taxes for the general purposes of local community government and they are permitted to exact license taxes for the prosecution of various pursuits within their limits. (*State v. Burchard*, 2 Or. 78; *State v. Bird*, S. C. 1872.) In these cases power was conferred upon the city of Portland and the city of Corvallis to exact a license tax from all persons within the city limits who desired to sell liquor in less quantities than one quart, and by the acts of the legislature such persons were exempted from the operation of the general license law of the state. Legislation of this character has always been thought necessary to enable the municipal authorities to conduct the local governments without embarrassment, which would certainly overwhelm them if necessary funds could not be raised by general tax or special license tax.

Another power equally necessary to the existence of a

municipal corporation is that which enables it to control the streets and alleys within its limits. Opening, grading, draining, leveling, and repairing streets and alleys, are objects which can never be successfully attained by the most rigid enforcement of the general road laws of a state. The persons most directly interested in the benefits, and comforts flowing from improvements of that character, are those who live in cities, and natural justice would seem to demand that they have entire control thereof. The paramount and primary control of the highways of a state, including the streets in cities, is vested in the legislature (Dillon Muni. Corp., sec. 538), and there can be no other safe and judicious rule laid down than that where the legislature sees fit to yield control of the streets and alleys of a city to the corporate authorities, they will be upheld in exercising that control.

There is an obvious and very decided difference between streets and alleys in a city, and roads and highways traversing the rural districts, and it is to these last that subdivision 7 sec. 23 of art. IV of the constitution applies and is limited. The very object of granting city charters is to give rights and powers not possessed by the public corporations, like counties created by general law. When complete jurisdiction over a subject has been given to a city, as for instance the improvements of streets, the general laws of the state in regard to roads and road labor in counties and road districts, ceases to be applicable as soon as the city exercises its powers. (Dill. on Muni. Corp., sec. 534.)

The primary and paramount control of the streets having been vested in the legislature, and that body having by special act and in general terms given up its jurisdiction thereof to the city, the city may and should control them. Any other conclusion than this, and the one already reached, would abridge the authority of the legislative assembly invested by art. XI, sec. 2 of the constitution, by preventing that body from investing municipal corporations with one of the very powers necessary to the end of efficient municipal government.

We pass now to the consideration of the question whether the amendment of 1872 conflicts with this clause of the constitution, which declares that all taxes shall be equal and uniform. (Art. IX, sec. 1.) The equal and uniform taxation clause has frequently been considered by the courts. The result of the decisions, as stated by Mr. Cooley, (Con. Lim. 494, 502,) is that the tax must be uniform throughout the taxing district. A state tax is to be apportioned through the state; a county tax, through the county; a city tax, through the city. If the rule of apportionment is uniform throughout the taxing district, the constitutional provision is not violated. The object of the constitutional provision is simply that one proportion of a community shall not be compelled to contribute an unequal share of a fund and a more favored class be proportionally relieved. In this case no such result has been attained. The inhabitants of the surrounding road districts are not compelled to contribute any greater tax than before the jurisdiction of the county court over the city of East Portland was suspended.

Judgment reversed, and the proceedings complained of annulled.

NOTE—This decision was affirmed in the case of *The City of Astoria* v. *Clatsop County*, decided at the December term, 1877. The question presented in the two cases being identical, the latter case is not reported.

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*AMOS UNDERWOOD, Respondent, v. FRENCH & MOODY, Appellants.

FORMER ADJUDICATION—RECORD CONCLUSIVE AS TO.—The defendants pleaded a former adjudication. Plaintiff replied that the matters adjudicated in the former action were not the same matters set up on the complaint in this action: *Held*, that it was error to permit the jurors in the former trial to testify that the cause of action in the pending cause was not passed upon by the jury in the former trial, it appearing from the record that it was in issue in the former action.

APPEAL from Polk County.

The facts are stated in the opinion of the court.

*See 25 Am. Rep. 500.

B. Witten and W. W. Thayer, for appellant:

The court below erred in admitting parol testimony to explain the judgment and judgment-roll in the former action, the record itself being conclusive as the matters there tried.

In order to avoid the effect of the bar, the circuit court allowed the proof excepted to, and the jury therefore disregarded it. The ruling in effect allowed the plaintiff to split an entire demand. This was erroneous. Leaving out of this case the special damages for the wood-boat and the wood-chutes, the causes of action are identical, and if so, it was a complete bar. (2 Pars. on Cont., 234, note; Freem. on Judg., 246; 36 Cal. 28; 19 Wend. 207; 31 Wend. 381; Code 255, sec. 726; 6 Hill, 54; Broom's Leg. Max., 330; 11 N. Y. 548; 42 Cal. 371; 16 Wend. 583.)

Even in cases of tort, a party cannot split an entire demand. (15 John. 432.) Recovery is a bar, notwithstanding part of the account was left out by mistake. (11 John. 530.)

Where a demand of a party has been submitted to the jury, and they see fit to disallow it, either for want of sufficient proofs or for any other cause, a verdict and judgment thereon is conclusive, and the same demand is forever barred. (16 John. 157; 2 Id. 210; 15 Id. 432.) All damages accruing from a single wrong, though at different times, make but one cause of action. It goes against actions for the same wrong, and against several actions on the same contract. (*Bendernayle v. Cocks,* 19 Wend. 215.) Parol testimony in courts of record is inadmissible to contradict the record. (3 Com. 173.)

John C. Cartwright and N. H. Gates, for respondent:

Respondent, by his attorneys, claims that the court below did not err in allowing parol evidence to rebut the record, or to explain the same, the question as to a former recovery was in issue, and was a question of fact for the jury to decide. (1 Greenl. on Ev., secs. 532, 533; 1 Hill, 540; 1 Kernan, 420; 2 Hill, 481; Civ. Code, 255, subd. 2, secs. 723, 726; 30 Cal. 229; 33 Cal. 74; Smith's Lead. Cas. 573,

668, 669, 670; 1 Cal. Dig., tit. estoppel; Freem. on Judg., 218, secs. 256, 257, 259, 273, 274; 17 Ala. 133; 26 Id. 594; *Doty v. Brown,* 4 Com. 71; *Davis v. Talcot,* 14 Bar. 511; Herman on Estoppel, secs. 73, 74.)

By the Court, WATSON, J.:

The errors assigned appear in the bill of exceptions. The complaint sets up a contract made between plaintiff and defendants, August 1, 1874, in which plaintiff agreed to furnish and deliver, and defendants agreed to receive and pay for, at Underwood's ferry, on the Columbia river, one thousand cords of fir wood, to be delivered daily, Sundays excepted, as needed by the defendants for the steamboat then owned and run by them on the Columbia river. Defendants agreed to pay for the wood so furnished three dollars and fifty cents per cord, in gold coin. Plaintiff entered upon the performance of the contract on his part, and at an expense of two hundred dollars constructed a dock or boat, and at an expense of seventy-five dollars constructed a chute, in order to deliver the wood. That he, before the twenty-sixth day of February, 1875, delivered to defendants under the contract four hundred cords of wood, which they received and paid for. That he has also received compensation for one hundred and eighty-three cords of wood, which was to have been delivered from February 27, 1875, to May 8, 1875. That on the eighth day of May, 1875, he had the balance of said wood, amounting to four hundred and seventeen cords in his possession at Underwood's landing, and was ready, and willing and offered to deliver the same, but that defendants failed and neglected to receive or pay for it. He claims damages in the sum of fourteen hundred and fifty-nine dollars and fifty cents, for defendants' failure to receive and pay for the wood, and two hundred and seventy-five dollars for the dock and chute. The answer, with other defenses, alleges that on the eighth day of May, 1875, plaintiff commenced an action in the circuit court for Wasco county against defendants for the identical same cause of action, and to recover the damages claimed in this action in consequence of defendants' refusal

to receive said wood and termination of said agreement. That issue was duly joined in said action; and that at the June term, 1875, of said court, the cause was tried before the court and a jury, and plaintiff recovered a judgment therein against defendants for the sum of two hundred and seventy-four dollars and fifty cents, which judgment they plead as a bar to a recovery in this action.

Plaintiff, for a reply to so much of the answer as sets up a former adjudication, denies that the former action was for the same identical cause of action, or to recover the same damages claimed in this action, or that the damages claimed in this action were adjudicated or passed upon in said action. That the judgment therein was for different wood, and not for the four hundred and seventeen cords sued for in this action. That all the damages claimed in this action accrued after the commencement of the former action. At the trial defendants offered, and the court admitted in evidence, the complaint, answer, reply and journal entries in the former action described in the pleadings.

The defendants having rested their case, plaintiff introduced as a witness J. H. Shastain who had been a juror in the former trial, and asked him the following question: "Did the jury in the case of *Amos Underwood v. D. M. French and Z. F. Moody,* tried in this court at the June term, 1875, assess the damages upon all the wood mentioned in that case in plaintiff's complaint, or only on one hundred and eighty-three cards thereof." The defendants objected, and their objection being overruled by the court excepted to the ruling.

The witness then stated in response to the question that the jury assessed damages on one hundred and eighty-three cords of wood only at one dollar and fifty cents per cord for the one hundred and eighty-three cords. Two other witnesses, also jurors, testified under like exception substantially the same as Shastain. The jury found a verdict in favor of the plaintiff for the sum of nine hundred and thirty-five dollars and seventy-five cents, and the court rendered a judgment for plaintiff in accordance with the verdict. Defendant appeals to this court. The only error assigned is that

the court erred in permitting the witness Shastain to testify that the jury only assessed the plaintiff's damages upon one hundred and eighty-three cords of wood. The defendants, to sustain their plea of a former adjudication, had introduced the record of the former trial.

It is clear from a mere inspection of the record that the same cause of action was presented in the former action as in the one now under review. The same contract is set up; the same breach is relied upon and the same damages are claimed. In the former action the entire claim was controverted by the answer; issue was joined and a trial had, and a verdict and judgment rendered in favor of the plaintiff.

The complaints in each action claim damages for defendant's failure to receive and pay for all of the balance of the one thousand cords of wood not paid for before May 8, 1875. The only difference is that plaintiff in this action undertakes to give defendants credit for the amount recovered in the former judgment as a payment for one hundred and eighty-three cords of wood, and that he claims in addition damages for the dock and chute constructed to enable him to carry on the business of delivering the wood. This damage certainly accrued before the commencement of the former action, and no evidence was offered to show that it was not considered in that action.

An inspection of the record leaves no doubt that the damages for defendant's failure to receive and pay for all the wood claimed for in his complaint in this action were adjudicated in the former action.

Can parol evidence be properly admitted to contradict the record, and show that matters directly put in issue by the pleadings in the former action were not considered by the jury in finding their verdict in that action? We think not. The plaintiff having presented his entire claim in the former action, and defendant having controverted it, and the issues joined having been tried, he should not in this action be permitted to show by parol evidence either that he failed in his evidence in that action, or that the jury did not try the issues they were sworn to try, or did not consider the evidence offered. (Freeman on Judg., sec. 272.) To admit parol evi-

dence to show that what is clearly shown by the record to have been in issue was not in fact tried, would be to contradict the record by parol evidence. (Freeman on Judg., sec. 275.)

Parol evidence is admitted to identify the subject-matter, where an inspection of the whole record leaves it doubtful whether the same subject-matter was passed upon (2 Greenlf. on Ev., sec. 532), but not to contradict the record where it is not doubtful.

The principle contended for in this case would go further than merely to show that an issue joined by the pleadings was not tried by the evidence, and would seek to show not what was presented to the jury, but what was considered by them. No case cited by counsel or found by us goes that length.

Such a rule would permit every case once tried to be tried over again as often as a part of the jurors who tried it could be found to testify that some of the issues submitted to them were not considered in their deliberations. It is further open to the objection that it admits the evidence of the jurors to impeach their own verdict.

The judgment of the court below will be reversed.

BISHOP A. BAILEY, Respondent, v. JOHNSON WILLIAMS, Appellant.

SUMMONS—PROCESS—A summons used to bring a defendant into the circuit court is not process within the meaning of section 1166, and need not run in the name of the state.

DISCRETIONARY ORDER NOT REVIEWABLE.—The granting of an order to set aside a default is in the sound discretion of the court, and such order should not be disturbed on appeal, unless it clearly appears that there was an abuse of discretion in allowing it.

APPEAL from Clatsop County.

The process issued in this action, purporting to be a summons, did not "run in the name of the state of Oregon." After the service of this process, a judgment by default was entered against the defendant. Thereafter, at the same term of the court, the defendant moved the court to set aside the

judgment, and for leave to answer, and filed an affidavit of merits. The court denied the motion, and the defendant appeals from the judgment, and from the order of the court overruling the motion to set aside the same and allow defendant to answer.

W. W. Upton, for appellant.

Milton Elliott, for respondent.

By the Court, PRIM, C. J.:

It is insisted by counsel for appellant that the summons served on the defendant in this case is void, for the reason that it did not run in the name of the "State of Oregon." Section 1166 of the code is in these words: "All process authorized by this code to be issued by any court or officer therefor, shall run in the name of the state of Oregon, and be signed by the officer issuing the same; and if such process be issued by a clerk of a court, he shall affix thereto his seal of office." If a summons is a process authorized by the code to be issued by a court or an officer thereof, it is a process within the meaning of the above section, and would be void unless it runs in the name of the state of Oregon. Ordinarily a summons is understood to be included under the head of a process, but our code has defined what the requisites of a summons shall be, and consequently it becomes necessary to consult its definition, in order to ascertain what constitutes a summons. Section 51 of the code reads as follows: "The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action, and the title thereof. It shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to appear and answer the complaint, as in this section provided, or judgment for want thereof will be taken against him."

The summons contained in this record contains all the requisites of the preceding section, but it does not run in the name of the state of Oregon.

By an inspection of this section it will be seen that it is not required to be issued by a court, or an officer thereof. It may be signed by the plaintiff or his attorney. An attorney in one

sense is an officer of the court, but not within the meaning of section 1166. We think a summons, when used in the circuit court, is not a process within the meaning of section 1166 by the code, and therefore need not be in the name of the state of Oregon.

The judgment in this case was rendered by default for want of an answer, and in a few days after it was rendered it appears that the defendant filed a motion, accompanied by an affidavit to set aside the default and to be allowed to file an answer. This motion was denied by the court, and this ruling of the court is assigned as error. This was a matter which rested wholly in the sound discretion of the court below, and should not be disturbed, unless it can be shown that that discretion was clearly abused. (*White v. The Northwest Stage Company,* 5 Or. 99.) And it was further held by this court in the case just referred to, "that a motion to open up a default and to set aside a judgment should be accompanied with a copy of a verified answer, which the party desires to be permitted to file, so that the court may judge whether there be a meritorious defense."

It appears from the record before us that appellant failed to comply with this rule of practice, and we are unable to discover any abuse of judicial discretion in the court below.

There being no substantial error in this record, the judgment of the court below is affirmed.

ADOLPH WOLF, Respondent, v. B. M. SMITH, Appellant.

TRANSCRIPT ON APPEAL—LOST RECORDS.—An appellant must bring into the appellate court a perfect record. In case of loss or destruction of originals, they may be supplied by copies embracing every paper necessary to show that the original and the appellate tribunal had jurisdiction.

APPEAL from Polk County.

The facts are stated in the opinion of the Court.

N. L. Butler, P. C. Sullivan and R. S. Strahan, for appellant.

John Kelsay and J. J. Daley, for respondent.

By the Court, McARTHUR, J.:

This case was originally commenced in the county court of Polk county, where a trial was had, which resulted in a verdict and judgment for appellant. From that judgment the respondent appealed to the circuit court. When the case was called affidavits were filed showing the loss of the papers, and under section 503 of the code an order was made permitting the substitution of copies. Pursuant to said order, what are described as "substantial copies of the pleadings in said action," were filed. A trial was then had, which resulted in favor of respondent. The affidavits alluded to set forth that a notice of appeal and an undertaking had been filed, and were among the lost papers. The jurisdiction of the court depended upon the service of a notice of appeal, and the filing of the original thereof, with proof of service indorsed thereon, and the filing of an undertaking.

There was no copy of either substituted for the lost originals, hence there is nothing in the record to show that the court had jurisdiction. The fact that the parties appeared, and that the cause was thereupon heard and determined in the circuit court, cannot be taken as curing the defect. In *Oliver v. Harvey*, 5 Or. 361, it was held that even a waiver of filing the notice of appeal by stipulation is not equivalent to filing the same, and that consent cannot confer jurisdiction. The appeal is jurisdictional, and must be taken in the mode prescribed by the code (29 Cal. 461), the appellant must bring into the appellate court a perfect record (27 Ind. 1), and where the record is lost or destroyed copies of every paper and pleading necessary to give jurisdiction, and to enable the court to properly hear and determine the case, must be supplied.

Judgment reversed.

GEORGE NURSE, Appellant, v. WILLIAM JUSTUS, Respondent.

COSTS AND DISBURSEMENTS—STATUTES CONSTRUED.—Section 539 of the code, relating to costs and disbursements, applies to cases originally commenced in the circuit courts. Section 542 governs in cases brought to these courts by appeal.

APPEAL from Jackson County.

This action was originally tried and determined in the justice's court for Jacksonville Precinct, Jackson county, Oregon. Nurse recovered a judgment against Justus for twenty-one dollars, together with his disbursements, taxed at twenty-one dollars and thirty-five cents. Justus appealed to the circuit court. The cause was tried therein by a jury, and Nurse had a verdict for twenty-one dollars. Thereafter, on said verdict, the court rendered judgment in favor of Nurse for twenty-one dollars and the disbursements in the justice's court, taxed at twenty-one dollars and thirty-five cents, and at the same time rendered judgment in favor of Justus for his costs and disbursements sustained in the circuit court, and taxed at seventy-three dollars and eighty-six cents. From this judgment in favor of Justus, this appeal is taken.

Thayer & Williams, for appellant.

There was no appearance for respondent.

By the Court, MCARTHUR, J.:

The record presents but one question. When an appeal is taken to the circuit court from the justice's court, must the judgment recovered in the circuit court be in excess of fifty dollars before the appellate court can adjudge the recovery of costs and disbursements to the prevailing party? The question is one which must be decided by construing and applying certain provisions of the code, about to be referred to. We are of opinion that section 539 does not apply to cases appealed from the justice's courts; but that such cases fall within and are governed by the provisions of section 542. After an appeal from the justice's court is perfected the action must be tried anew upon substantially

the same issues tried in the court below (sec. 533), and the manner of proceeding is the same as if the action had been commenced in the circuit court. (Sec. 536, subd. 3.) These provisions refer to the formal and methodical disposal of the action as such, and cannot be held to control or apply to the incidents of the judgment, as costs, disbursements, etc. An appeal, though tried anew, cannot be regarded as a matter so entirely independent of the original action as to permit of the application of every provision of the code that might be invoked in an action originally begun in the circuit court. It is not a new action, but simply a retrial of an action in an appellate tribunal for the purpose, theoretically, of correcting errors of the inferior court. It is only in cases originally begun in the circuit court that the provisions of section 539, as to costs and disbursements, can be fairly held to apply. In appeals the provisions of section 542 must govern. Under this latter section costs, when allowed to either party on appeal, must be allowed to the prevailing party. Nurse was the prevailing party upon the appeal, and was therefore entitled to recover his costs in the appellate tribunal. And in this, as in other cases, the right to recover disbursements is incident to the recovery of costs. Had the judgment been modified, the allowance of costs would have been matter of discretion, but as the case stands we think the judgment in favor of Justus for costs and disbursements was error.

Judgment reversed.

HAWLEY & DODD, Respondents, v. W. H. BINGHAM, Appellant.

CONTRACT—CONDITION PRECEDENT.—B. executed his promissory note to H. & D., payable January 15, 1876, in the usual form, with the addition of the following words: "The above note is given upon, and for the sole consideration that the said Hawley & Dodd have agreed and promised that upon the payment of the said note at maturity (time being of the essence of the contract), they will sell and transfer to the undersigned, Bingham, the planing machine which they have this day entrusted to him:" *Held*, that the promise of B. was not dependent upon the promise of H. & D. to sell and transfer the machine as a condition precedent; but that it was an independent promise to pay.

APPEAL from Yamhill County.

This is an action by the respondents upon a promissory note executed by the appellant in their favor. The note is in the usual form, with the following additional stipulation:

"The above note is given upon and for the sole consideration that the said Hawley, Dodd & Co. have agreed and promised that upon the payment of said note, principal and interest, at maturity (time being of the essence of the contract) they will sell and transfer to the undersigned the Lester double-header planing machine, which the said Hawley, Dodd & Co. have this day entrusted to the care of the undersigned."

The right of the respondents to recover was resisted upon the ground that the delivery of the machine in question was a condition precedent to such right. The respondents recovered judgment, and the appellant brought this appeal.

E. C. Bradshaw, Jas. McCain, and Ramsey & Hyde, for appellant.

W. W. Upton, C. B. Upton and H. Hurley for respondent.

By the Court, PRIM, C. J.:

It is claimed that the complaint in this action is bad upon its face, because it does not contain any averment that plaintiffs had performed, or offered to perform, their promise as to the sale and transfer of the said machine to defendant on the day the said note fell due. This position is based upon the theory that the promises of the plaintiffs and those of the defendant are mutual and dependent, and that the performance of one is a condition precedent to a right to demand a performance of the other. It is often a very difficult and delicate question to determine, whether the promises and covenant of a contract are mutual and dependent, or whether independent of each other.

Mr. Parsons, in his work on Contracts, says: "Covenants and agreements may be wholly independent, although relating to the same subject and made by the same

parties, and included in the same instrument." (Vol. 1, p. 528.)

By reference to the complaint in this action, it appears that on May 7, at Portland, the defendant executed and delivered to plaintiffs the note on which this action is based, in which he promised, for value received, to pay to the order of plaintiffs, three hundred dollars, on or before January 15, 1876, with interest thereon at one per cent. per month until paid. The note then contains this recital: "The above note is given upon and for the sole consideration that the said Hawley, Dodd & Co., have agreed and promised that upon the payment of said note, principal and interest, at maturity, they will sell and transfer to the undersigned the Lester double-header planing machine, which the said Hawley, Dodd & Co., have this day entrusted to the care of the undersigned."

We think it sufficiently appears in the complaint that the promise of defendant to pay to the order of plaintiffs a certain sum of money at a certain time and place, is not dependent upon the promise of plaintiffs to sell and transfer said machine as condition precedent; but is an independent promise to pay, which may be enforced in this action. The former part of the note appears to contain an absolute promise on the part of defendant to pay a certain sum of money at a certain time and place; while the latter part of it contains a recital of the agreement out of which it arose, and the consideration upon which it is founded.

Taking this view of the instrument in question, we think the complaint contains a statement of facts sufficient to constitute a cause of action.

The judgment of the circuit court is affirmed.

BENJAMIN F. SMITH, Respondent, v. J. O. P. LOWNSDALE, Appellant.

WAIVER.—Waiver of demand and notice may be made by parol.

IDEM—INDORSER—PROMISE BY, AFTER FAILURE TO PROTEST.—A promise to pay made after maturity, with knowledge that demand and notice of non-payment had not been made, removes the effect of any negligence in making demand or in giving notice.

SECURITY—EFFECT OF TAKING BY INDORSER.—An indorser who has taken sufficient security to protect himself against possible loss waives his legal right to require proof of demand and notice.

PRACTICE.—Permitting a jury to take a written charge to the jury room: *Held* to be bad practice.

APPEAL from Multnomah County.

This action was brought by Smith against Lownsdale on a promissory note executed by one Cooper to Lownsdale, and by him indorsed to Smith. Lownsdale took from Cooper and wife a mortgage to secure him against loss on account of the indorsement, and still holds the security. No demand was made and no notice given. Cooper became insolvent, and died after the maturity of the note. Issue was joined as to waiver of demand and notice by Lownsdale. After the complaint was filed a motion was made by counsel for Lownsdale to strike out a certain allegation contained therein, which is set out in the opinion, and the denial of said motion is charged as error. The bill of exceptions shows that respondent offered testimony tending to prove that appellant, before the maturity of the note, requested respondent not to protest it at maturity, and promised that he would pay the same without demand and notice of non-payment, and would waive the same as he had security for his liability. Respondent then offered the mortgage from Cooper and wife to appellant, and the court overruling objections to its admission admitted the same, and at the time expressly charged the jury that the taking and existence of the same could not be deemed a waiver of demand and notice on the part of Lownsdale, nor any excuse for Smith's neglect to demand payment of the maker and give due notice of the non-payment, and was to be considered by the jury as illustrating or explaining the oral testimony of the plaintiff, and for the purpose of aiding the jury in determining the truth concerning the alleged conversation between plaintiff and defendant. Admitting the mortgage and giving this instruction were excepted to and are charged as errors. When the jurors were ready to retire the court allowed them to take the general charge, which had been reduced to writing, with them to the jury

room, overruling applicant's objection thereto. This is also charged as error. The verdict was for Smith, who had judgment accordingly.

Hill, Durham & Thompson, for appellant:

The court erred in allowing the mortgage referred to to be read for any purpose. (*Cramer v. Perry,* 17 Pick. 332.) It was error to allow the jury to take the written instructions of the court to the jury-room, when they retired to deliberate upon their verdict. (Civ. Code, secs. 202, 203; *Farmers' and Mechanics' Bank v. Whinfield,* 24 Wend. 420; 1 G. & W. on New Trials, 70.)

Catlin & Killen, for respondent:

An indorser who is secured is not entitled to demand or notice, and the issue concerning demand and notice was an immaterial one. (Story on Prom. Notes, sec. 357; 3 Kent, 113; Story on Bills, sec. 374; 1 Pars. on Cont. 271, and authorities there cited; *Bank v. Griswold,* 7 Wend. 166.)

By the Court, MCARTHUR, J.:

The first error assigned is in denying appellant's motion to strike out the following allegation from the complaint: "That about the last day of August, 1871, and at various times since, the defendant has promised and agreed to pay such note." We think there was no error in this ruling. L. was an indorser, and he had a right to insist upon demand and notice of non-payment as a condition precedent to the attaching of any liability to him. But this right he could waive before maturity and by parol. (1 Pars. N. and B. 584.) And however much denied and debated heretofore, we take it to be now settled that a promise to pay, made after maturity, the note in this case matured November, 1868, with knowledge that demand for payment and notice of non-payment had not been made, removes entirely the effect of any negligence in making demand or in giving notice. (1 Pars. on N. and B., 595.) And we are of opinion that the allegations of the complaint were sufficient to let in proof of defendant's knowledge of these facts.

Though there is a conflict of authorities upon the ques-

tion of demand and notice to an indorser who has taken security sufficient to protect himself against possible loss, Chancellor Kent and Justice Story maintaining the affirmative, and Mr. Parsons dissenting from their views, we think the weight of authority clearly is that if an indorser, before or at the maturity of the bill, has protected himself from loss by taking sufficient collateral security of the maker, it is a waiver of his legal right to require proof of demand and notice. (3 Kent's Com., 10 ed., 163; Story on Prom. Notes, secs. 281, 357; 1 Pars. on Cont., 5 ed., 271, note j.) Mr. Parson's views will be found in the first volume of his work on notes and bills, p. 571 *et seq.* Following the weight of authority, we think it was entirely proper for the court to admit the mortgage in evidence for the purpose of sustaining the affirmative of the issue in relation to waiver of demand and notice. Respondent could have urged its admission and relied upon it for a more effective purpose. The special oral charge of the court in submitting the mortgage to the jury, though not in accordance with our view of the law, was not an error that affected the rights of the appellant; its entire effect was to limit and abridge the respondent's rights. It could not possibly have prejudiced the appellant's case with the jury.

There remains but one other question to consider. The court, at the request of counsel, had reduced the general charge to writing, though the special instruction given at the time the mortgage was admitted was oral. The jury were allowed to take with them to their room the written charge. While as a matter of practice we do not approve this, we are unable to find any statute expressly or by necessary implication forbidding it. Section 202 of the code does not meet the question. That applies to the pleadings and the evidence, and does not directly or indirectly refer to the charge to the jury. The intention of prohibiting the court from submitting to the jury a general written charge could not have been in the legislative mind when section 202 was enacted (Oct. 11, 1862), for the written charges to juries were not part of our system until the amendment of

subd. 6, sec. 194 of the code, which was approved October 20, 1864.

It is conceded that the law of the case was clearly and correctly stated in the written charge; therefore, in this particular instance, nothing prejudicial to the substantial rights of the appellant could have resulted from the act.

Judgment affirmed.

S. E. PADDOCK, Respondent, v. R. D. HUME et al., Appellants.

UNDERTAKING ON ARREST IN CIVIL ACTION—SURRENDER BY BONDSMEN.—S., a non-resident, was arrested in a civil action brought by P. H. and another, executed a bond to S. for any judgment that he might recover against P. in the action. S. recovered judgment; but prior to such recovery, H. and his co-obligor surrendered P. in the manner provided by statute for a surrender on statutory undertakings: *Held*, that the allegation that the writing was a "bond or writing obligatory," describes an instrument under seal, which implies a consideration; that the fact that such instrument is not authorized by the statute does not necessarily make it invalid; that the surrender in question did not operate to discharge the obligors in the bond from liability thereon.

APPEAL from Multnomah County.

Paddock, the respondent, brought a civil action against one Shaeffer, a non-resident, and procured his arrest. The appellants, Hume and Herman, executed a bond conditioned that Shaeffer would pay any judgment that Paddock might recover in the action, whereupon Shaeffer was discharged from arrest. Paddock subsequently recovered judgment in the action. Before such judgment was rendered, Hume and Herman duly delivered to the proper officer a properly certified copy of the bond or undertaking as provided by statute in case of surrender under bail bonds, surrendered Shaeffer into the custody of the sheriff, and had an order entered discharging them from liability.

This action was brought by Paddock to recover from Hume and Herman, upon the bond or undertaking in question, the amount of the unsatisfied judgment against Shaeffer.

The complaint alleges that the obligation upon which the

action was brought is a "bond, undertaking or writing obligatory." The answer confesses the allegations of the complaint, and pleads the surrender in avoidance, which matter in avoidance is denied in the reply. The action was in justices' court. The respondent recovered judgment, and the appellants appealed to the circuit court. Upon the trial in the circuit court, the jury found for the appellants. Whereupon, respondent filed a motion for judgment, notwithstanding the verdict, which motion was allowed and judgment rendered accordingly. From this judgment this appeal is taken.

F. R. Strong, for appellant:

The order exonerating the bail was a complete discharge of the defendants from all liability upon the undertaking. (Civ. Code, 129, secs. 110, 113; *Hume v. Norris,* 5 Or. 478.) It was an order of a court of competent jurisdiction, and can only be set aside by a writ of review, and cannot be impeached collaterally.

It is contended by the respondent that because the undertaking, in addition to what is required by the law, contains an undertaking to pay the amount of such judgment as should in that action, be recovered against the defendant, Shaeffer, these defendants are still liable for the judgment as upon a common law bond for the judgment.

This is not a common law bond, nor is it an instrument known to the common law. It is purely a creation of the statute, and has no force except such as the statute gives it, and it must be construed with reference to the statute, the terms of which enter into and become a part of the obligation. (5 Or. 442; 2 Id. 318.)

There is no consideration for the undertaking to pay the judgment. All the benefit derived to the defendant in the action of *Paddock v. Shaeffer,* was release from arrest. This release he was fully entitled to on giving surety. He got no additional benefit by this extra stipulation, when Shaeffer was surrendered to the constable, who was in law the agent of the plaintiff, the plaintiff was in as good a

subd. 6, sec. 194 of the code, which was approved October 20, 1864.

It is conceded that the law of the case was clearly and correctly stated in the written charge; therefore, in this particular instance, nothing prejudicial to the substantial rights of the appellant could have resulted from the act.

Judgment affirmed.

S. E. PADDOCK, Respondent, v. R. D. HUME et al., Appellants.

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This action was brought by Paddock to recover from Hume and Herman, upon the bond or undertaking in question, the amount of the unsatisfied judgment against Shaeffer.

The complaint alleges that the obligation upon which the

action was brought is a "bond, undertaking or writing obligatory." The answer confesses the allegations of the complaint, and pleads the surrender in avoidance, which matter in avoidance is denied in the reply. The action was in justices' court. The respondent recovered judgment, and the appellants appealed to the circuit court. Upon the trial in the circuit court, the jury found for the appellants. Whereupon, respondent filed a motion for judgment, notwithstanding the verdict, which motion was allowed and judgment rendered accordingly. From this judgment this appeal is taken.

F. R. Strong, for appellant:

The order exonerating the bail was a complete discharge of the defendants from all liability upon the undertaking. (Civ. Code, 129, secs. 110, 113; *Hume v. Norris,* 5 Or. 478.) It was an order of a court of competent jurisdiction, and can only be set aside by a writ of review, and cannot be impeached collaterally.

It is contended by the respondent that because the undertaking, in addition to what is required by the law, contains an undertaking to pay the amount of such judgment as should in that action, be recovered against the defendant, Shaeffer, these defendants are still liable for the judgment as upon a common law bond for the judgment.

This is not a common law bond, nor is it an instrument known to the common law. It is purely a creation of the statute, and has no force except such as the statute gives it, and it must be construed with reference to the statute, the terms of which enter into and become a part of the obligation. (5 Or. 442; 2 Id. 318.)

There is no consideration for the undertaking to pay the judgment. All the benefit derived to the defendant in the action of *Paddock v. Shaeffer,* was release from arrest. This release he was fully entitled to on giving surety. He got no additional benefit by this extra stipulation, when Shaeffer was surrendered to the constable, who was in law the agent of the plaintiff, the plaintiff was in as good a

position as he was before he took the security for his appearance.

A bond at common law implied consideration. For this reason a bond defective, as a compliance with the statute, has been held binding as a common law obligation, but I find no instance where an unsealed instrument has been held to imply a consideration. A bail bond which imposes conditions more onerous than the law requires has been held void in 33 Geo. 37; 1 U. S. Dig. N. S. 99, sec. 2; Id. 125; Id. sec. 3; 2 Brevard (S. C.) 394; 4 U. S. Dig. 234, sec. 49; 15 Geo. 573; 15 U. S. Dig. 71, sec. 19; 3 Kelley (Geo.) 128; 8 U. S. Dig. 42, sec. 3.

It has also been held that where a bail bond recites immaterial or irrelevant matter, such recital will not vitiate the bond, but may be rejected as surplusage. (*State v. Adams*, 3 Head. 259.) Notwithstanding an absolute engagement expressed by the literal terms of a bond, the purpose of the law under which it is executed is sufficiently satisfied when that which the law regards as legal indemnity of the obligation is accomplished. (20 Minn. 196; *Ohio v. Findley et al.*, 10 Ohio, 51; *U. S. v. Hodson*, 10 Wall. 395.)

The insertion of an obligation to pay the judgment should be regarded as a mistake of the law. The parties not intending to bind themselves any further than was necessary to relieve the defendant from arrest. In such case the parties would not be bound by the bond to what they agreed to do, that was not required to attain the proposed end. (1 Pars. on Cont. 437.)

Caples & Mulkey, for respondent:

The bond was voluntary on the part of the defendants, without any claim of fraud, and the plaintiff had a right to, and did rely on their agreement to pay the judgment. Parties are at liberty to make any contract they see fit that is not prohibited by statute or in violation of public policy, and this contract, instead of being prohibited by the statute, is expressly authorized. (Civ. Code, sec. 775.)

But it is contended, though no such defense is set up in the answer, that the undertaking not being in form required

by the statute is void. Such, however, is not the law. The bond is good between the parties as a contract. It does not follow that the bond is necessarily invalid, though not authorized by statute it will be good as a common law bond, when it does not contravene public policy nor violate a statute, and binding on the parties to it. (12 Iowa, 570; 23 Iowa, 21; 7 Bosw. 670; 13 Cal. 553; 17 Cal. 434; 16 Mo. 258; 5 Mass. 314; 12 Ill. 93; 16 B. Monroe, 556; 37 Barb. 179; 8 Ala. 466; 8 Barb. 340; 28 N. Y. 318; 7 Wend. 499; 21 Wend. 270.)

By the Court, PRIM, C. J.:

The circuit court having rendered judgment in favor of the plaintiff upon the pleadings, notwithstanding the verdict of the jury for the defendants, the correctness of the judgment can only be ascertained and determined from the state of the pleadings.

On looking into the pleadings we find that it is alleged in the complaint that defendants executed a "bond undertaking or writing obligatory," to the effect that said Shaeffer should be and appear at the trial in a certain civil action then pending in a certain justice's court between the plaintiff and said Shaeffer, and that said Shaeffer would pay any judgment that might be recovered against him in said action, and that in case said Shaeffer should fail so to do, the defendants would pay the amount of whatever judgment should be recovered by plaintiff against said Shaeffer in said action.

And it is further alleged that said plaintiff did recover a judgment against said Shaeffer for seventy-nine dollars, and twenty-one dollars and fifteen cents costs, which judgment said Shaeffer has wholly neglected and failed to pay. None of these allegations of the complaint having been denied in the answer of the defendants, they must all be treated as confessed under the rules of pleading adopted by our code. The defendants undertook to plead by way of avoidance that before they had become liable on their said undertaking, they had delivered into the hands of the constable for said precinct a copy of said undertaking, certified to by the

justice of the peace of said precinct; and at the same time and place had surrendered the said Shaeffer into the custody of said constable, in exoneration of their bail.

If the undertaking had been simply a statutory undertaking, this defense would have been available, but it is not. The code provides in such cases that "the defendants may give bail by causing a written undertaking to be executed in favor of the plaintiff to the effect that defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment of the court." (Civil Code, sec. 109.)

Thus it will be seen by the section just cited that there was no law requiring that the undertaking should contain any agreement on the part of defendants to pay the plaintiff whatever judgment he might recover against said Shaeffer in said action. Hence it is insisted by counsel on behalf of defendants that that part of the obligation should be disregarded and treated as void, for the want of any consideration to support it.

Neither the undertaking nor a copy thereof appears in the record; but it is alleged in the complaint to be a bond or writing obligatory, and this allegation not having been denied in the answer, must be treated as true.

A bond or writing obligatory implies an instrument under seal, and in that class of instruments a consideration is always implied in law. So far as the record discloses, this bond or writing obligatory was voluntarily executed by defendants, and we see no sound reason why it should not be treated as good at common law, and be enforced as such between the parties. (12 Iowa, 573; *Barnes v. Webster*, 16 Mo. 258; 5 Mass. 314; 23 Iowa, 21; 16 B. Monroe, 556.)

If the bond was executed without consideration or obtained by fraud or mistake, the defendants should have so pleaded in their answer. We are not aware of any law, either statutory or common, which prohibits one party from agreeing in writing to pay the debt of another, nor is such an agreement contrary to public policy. Such contracts are directly authorized by the statute. (Civil Code, sec.

775, subd. 2.) Nor does it follow that a bond is necessarily invalid, though not authorized by the statute. It will be good as a common law bond, where it does not contravene public policy nor violate a statute, and be binding on the parties to it." (12 Iowa, 573.)

There being no error in the record, the judgment of the court below is affirmed.

EZEKIEL WRIGHT, Appellant, v. HARRISON YOUNG et al., Respondents.

EXECUTION—LEVY AND RETURN OF PERSONAL PROPERTY.—The mere levy on personal property, the property being subsequently returned, is not a satisfaction of the judgment, and furnishes no valid objection to the issue of another execution on the same judgment.

EXECUTION AGAINST REAL PROPERTY—INFORMALITY OF.—Where an execution commanded the sheriff "to levy upon the real estate, goods and chattels" of the defendants in the writ, instead of directing a resort to the personal property of such defendants first, and then a levy on the realty, it is informal, but not void.

IDEM—WAIVER.—Where two executions, of the same date and tenor, were issued upon the same judgment to the sheriff of the same county, and the return of such sheriff shows that he duly executed one writ, and that the other was returned to the clerk without any thing further or different being done with it, the proceeding was irregular, and might have been taken advantage of by a motion to quash. The failure to take advantage of such irregularity at the time is a waiver of it.

CONFIRMATION OF SALES ON EXECUTIONS UNDER TERRITORIAL STATUTES. When the state government superseded the territorial government, the laws of the territory were continued in force until the code took effect in 1863, and all sheriffs' deeds, whether made on executions issued by the district, circuit or county courts, were required to be submitted to the circuit court of the state for confirmation.

INDORSEMENTS ON SHERIFFS' DEEDS.—The omission to indorse the approval of the circuit court upon a sheriff's deed does not render the deed inoperative.

ORDER CONFIRMING SHERIFF'S SALE—EFFECT OF.—An order confirming a sheriff's sale is conclusive upon all questions relating to the sale; that is, as to the regularity of all proceedings after execution, and before confirmation.

APPEAL from Douglas County.

This is an action by the appellant to recover possession of certain real estate as the heir at law of one Jackson

Wright. The respondents claim under a sheriff's deed upon a sale on an execution issued October 1, 1862, in Jackson Wright's lifetime. The execution was issued out of the county court of Douglas county, upon a judgment therein against said Jackson Wright and two other persons for one hundred and fifty-two dollars and fifty-eight cents, including costs. The execution when offered in evidence, was objected to, and the appellant sought to impeach its validity by showing that other executions had been issued on the same judgment, and that under one of them, at least, personal property of one of the judgment creditors had been levied upon, sufficient in value to satisfy the judgment.

It appears that instead of one execution having been issued on the first day of October, 1862, there were two, and there is nothing showing upon which the sale of the real property was had. The personal property levied upon consisted of cattle, which the sheriff subsequently released by turning them out, and letting them go upon their accustomed range. The execution or executions upon which the sale was made commanded the sheriff to "levy upon the real estate, goods and chattels" of the defendants, instead of directing a resort to the personal property first. The findings in the court below were in favor of the respondents, and they had judgment accordingly.

W. W. Thayer and J. F. Gazley, for appellants:

A writ of execution irregularly issued is a nullity. (Herman on Ex., sec. 63.) An execution issued and levied, while the lien of the first is undisposed of, is irregular. (Id. sec. 88.) A levy cannot be made upon goods and chattels, and at the same time upon real property. This is a self-evident proposition, and it logically follows that an execution cannot be levied upon real property while a levy under a former execution upon personal property is undisposed of. The levy upon the chattel under the execution of May 26, 1862, was undisposed of. It could not be released except in the manner provided by law. (Id., secs. 159-169.) A party cannot have two concurrent writs at the same time. (Id.,

secs. 71, 233.) If goods are lost to the defendant by the officer, it will be a satisfaction of the debt to the extent of the property wasted. (Id., sec. 176; 1 Denio, 574; 12 Johns. 207.) If no sale is made for want of bidders, sheriff must adjourn the sale. (Or. Code, 1855, sec. 22; Crocker on Sheriffs, sec. 423.) A valid levy must first be disposed of before other property can be taken. (Herman on Ex., sec. 163; 12 Johns. 207.) A levy upon sufficient personal property of defendant is *prima facie* a satisfaction of the execution. (Herman on Ex., sec. 176; 8 Cal. 30; 11 Wend. 125.) In order to confirm sheriff's sale of real estate, the court must indorse its approval on the deed. (Code, 1855, sec. 28.)

The plaintiff purchasing under execution is chargeable with all irregularities. (2 Cains, 61.) A sheriff cannot sell real estate while there is a subsisting levy on personal property. (6 Wend. 562.) The two last simultaneous executions were issued for a sum in excess of what was due, and were void. (Herman on Ex., sec. 267; Code, 1855, sec. 5.)

Willis & Eglin, for respondents:

The evidence excepted to by plaintiff was properly admitted by the court inasmuch as the judgment, execution, sale, certificate of sale, approval of deed, and confirmation of sale, are proper evidence of title. (5 Or. 191.)

The conclusions of law excepted to are properly found because the confirmation of sale is a final adjudication touching the regularity of all proceedings taken in the execution of final process. It operates as a judgment, and cannot be attacked collaterally. (Herman on Ex., sec. 434; 4 Or. 232; 9 Cal. 426.) The objection to the regularity of the execution must be raised on motion before confirmation of sale or by suit to set aside the sheriff's deed. (62 N. Y. 623; 14 Cal. 138, 143; Herman on Ex., secs. 80, 81, 407.) The only question in this action on which a reversal of the judgment of the circuit court could be asked, if it be deemed to be material in the present action, is as to whether or not the levy made upon the twenty head of cattle, and the release of them by the sheriff, on not finding a purchaser or bidder, and turning them out upon their range

without fault of the execution creditor, is a satisfaction of the judgment of the county court.

A levy on sufficient personal property is not, *per se*, a satisfaction of the judgment, but is only a satisfaction *sub modo* and does not prohibit the execution creditor from issuing an *alias* execution if there has been no loss to the debtor from and through the misconduct of the officer. (23 Wend. 490-9; 3 McLean, 354, 542; 2 Hill, 329; 1 Cranch C. C. 283; 1 Denio, 574; Herman on Ex. 254; 15 Minn. 381; 13 Id. 407; 3 Wal. S. C. 688; 2 N. Y. 451; 4 E. D. Smith, 378; 22 Barb. 522; 28 Id. 476; 7 Abb. Pr. 347; 6 Cal. 47.

By the Court, SHATTUCK, J.:

It is conceded by the appellant's counsel that the respondents have a good title to the lands in controversy, if the execution sale under which they claim is valid.

The circuit court found that successive executions were issued on the judgment against the appellants' ancestor, and that personal property in amount sufficient to satisfy the judgment had been levied on; but that the levies were released and the property restored to the parties entitled to it. So that, in fact, nothing was made out of those levies. It does not appear from the evidence accompanying the bill of exceptions, that the defendants in the execution were deprived of their property, or lost anything whatever by reason of these levies, or by reason of any misconduct of the execution plaintiff or of the officer.

The alleged loss of some of the cattle levied on cannot, upon the evidence offered, be fairly attributed to the levy. They were released from the levy and returned to the pasture or range whence they were taken, and after that were lost. In such case, there being no loss to the debtor by reason of the levy, we hold that the mere levy on the personal property, it being subsequently returned, is not a satisfaction of the judgment, and furnishes no valid objection to the issue of another execution on the same judgment.

The execution on which the real property was sold, was not void upon its face because it commanded the sheriff

"to levy upon the real estate, goods and chattels of" the defendants, instead of directing a resort to the personal property and then a levy on the realty. It was informal, but it had the substance of all which the statute requires. It was not invalidated, because two executions of the same date, upon the same judgment, and of the same tenor, were issued to the sheriff of the same county. Such a proceeding was irregular, and might have been taken advantage of by a motion to quash; but the return of the officer shows that he received one writ, and executed it in due form and manner; and that the other was returned to the clerk without anything further or different being done with it. The failure of the appellants' ancestor to object at the time to this alleged irregularity, ought to be deemed a waiver of all objections on this ground.

But the whole ground and objection to this sale has been covered and passed upon by the proceedings found by the court below to have been had at the time of the delivery of the deed by the sheriff. The twelfth finding shows that after the time for redemption had expired, the sheriff who made the sale executed a deed to the purchaser of the property sold, and submitted the same to the circuit court for Douglas county, and that on the fourteenth day of May, 1863, said court approved the deed, and confirmed the sale. What the evidence was which was introduced before the court below on this point, the bill of exceptions fails to disclose. It must be presumed to have been legal evidence, and that no error was committed by admitting it. It is claimed, however, that this execution sale having been made on a judgment and process of the county court, the proceedings should have been returned, and the deed submitted for approval and confirmation to that court, and not to the circuit court, and that in any view of that point the deed is incomplete and incompetent as evidence, because the court did not indorse its approval in the deed as required by statute. (Stat. 1855, p. 125, sec. 28.)

The constitution of the state (sec. 7, art. xviii), continued all the laws of the territory in force, which were not inconsistent with the constitution. By construction and

uniform practice the jurisdiction and practice of the territorial district court were deemed transferred to the circuit court, and the territorial statutes, compiled and published in 1855, were recognized as the law of the state regulating and controlling the practice and decisions of the circuit court.

Those statutes provided as above quoted that a sheriff, in case of a sale of real property and no redemption, should execute a deed and submit it to the district court for approval. When the circuit court superseded the district court, such deeds whether made on a district court, a circuit court, or a county court execution, were submitted to the circuit court; the above provision of law being the only one in force relating to the approval of sheriff's deeds. Such, we understand, was the practice acquiesced in by the profession, and permitted by the courts, till the change of the laws, June 1, 1863.

We think it was a correct practice. The subject-matter of the proceeding was within the general jurisdiction of the circuit court, and there being no law directing the county court to exercise the authority, it fell within what may be termed the residuary jurisdiction of the circuit court provided by sec. 9, art. vii, of the constitution: "All judicial power, authority, and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit court."

The failure to indorse the approval on the deed does not render the deed ineffective. We conclude from the finding that the circuit court in 1863 did review the proceedings concerning the sale, and approved and confirmed them; which was the substantive thing to be done, and, as before said, we must presume that the court below found such decision and approval expressed in some of the modes in which a court expresses and preserves its orders. The neglect to comply with the mode of approval directed by the statute was at most only an irregularity, and not one affecting any substantial right. The statute provides, and this court has repeatedly held that an approval of the sale

by the court is conclusive upon all questions arising on the proceedings concerning the sale, that is upon all matters occurring after judgment, and prior to the order of confirmation. And we repeat the ruling in this case and hold that the objections to the sale in question in this case must be deemed disposed of by the order of approval and confirmation of sale; that the appellant's ancestor slept upon and waived his right, if he had any, by neglecting to make timely objections to the confirmation, and his heirs cannot now be heard to complain of irregularities.

WILLIAM STRONG, Administrator of the Estate of AMORY HOLBROOK, Respondent, v. W. H. BARNHART, Appellant.

JUDGMENT—EXECUTION ON PROCEEDING TO OBTAIN WRIT OF WHAT DEFENSE ADMISSIBLE—PRESUMPTIONS IN FAVOR OF JUDGMENT.—On a proceeding for leave to issue execution on a dormant judgment, such judgment cannot be questioned for want of jurisdiction, unless such want of jurisdiction appears on the record. In such a proceeding the same presumptions obtain in favor of the validity of the judgment that would obtain in case it was attacked collaterally, and the only defense admissible is either that there is no such judgment, or that it has been in some way discharged.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

Simpson & Waldo, for appellant:

The appellant herein objected in the court below to the granting of said motion, for the reason that it appeared by the whole record when introduced in evidence, that the proper legal steps required by law to be taken before the court could acquire jurisdiction of the person of the defendant, to authorize the rendition of such alleged judgment, had not been taken; and that, therefore, said alleged judgment was *coram non judice* and void.

The only evidence of the service of process upon William H. Barnhart was a certain paper found in the judgment-

roll, purporting to be a summons, and an indorsement upon it, which said indorsement reads as follows, to wit:

"I hereby certify that I served the within summons by delivering a certified copy of the same, together with a copy of the complaint, to Wm. H. Barnhart, this tenth day of December, 1855. WM. M. MILLAN, Sheriff."

There was no other evidence of the service of process on said Barnhart than what appeared by said alleged certificate so indorsed on said paper, and no pretense that there was any other, or that he appeared in the action.

This certificate fails in several particulars to show such service as the statute demands, to support a judgment by default: 1. There is no venue to the return. A venue is to be found in all the forms. (Crocker on Sheriff's Form No. 120; 1 Wait's Pr. 543.) 2. The statute required that the summons should be served "by the sheriff of the county where the defendant is found." (Gen. Laws, 1855, p. 86.) The return does not show this fact. 3. The statute also required that with the summons should be served a copy of the complaint, "prepared by the plaintiff, his agent or attorney." The return does not show that the copy of the complaint served was so certified, or that it was certified at all. 4. It does not appear from the return who certified to the copy of the summons alleged to be served. 5. The statute required the return to state the place of service. This it does not do. "From the time of the service of the summons in an action at law, the court shall be deemed to have acquired jurisdiction." (Gen. Laws, 1855, p. 88.)

The statute has prescribed the process by which jurisdiction of the person is acquired. The service must be made by certain authorized persons in a certain way, and with definite restrictions as to time and place. (4 Or. 11, 17, 18; 26 Wisc. 390.) The person, the time, the place, the manner, are all essential ingredients in a due service of process.

"In order to a legal service, the service must be, of course, by some one authorized, as well by his personal capacity to act, as by the existence of the particular parts

which impart the authority or control the mode of action. The mere fact that A. serves a paper, is not even *prima facie* evidence of his right to serve it. He must be the person described in the statute, and must act in the manner prescribed by law. This is necessary, in order to give him his authority, and this must appear by the record in order to show the authority. The validity of the act depends upon its being authorized, and this must appear in the record." (*McMillan v. Reynolds,* 11 Cal. 379.)

Now, that the proof of the due service of process as shown by the bill of exceptions is imperfect, at least, is certain. But the respondent assumes that this imperfection is of no consequence; that "the jurisdiction of a superior court is presumed;" that it is only the proof of service that is imperfect; that the fact of service is not shown to be faulty, and hence will be presumed by the court to have been regular and well made.

A court sits to "hear and determine." It does not find evidence or furnish proof of facts of which by law it does not take judicial knowledge. The case before the court depends upon a jurisdictional fact, which was required to be established and proved by parties authorized by law to make such proof, and to be proved in a certain way. The proof actually made was not such as the law required; that fact appears upon the face of the record. It is a rule as old as the common law, that no man shall be deprived of his property without due process of law; and, "the corner-stone of a proceeding at common law was, that no judgment could be given against a defendant unless he appeared in the action. Out of this important fact grew the reasonable presumption that the record was absolutely true, and the court had jurisdiction to render the judgment. But the law ceases with the reason of it." "It had its origin and is only applicable to a procedure in which judgment could not be given against a defendant, unless he was not only personally summoned, but was arrested and appeared in the action. If he did not appear, his goods and the profits of his lands might be restrained, *ad infinitum,* to compel an appearance; or, if he absconded, he might be outlawed,

but no judgment could be given against him in the action until he appeared, or was heard." (3 Bl. Com. 280, *et seq.*; *Hess v. Cole*, 3 Zab. 116; *Neff v. Pennoyer*, March, 1875.)

In the case of *Harris v. Hardman*, 14 How. 334, a defective return of service upon which a judgment by default was rendered, was held insufficient to give the court jurisdiction, and that such judgment was void. The return was as follows: "Executed on the defendant Hardman by leaving a true copy at his residence." The section of the statute of Mississippi, under which the service was made, was similar to our own. (Civ. Code, subd. 5, sec. 54.) The principle enunciated in *Harris v. Hardman* is directly in point—that to support a judgment by default, where the record is made up *ex parte*, the return of service must show that the defendant has been regularly summoned.

In *Wilson v. Greathouse*, 1 Scam. 174, a return in these words: "Executed on the within defendant by his reading the within," was held insufficient. That a judgment by default on such a return of service, was void. The statute required that the service should be made by reading. The defect in the return was that the date of service was not stated, so that the court could determine whether process had been served within the time required by law before the defendant could be in default. It did not seem to occur to the court that this fact might be presumed. The judgment was that of a justice of the peace, but the court announced principles applicable to all courts where the method of acquiring jurisdiction is by summons directed to the defendant. However, in *Parson v. Dwire*, 23 Ill. 574, the judgment by default was that of a court of superior jurisdiction, and a return less defective than the preceding, was held insufficient to give the court jurisdiction of the person of the defendant; and it was further decided that "the judgment was utterly void, and as such could be objected to at any time, and in any proceeding, whether direct or collateral."

So in *Gilbreath v. Kuykendall*, 1 Ark. 52, where the summons was returned served "by reading the same to him," without stating to the defendant, and it not appearing by

other parts of the return that such was the fact, the return was considered too indefinite and uncertain; from this defect alone it would seem "to be the foundation of a judgment by default." The return ought to show, "with reasonable certainty, the time, place, and manner of service, and the name of the person or party upon whom it was made, so that it may appear to the court that the service was made in conformity with the provisions of the statute, upon the person or party named in the writ, at a proper time and within the jurisdiction of the officer making it." (2 Mass. 154; 13 Id. 483; *Ex parte* Cross, 7 Ark. 44; *Graves v. Robertson*, 22 Texas, 130; 20 Texas, 130.) *Dawson v. The State Bank*, 3 Ark. 505, is to the same effect.

O'Brien v. S. F. and T. Canal Co., 10 Cal. 343, was also a judgment by default. The return of the sheriff that he served the summons "upon James Steel, one of the proprietors of the company," was held an insufficient service upon a corporation to give the court jurisdiction. The return fails, says Field, J., to show that Steel was "president or head of the corporation, or secretary, cashier, or managing agent thereof;" yet, it would seem, if presumptions were admissible to fill out defective returns, the court might have presumed Steel to be one of these persons. A vital distinction between cases like these just cited, and another class of cases, lies in the fact that where a record is silent on a certain point, and a legal presumption is indulged in its favor, the presumption is not an invention of the court to supply the place of evidence that was not and could not have been before the court, but is a presumption that evidence was before the court of the fact on which the record is silent.

This was so in such cases as *Forbes v. Hyde*, 31 Cal., and *Hahn v. Kelly*, 34 Cal. Thus, in *Hahn v. Kelly*, 34 Cal., the point was made that the judgment was void, because the affidavit of publication of summons did not show that the affiant was printer, foreman, or principal clerk of the newspaper in which the summons was published. But "it is to be presumed," says the court, in the latter case, p. 421, "that such evidence was furnished to the court before the judgment was rendered."

The proof of service upon which the judgment against the appellant was rendered, appears on the face of the record. There is no room for any presumption in favor of the validity of the judgment. It must stand or fall, as his proof is good or bad. The presumption at common law, to illustrate by an application to this case, was not that the person serving the summons made a regular legal service, although the fact does not appear by the certificate, but that the fact that he did make such a service was shown to the court by other proof.

The respondent endeavors to make the rule applicable to this case by contending that, although the return does not show upon its face a regular service, yet, for aught that appears from the return, the summons might have been regular, and hence the court must presume it to have been so. But can that be a correct rule of law, which calls upon a court to presume that to be true which is incontestibly false? Whether the service was regular in fact, or whether not regular, cannot be known by this court, and could not have been known by the court rendering the judgment. But the proof now before this court was certainly the proof and the only proof before that. The statute prescribes how proof of service shall be made, and the record shows that proof of service was before the court, and what that proof was. It cannot be presumed against the face of the record that there was any other or different proof. Actual records would lose their value somewhat if, whenever a record was found defective, another could be created by presumption to supply its place. There is not a case in our own reports, hereafter to be cited, or elsewhere, where the judgment could not have been upheld by such an unfailing remedy for bad records. (*Galpin v. Page*, 18 Wall. 366; 14 Wisc. 35; 4 Or. 14, 15, 18, 19.)

The validity of the judgment depends, then, solely on the sufficiency or insufficiency of the proof of jurisdiction over the person of the defendant, set forth in the bill of exceptions. The insufficiency of this proof is manifest. In *Trullenger v. Todd*, 5 Or. 36, a judgment by default was declared void, because the return of service of summons

failed to disclose the fact that the defendant could not be found. In *Harris v. Hardman,* heretofore cited, the same defect occurred in the return, and the same view was taken of such defect as in *Trullenger v. Todd. Trullenger v. Todd* announces distinctly that the presumption of jurisdiction, or, in other words, the presumption in favor of the record, is wanting where the record itself discloses that the proof of the service of summons upon the defendant was too defective to warrant the entry of judgment against him. The method of attacking the judgment by appeal, had nothing to do with the decision. The judgment was set aside because it was void.

The want of jurisdiction may not appear. But if a judgment is set aside on appeal, for want of jurisdiction to enter it, and the same evidence of such want of jurisdiction appears in any collateral proceeding, it ought to be set aside as well. There can be no distinction in law, or reason between a direct and collateral attack on a judgment, when its invalidity is shown by the record itself. (See, also, *Smith v. Ellendale Mill Co.,* 4 Or. 70; *Willamette Falls Co. v. Williams,* 1 Or. 112.)

Besides, the statute explicitly declares that the return "must" state the place of service. Can the court dispense with this provision of the service? As a provision of the statute it is a law; and is not a return made in plain violation of it, incurably defective?

In *Heatherly v. Hadley,* 4 Or. 1, the proof of the service of summons did not show that a copy of the complaint certified "by the plaintiff, his agent or attorney" was served with the summons. In a direct attack, this defect was held fatal to the decree rendered on such service. The argument, heretofore, has been applicable to collateral attacks, but in *Hunsaker v. Coffin,* 2 Or. 112, this court declared a motion under the statute to revive a judgment to be, not a collateral, but a direct proceeding. The case of *Heatherly v. Hadley,* is, therefore, precisely in point; for the certificate in this case fails to show that the copy of the complaint served was certified at all.

Thayer & Williams and William Strong, for respondent:

Does this record show that the court rendering the judgment did not have jurisdiction of the person of defendant Barnhart? This must be shown affirmatively, because if the record shows nothing as to the manner in which jurisdiction of the person was acquired, it is conclusively presumed to have had such jurisdiction, the court where the judgment was rendered being a court of record, having common law jurisdiction. (Freem. on Judg. 126; Cooly's Const. Lim. 406, *et sub* and notes.) The plea to a *scire facias,* is *nul tiel* record, payment, etc. (Payne and Durer, 424.) Questions which go to impeach the record cannot be raised upon a *scire facias.* (4 Cow. 457; 40 Geo. 148; Freem. on Judg., sec. 445 and notes.)

The objection is upon the insufficiency of the service. That it was not made by any duly authorized officer. That the person serving it does not appear to have been the sheriff of Multnomah county. While we are ready to admit that the return is informal, and that possibly a judgment taken by default upon such a return might be reversed upon error, yet we do insist that the judgment is not void. The return is signed, "Wm. McMillan, Sheriff." The court is presumed to know its own officers, and officers are presumed to act within their jurisdiction.

We take the ground that even if it were true that Wm. McMillan was not sheriff, the judgment cannot for this reason be impeached in this proceeding. This record does not show that the writ was not properly served by a proper officer. McMillan subscribes himself as sheriff, and it is immaterial whether he was sheriff of Multnomah or of any other county in the state. Date of the service would give more than thirty days prior to the first day of the next term of the court to which the defendant is required to appear. The service was made on the tenth day of December, 1855 The next term of the court commenced on the first Monday in March, 1856. (Acts of 1855-56, 71.)

The counsel for appellant, upon the argument before the circuit court, referred to the case of *Hunsaker v. Coffin;* decided by this court in 1864. (2 Or. 107.) That case, how-

ever, is not in point, because the court there held that there was no legal summons, therefore no summons. The remark of the judge, in announcing the decision, that the case was between the same parties, and no tension of terms could make it a collateral proceeding, was not called for, and was *obiter*. It is so contrary to principle and authority, that it must have been inadvertently made.

The reason given for the *dictum*, that the motion is between the same parties, and the subject-matter the same, is equally applicable to the case of an action brought upon a judgment, where the record of the judgment is offered to prove its existence. The true rule is, that every proceeding is collateral except an appeal or writ of review, and they cannot be brought unless within the time limited by law. If the *dicta* is sound law, then proceedings by writ of review should be abolished. The same object can be accomplished by an objection to the validity of the judgment wherever it is sought to be enforced. (Cooley's Const. Lim. 406.)

The most that can be alleged against this return is that it does not show all that might be required, but it does not show anything inconsistent with a due service. In case of an attempted service of process, the presumption exists that the court considered and determined the question; whether the acts done were sufficient or insufficient. We refer to the following authorities: Freeman on Judg., secs. 125, 126, and the authorities cited in the notes; also, 2 Hill, 517; Cooly's Const. Lim. 406-409 and notes.

By the Court, BOISE, J.:

This is a proceeding under the statute for leave to issue an execution on a dormant judgment. The appellant herein objected in the court below to the granting of the motion for leave to issue execution for the reason that it appeared by the record of said dormant judgment, that there had been no proper service on the defendant Barnhart to give the court jurisdiction of his person, so as to render a valid judgment against him.

The return of this service, as appears in the record, is as follows:

"I hereby certify that I served the within summons by delivering a certified copy of the same, together with a copy of the complaint, to Wm. H. Barnhart, this tenth day of December, 1855.

"Wm. H. C. Millian, Sheriff."

There is no other evidence of the service of process on said Barnhart, in the judgment-roll. This service is indorsed on the summons.

It is claimed by the appellant that such a return did not give the court jurisdiction: 1. It is claimed that this return has no venue; 2. It does not show it was served by the sheriff of the county; 3. It does not show that a certified copy of the complaint was served; 4. It does not show in what county or state the process was served.

It is claimed that this judgment is absolutely void and not voidable, and that the judgment has no validity for any purpose, and can be attacked collaterally and impeached for want of jurisdiction of the court when offered in evidence in this case, provided this shall be regarded by the court as a collateral attack. But it is insisted that this is a continuation of the same suit, and that this is a direct, and not a collateral attack, and that there are no presumptions which will prevent inquiry behind this judgment in this case, and that the regularity of the proceedings of the court in rendering this judgment are as subject to inquiry now as on an appeal. In order to determine the effect that should be given to this judgment, it will be necessary to inquire what defense was interposed in this case.

This is a proceeding in the nature of a *scire facias*, which is a judicial writ to obtain execution on a judgment, and issues out of the court where the record is, and the same defenses only can be pleaded in this proceeding that were pleadable to a *scire facias*. The only pleas to a *scire facias* were either *nul tiel* record, or payment, accord and satisfaction, or some matter which showed that the judgment had been discharged. It is a maxim of the law, says Mr. Chitty, "that there can be no averment in pleading against the

validity of a record, though there may be against its operation, therefore no matter of defense can be pleaded which existed anterior to the recovery of the judgment."

The only defense then that can be set up to this judgment is either that there is no such judgment, or that it is in some way discharged. (1 Chitty Pl. 485; Freeman on Judgments, sec. 445; 13 How. Pr. 178.) It makes no difference whether this is considered a continuation of the original case or a new case on the judgment. For if this judgment were sued in another court of this state, and was offered in evidence, it would not be subject to be questioned for want of jurisdiction, unless such want of jurisdiction appeared in the record and showed that the pretended judgment was absolutely void, and consequently no judgment.

In this case we think, therefore, that the same presumptions in favor of the judgment obtain which would be entertained in its favor were it attacked collaterally. And we conclude from the well established rules on this subject that the presumptions obtain in favor of the validity of a judgment in all cases where its authority is invoked, unless the same is directly attacked by appeal or some other legal mode which opens the judgment and authorizes inquiry into the facts which were the subject of the judicial investigation and determination as the foundation of the judgment. As an authority to maintain the position that the facts on which the judgment was founded may now be open to inquiry, the appellants rely on the authority of the case of *Hunsaker v. Coffin*, 2 Or. 107. In that case the summons required the defendant to appear forthwith, and was therefore in direct contravention of the statute, and was void, and the service of such a summons would be simply void, and not an irregularity. So in that case the judgment was void, because on inspecting the judgment-roll it was found that there was no legal summons. In that case there is no recital in the record that the defendant had been duly summoned, so there was no record showing that the court passed on the question of jurisdiction except the presumption arising from the court having entered a judg-

ment in its journal, such a judgment being found in the journal. Jurisdiction would be presumed unless some other part of the record showed want of jurisdiction. In the case of *Hunsaker v. Coffin,* on looking into the judgment it was found an illegal summons had been served, and the record showed that the court did not have jurisdiction of the defendant Coffin. In that case the record taken altogether showed that the court did not have jurisdiction of the person, and the presumption arising from the appearance of the judgment in the journal was overcome. (Freeman on Judgments; *Hahn v. Kelly,* 34 Cal. 391.)

In the case of Hunsaker the court was evidently right in coming to the conclusion that the judgment was void in refusing the motion or execution. In that case there was no attempt to attack the judgment for any other reason than that it was null on its face, and the remark of the court that the case stood in a different position as to presumptions in its favor, than where the attack is collateral, was not necessary in giving judgment against the motion, and was *obiter,* for the judgment was void and could be used for no purpose. The case now before the court is different. There is a complaint and summons and an attempted service which is as follows:

"I hereby certify that I served the within summons by delivering a certified copy of the same together with a copy of the complaint to Wm. Barnhart, this tenth day of December, 1875. WM. MCMILLAN, Sheriff,"

This service is defective is not stating enough to show on its face that all the requirements of the statute in making the service had been complied with, nor does it show but what all these requirements had been complied with. It may have been in Multnomah county, by a sheriff of that county, and the copy of the complaint may have been properly certified. Now the question is, was this a defective service or no service at all? The service was in the record, and before the court. The court is presumed to have passed on this defective service and held it sufficient. Such a holding may have been erroneous, and could have

been corrected on appeal and the judgment reversed and sent to the court below for further proceedings, when the defective service could have been amended, provided the officers had done the acts necessary to make a good service, all of which were not mentioned in the record. This is different from a case where it appears that the court could not have jurisdiction. We think this service was irregular, and the court having held it sufficient, and no appeal being taken, that the jurisdiction of the court will be presumed.

Judgment of the court below affirmed.

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*THOMAS FARLEY, Respondent, v. P. C. PARKER, Appellant.

EVIDENCE—DEED OF PERSON NON COMPOS MENTIS MAY BE IMPEACHED.—The deed of a person *non compos mentis* is void, and when submitted to show title in an action of ejectment, may be impeached by evidence, showing the existence of that condition at the time of the execution of the deed.

WITNESS — OPINION OF INTIMATE ACQUAINTANCE.—Under section 696, subdivision 10 of the code of civil procedure, if the testimony shows that the witness is an intimate acquaintance of the person whose sanity is brought in question, his opinion is admissible, touching the mental sanity of such person, even though the witness should not, in express words, state the fact of such intimate acquaintance.

JURISDICTION — TERRITORIAL PROBATE COURTS. — The probate courts, under the territorial organization, were courts of limited and inferior jurisdiction.

APPEAL from Marion County.

The facts are stated in the opinion of the court.

A. C. Gibbs, for appellant:

A deed from an insane person, not under guardianship, is voidable only, not void, and creates a seisin. If the plaintiff had a remedy it was in equity to have the deed set aside, as an act of an insane person. A court of law is bound to enforce a written contract or deed; a court of equity may go behind either, and inquire into the condition of the parties, and the very right of the case between them. Thus Farley could not have his equitable estate inquired into in his action of ejectment. He is confined to his paper title—legal

* See 25, Am. Rep. 504.

estate. (1 Story's Eq. Jur. 10 ed. secs. 161, 437, 438; 2 Johns. Ch. 585, 596 and 597.)

Law and equity is not blended in Oregon. Farley had his election to bring a suit in equity or an action at law. He has chosen the latter, and is bound by his estate pleaded, which is purely legal, and not equitable. (Story's Eq. Jur. sec. 694; *Peck v. Newton,* 45 Barb. 173; *Griswold v. Miller,* 15 Barb. 520, 524; *L'Amaroux v. Crosby,* 2 Paige, 422; 5 Pick. 217; 11 Pick. 305; 6 Met. 415; 1 Gray, 437; 6 Id. 279.)

This is not only the settled doctrine of Massachusetts, but also of the common law. Mr. Justice Blackstone, in his Commentaries, vol. 11, p. 291, states the doctrine thus: "Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable but not actually void."

Chancellor Kent lays down the broad doctrine that "by the common law a deed made by a person *non compos* is voidable only and not void." (4 Kent, Com. 4th ed. 451; 3 J. J. Marshall, 660; 1 J. J. Marshall, 244, 245; 7 Dana (Ky.), 524; 3 Conn. 231; 15 Ohio (Griswold), 156; 54 Ill. 323; 33 Ill.; 32 Iowa, 524; 53 Maine, 451, 456; 48 N. H. 133; 17 Wend. 119, 134; 3 Barb. 556; 12 Id. 235, 327; 20 Id. 559; 2 Pick. 183; 32 Iowa, 524; 5 Seld. N. Y. 45; 24 Ind. 387; 1 Hill, 130; 9 N. Y. 45; 51 N. Y. 379; 17 N. Y. 270; 48 N. H. 133; 2 Am. R. 202, 205; 20 Barb. 559; 5 Dure, 130; 48 Barb. 109; 15 Barb. 520, 524.)

As the result of the investigations of Judge Washburn as to the weight of authorities, he fully sustains Mr. Justice Blackstone and Chancellor Kent. (3 Washb. Real Prop., 244, sec. 15; 2 Greenleaf, sec. 300 and note 4; and 1 Story's Eq. Jur., secs. 228, 229, 230, 437 and 694.)

The opinion of an intimate acquaintance respecting the mental sanity of a person, may be given. (Code, 250, sec. 10; 42 N. Y. 282; 34 Id. 170; 36 Id. 276; 24 Id. 298.)

His evidence did not show that he was an "intimate acquaintance," and there was no other evidence as to that, as the bill of exceptions shows. Decrees of probate courts

are only presumptive evidence, not conclusive in such matters. (*Hart v. Deamer*, 6 Wend. 497; *Griswold v. Miller*, 15 Barb. 520; 51 N. Y. 386; 2 Paige's Ch. 426, 427, note; *In re Morgan*, 7 Paige, 236; 2 Barb. Ch. 208; 2 Greenl. Ev. secs. 698 and 690; 2 Cowen & Hill's notes, 942, note 680; 1 Phil. Ev. with notes by Cowen & Hill, p. 375.)

The decree of a probate court granting letters of guardianship is void, if it does not appear that notice was given to the subject of it before the inquisition is taken at least ten days. (Stat. Or. 1855, p. 393, sec. 9; 5 Pick. Mass. 219; *Bates v. Delevan*, 5 Paige, 299; *Thompson v. Merchant's Bank*, 9 Paige, 216; Freeman on Judg. secs. 116, 117, 123; 5 Wend. 290; 10 Wend. 592; *Bloom v. Burdick*, 1 Hill. 130; Blackwell, 185-6.)

Dolph, Bronaugh, Dolph & Simon, and F. A. Chenoweth, for respondent:

A deed executed by an insane person is not voidable only but absolutely void; and that the pretended grantor upon recovering from his insanity, or his heir at law, in case he dies without ever being restored to reason, may sue for and recover the lands in ejectment, is abundantly settled by the authorities. The plain reason of the rule is that it requires two competent assenting minds to conclude a contract, and if one of the minds be insane, the contract is void *ab initio*, a nullity. (1 Pars. on Cont. 383, notes *a* and *b*; *Dexter v. Hall*, 15 Wall. 20-26; *Gibson v. Soper*, 6 Gray, 279; *Hoovy v. Hobson*, 53 Maine, 452; *Chew v. The Bank*, 14 Md. 317-318; *Miles v. Lingerman*, 24 Ind. 385; *Van Deusen v. Sweet*, 51 N. Y. 378.)

It is also established by the case of *Van Deusen v. Sweet*, 51 N. Y. 383-384, that "it was competent for the plaintiff to sustain the action by showing that Sweet, at the time of executing the deed to Jacobie, was of unsound mind, although no fraud was practiced upon him, in order to induce him to execute the deed, and although the incompetency of Sweet to transact business or execute a conveyance of his property had not been legally or judicially ascertained or declared at the time of or prior to the execution of said deed;" and again, "It was not merely void-

able, but absolutely void. It was, in fact, not his deed, never having had any legal existence or vitality. There was consequently nothing to be set aside by the interposition of a court of equity, or by recourse to an equitable action; but the fact of its absolute nullity was available to overcome and avoid the defense set up and interposed under it to defeat the plaintiff's claim and title."

The condition of mind of the person alleged to have been insane both before and after the main fact, may be shown as tending to evidence the condition of the party's mind at the time of the conveyance. (23 Penn. St. 117; 4 Conn. 203.) For the purpose of showing the condition of Michael Farley's mind on November 28, 1856, the deed to Colvin from him being dated——, 1856, we were allowed to read in evidence the paper, entitled in the notice of appeal, "Proceedings in the probate court in vacation, October 20, 1856." It appears from this transcript that the judgment was rendered by the court, and not in vacation by the judge.

The court of probate in Oregon is a court of superior and general jurisdiction, and unless it appears affirmatively from the record of its proceedings that it did not have jurisdiction of the person or subject-matter affected by its decision, the presumption of law is in favor of the judgment. (*Russell v. Lewis*, 3 Or. 380; *Heatherly v. Hadley*, 4 Id. 1; Stats. 1854, 313, sec. 13; *Crepps v. Durden*, 1 Smith's Lead. Cas. 1021-23.)

It does not appear affirmatively from this record that Michael Farley was not served with notice of that proceeding. It appears affirmatively only that he was not present at the hearing before the court; but the recital in the journal entry that the coroner's return showed that Michael Farley was found in his county, is more nearly affirmative proof that he was than that he was not served with notice. Whether a witness has shown such an intimate acquaintance with the person whose sanity is in question as to entitle him to express an opinion thereon, is a matter largely in the discretion of the court. (*Pittman v. Pittman*, 3 Or. 554.)

The judgment of the probate court of Douglas county, rendered on November 28, 1856, declaring said Michael Farley to have been insane, is conclusive evidence of his insanity, so long as the same remains unreversed and unimpeached. This charge referred to the proceedings in probate court, etc., a copy of which is hereto given in this bill of exceptions, and there was no evidence in the case referring to any other judgment or proceeding in any other probate court. By the statute of Oregon in force when said adjudication of insanity was had, the jurisdiction over that matter was expressly conferred upon the probate court. (Stats. 1854, 362, sec. 9-10.)

That court was a court of superior jurisdiction, and if it obtained jurisdiction of the person of Michael Farley, which, as we have already argued, is to be presumed, unless the contrary appears affirmatively from the record, then it is a well established principle that the judgment of said court in the premises is conclusive as to the questions determined therein while it stands unreversed. (*Swift v. Stark*, 2 Or. 99; *Warner v. Myers*, 3 Id. 218; 1 Greenl. Ev., sec. 528; Code, 254-55, sec. 728, subd. 1.)

By the Court, PRIM, C. J.:

This is an action to recover the possession of real property. The respondent claims to own the undivided one-sixth part of eighty acres of land, as one of the heirs at law of Michael Farley deceased.

The answer denies the allegations of the complaint, and alleges that one Colvin is the owner of said land, and that appellant is in the possession thereof under a contract of purchase from said Colvin.

The replication puts in issue the affirmative allegations in the answer. Respondent obtained a verdict and judgment in the court below, from which appellant appeals to this court. Both parties claim under Michael Farley, to whom patent was issued by the United States government for a donation claim of three hundred and twenty acres, of which the eighty acres in controversy is a part.

Appellant claims that Michael Farley, in his life-time,

sold and conveyed the land in question to said Colvin, and respondent claims that at the time of the execution of said deed Michael Farley was insane, and so the deed was and is void, and the title never passed out of Michael Farley.

After the plaintiff rested his case the defendants' counsel offered in evidence a deed from Michael Farley to Thomas Colvin, under whom, by conveyances, the defendant claims title and rested.

Plaintiff's counsel then undertook to show, by evidence, that the deed to Colvin was void on the ground that the said Michael Farley was insane at the time said deed was executed. To show the insanity of said Michael Farley, the plaintiff, by his counsel, offered to read in evidence the deposition of A. J. Swearinger, to which defendant, by his counsel, objected. The counsel of defendant based his objections to the admissions of this deposition on the following grounds: 1. The insanity of a person not under guardianship cannot be shown in an action of ejectment; 2. A deed given by an insane person not under guardianship is voidable, but not void; 3. The plaintiff's remedy, if he has any, is by suit in equity, and not by action at law.

Neither of these grounds, we think, were sufficient upon which to reject deposition. There appears to be some confusion in the cases reported as to whether a contract or deed executed by an insane person should be treated as void or only voidable. Mr. Parsons says: "The words void and voidable have often been very vaguely used when applied to contracts, and the word void has been frequently used to denote merely that the contract was not binding, and as expressing no opinion whether such contract might or might not be ratified." (Pars. on Cont. 329, note b.)

This being an action to recover real property, and defendant claiming title under a deed executed by said Michael Farley to Colvin, it was necessary to produce said deed in evidence to sustain his title. And when thus produced, although appearing to be regular upon its face, we think plaintiff had a right to attack and impeach it by any evidence tending to show that it was not the deed of said Michael Farley. His signature may have been forged or obtained by fraud.

Or, as it is claimed in this case, may have been executed by him while insane, and not capable of executing a deed or any other instrument requiring volition.

In *Dexter v. Hall,* 15 Wall. 20, it was held that a power of attorney, executed by a lunatic, or a person *non compos mentis,* was absolutely void. That was an action of ejectment, and the question presented here was ably argued and thoroughly considered by the court in that case.

Mr. Justice Strong, in delivering the opinion of the court, says: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding and acting in the ordinary affairs of life can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions."

The fundamental idea of a contract is, that it requires the assent of two minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind, and therefore cannot make a contract.

In *Van Deusen v. Sweet,* 51 N. Y. 383, which was also an action of ejectment, it was held competent to show that Sweet was of insane mind at the time of executing a certain deed, although no fraud had been practiced upon him to induce its execution, and although his competency to transact business had not been legally or judicially ascertained prior to or at the time of its execution.

And it was further held that a deed executed by a person *non compos mentis,* was not only voidable but absolutely void. As we understand these decisions, they mean simply that a deed regular on its face will be declared void whenever the testimony submitted shows that the person executing it was at the time of its execution *non compos mentis.*

The deposition of Swearinger was further objected to by defendant on the ground that it had not been shown that the witness was intimately acquainted with Michael Farley. This witness not being a professional witness could not give his opinion as to the mental sanity of a party, unless shown to be an intimate acquaintance. (Civ. Code, 250, sec. 696, sub. 10.) It does not appear in the deposition of

this witness that he stated directly in words that he was an intimate acquaintance of said Farley, nor do we think it was necessary that he should have done so, in order to bring him within the rule laid down in the statute.

When such evidence is offered, the court may look into the facts stated by the witness, in order to determine whether he was an intimate acquaintance of the party, and whether the facts stated are sufficient upon which to base an opinion as to the sanity of the party.

Applying this rule to this deposition, we think it sufficiently appears that the witness was an intimate acquaintance of said Farley, and that the facts stated by him were sufficient upon which to base an opinion as to his mental sanity. And by applying the same rule to the deposition of Reed, we think the opinion of that witness was properly rejected by the court as being nothing more than a casual acquaintance. It follows from the views therein expressed that there was no error committed by the court in its rulings upon either of these depositions. For the purpose of showing the condition of Michael Farley's mind on November 28, 1856, just after the execution of the deed to Colvin, the plaintiff was allowed to read in evidence certain papers, called "Proceedings in the probate court in vacation, October 20, 1856." Defendant, by his counsel, objected to the admission of these papers on the following grounds: 1. That it did not appear that the said probate judge had jurisdiction of the person of the said Michael Farley; 2. That no paper, notice, or citation had been issued in said proceedings; 3. That no notice of said proceeding had been served upon him, and there was no appearance by or for him, and the said proceedings were void."

These objections were overruled by the court, to which ruling the defendant, by his counsel, duly excepted, and assigns here as error upon which he relies to reverse the judgment. It was insisted by counsel on behalf of plaintiff that "the court of probate in Oregon is a court of superior and general jurisdiction, and unless it appears affirmatively from the record of its proceedings that it did not have jurisdiction of the person or subject-matter affected by its decis-

ion, the presumption of law is in favor of the judgment. (*Russel v. Lewis, Tustin v. Gaunt,* and several other decisions made by this court are cited and relied upon to sustain this proposition. But these decisions, we think, are not applicable, for the reason that the judgment or proceeding in question was not made by a court of general and superior jurisdiction, but appears to have been a proceeding had in 1856, under the territorial organization prior to the formation and adoption of the state constitution.

The probate court was at that time composed of a single judge, and had no clerk, and we think was a court of limited and inferior jurisdiction, and therefore not entitled to any presumptions in favor of its jurisdiction. The facts necessary to give it jurisdiction should appear among its proceedings, or they must be treated as void.

In *Tustin v. Gaunt,* it was decided by this court that "the constitution of this state having provided that county courts shall be courts of record, having general jurisdiction, to be defined and limited by law; and the legislature having given them exclusive and original jurisdiction in all matters pertaining to probate courts, it was held that county courts in exercising judicial powers in such business, should be regarded as courts of general and superior jurisdiction."

That decision was based expressly upon the constitutional provision, and had no reference or application to the judgments and proceedings of probate courts, rendered prior to the adoption of the constitution.

The "proceedings" had in the probate court, on October 20, 1856, in relation to the insanity of Michael Farley, failing to disclose the facts necessary to give the court jurisdiction were a nullity, and should have been rejected by the court.

And the court below having committed error in admitting this evidence, the judgment is reversed and the cause remanded for a new trial.

MULTNOMAH COUNTY, Appellant, v. W. H. ADAMS, Respondent.

CONSTITUTIONALITY OF STATUTE AFFIRMED.—Section 158 of the charter of the city of Portland, as amended and approved October 28, 1874, does not contravene article IV, section 23, subdivision 1, of the state constitution.

APPEAL from Multnomah County.

This is an action brought by the county of Multnomah against W. H. Adams, for the recovery of certain fines collected by him from defendants in state cases. The complaint alleges that the plaintiff is a duly organized public corporation; that Adams is the police judge of the city of Portland, a duly organized municipal corporation; that in virtue of the incorporation act or charter, the police judge of said municipality is *ex officio* justice of the peace; that acting as such, he has enforced the provisions of the criminal code over which the justice's jurisdiction extends, and in so doing has imposed and collected fines amounting to four hundred and fifty-nine dollars. These fines the county seeks to recover. To this complaint a demurrer was interposed, which, after argument, was sustained, and the complaint dismissed. The court below based its ruling upon section 158 of the charter, which provides that "after July 1, 1875, all costs, fees and expenses taxed against or received from any defendant in a criminal proceeding before the police judge, either for the violation of a city ordinance or a law of the state, shall, when received or collected, be paid by said judge to the city treasurer, who shall give him duplicate receipts therefor, one of which shall be filed with the auditor, and all fines imposed by said judge, and penalties recovered before him, either for violation of a city ordinance or a law of the state, shall, when received or collected, be disposed of by him in like manner; and all fees taxed against or received from a party in a civil action for the service of said judge as justice of the peace, or the service of a policeman as a constable, shall, when received or collected, be disposed of by him in like manner, and said

judge shall not be entitled to have and receive any other or greater compensation for anything by him done or performed under or by virtue of this act than the salary provided for in section 160. Such police judge shall not be required to entertain any civil action."

Raleigh Stott, District Attorney, and C. A. Ball, for appellant:

Section 158 of the city charter, being a special and local law, is unconstitutional, for that it attempts to regulate the duties of the police judge when he acts as justice of the peace, which can only be done by a general law. The word "duties," as used in art IV., sec. 23, subd. 1 of the constitution, includes every act that the law requires a justice of the peace to perform. The respondent should follow sections 100 and 101 of the justice's code in the disposition of the fines imposed in state cases.

John M. Gearin, for respondent:

The duty of paying over fines to a designated officer is merely ministerial, and therefore the section under discussion is not violative of the constitution.

By the Court, MCARTHUR, J.:

That the legislative assembly, in creating the office of police judge of the city of Portland, had authority to invest that officer with the jurisdiction of a justice of the peace within the city limits, has been so often decided that the question must be regarded as fully settled, and such authority fully established. (*Ryan v. Harris,* 2 Or. 175; *Craig v. Mosier,* 2 Id. 323; *State v. Wiley,* 4 Id. 184; and *Portland v. Dening,* 5 Id. 160.) Nor is the principal question presented entirely new. In *Ryan v. Harris, supra,* we passed upon art. IV., sec. 23, subd. 1, of the state constitution, which declares that the legislative assembly shall not pass special and local laws regulating the jurisdiction and duties of justices of the peace, and held this prohibition to mean that justices of the peace in one locality should not be given greater jurisdiction over causes of action, nor greater powers, than in another locality. This we still hold,

and see no reason to question the correctness of the conclusion reached. The duty of paying over the fines to the city treasurer is a mere ministerial duty, and cannot be held to fall within the prohibition of the constitution which refers to powers, duties and jurisdiction in relation to causes of action, judicial proceedings, magisterial acts. Over these fines the legislative assembly had plenary power, and could authorize the payment of the same to the ctiy as well as to the county or to the school fund.

Judgment affirmed.

W. H. ADAMS, Appellant, v. MULTNOMAH COUNTY, Respondent.

MUNICIPAL OFFICER—COMPENSATION OF—LEGISLATURE MAY FIX.—The legislative assembly has the power to fix the compensation for all services required to be performed by a municipal officer, either in the original charter, or by amendment thereto, and to declare the method by which and the source from which he shall be paid.

IDEM—STATUTES CONSTRUED.—Section 158 of the charter of the city of Portland, cannot be construed to authorize the police judge, or the city, to collect from the county in which the city is situated, the fees in those state cases, tried before the police judge, in which the defendants have been unable to pay, or in which payment could not be enforced by process, or in those cases in which the prosecution failed.

APPEAL from Multnomah County.

The appellant at the December Term, 1876, of the county court of Multnomah county, presented a claim for the sum $950.00 for fees as justice of the peace, between September 30, 1875, and December 1, 1876, in certain criminal cases wherein the state of Oregon was plaintiff and diverse persons were defendants. The services were rendered by appellant, as justice of the peace, he being such justice by virtue of his holding the office of police judge, of the city of Portland in said county. The claim was not allowed. The matter was taken before the circuit court by writ of review, and after a hearing upon said writ, the proceedings in the county court were confirmed. From the judgment of the circuit court this appeal is taken. There was no dispute as to the fact of the performance of the services, or the amount,

and it was admitted that plaintiff claimed the right to collect said fees, only as trustee for the city.

John M. Gearin, for appellant.

Raleigh Stott, District Attorney, and C. A. Ball, for respondent.

By the Court, MCARTHUR, J.:

In this case the decision must turn upon the construction of the same section of the city charter of Portland that was under consideration in *Multnomah County v. Adams*, just decided. Among other things that section 158 declares that after a certain date "all costs, fees and expenses taxed against or received from any defendant in a criminal proceeding before the police judge, either for the violation of a city ordinance or a law of the state, shall, when received or collected, be paid by said judge to the city treasurer." We have already held that the legislative assembly had authority to invest the police judge with the jurisdiction of a justice of the peace within the city limits, and that that body has plenary power over the disposal of fines collected by him, and therefore had a perfect constitutional right to direct that such fines be paid into the city treasury rather than into the county treasury, and that they be used for city purposes rather than devoted to the schools or to the general fund of the county. It is also perfectly competent for the legislative assembly to fix the compensation for all services required to be performed by a municipal officer, either in the original charter or by amendment thereto and to declare the method by which and the sources from which he shall be paid. This is what that body has undertaken to do and what it has done in the case before us. By section 160 of the charter the salary of the police judge is fixed at eighteen hundred dollars per year, which sum it is declared "shall be a full and complete compensation for his services as police judge and as justice of the peace." This takes the matter entirely without the operation of the general laws in relation to the fees and compensation of justices of the peace so far as the police judge is concerned. He must

look to the city for his salary and cannot collect fees in state cases from the county. The main question is, whether under section 158 of the charter, as above quoted, the city of Portland may, through its police judge, recover from the county the fees and expenses in trials of state cases before said officer when the same are not lawfully chargeable against a defendant or when being lawfully chargeable such defendant is unable to pay them. To impose a liability of this character upon one public corporation in favor of another public corporation the law should be clear and unequivocal. The section under discussion, while it is very clear and unequivocal in prescribing and commanding the performance of a duty on the part of the police judge, cannot be held to warrant or authorize the recovery from the county. The only construction we are able to place upon it, consistent with the other conditions of the law as declared by us, is that the officer named must pay over to the city all the costs, expenses and fees which he may receive or collect from defendants in city or state cases. There his duty ends. He has no authority to proceed to collect from the county the fees, costs and expenses in state cases in which the same are not paid or in which collection cannot be enforced by process, for the reason that he cannot invoke the general laws in relation to justices of the peace upon this subject he having no personal right to recover such fees, costs or expenses, and for the further reason that the section cited cannot by any tension of terms be held to impose a liability upon the county to pay the same to the city.

Upon the question whether the remedy against the action of the county court sitting as a board of county commissioners in case of the rejection of a demand against the county is by writ of review we have not thought proper to pass, and expressly leave that question undecided, for the reason that the result of our opinion upon the main question prevents a recovery either by action or by special proceeding.

Judgment affirmed.

DAVID MONASTES, Guardian, Appellant, v. JOHN CATLIN, Respondent.

JURISDICTION—COUNTY COURTS.—The county courts in the exercise of judicial powers in the appointment of guardians of the persons and estates of minors and insane persons, are courts of general and superior jurisdiction.

IDEM.—The appointment of guardians for minors and insane persons is jurisdiction pertaining to probate courts within the meaning of section 12 of article VII of the constitution.

APPEAL from Columbia County. The facts are stated in the opinion of the court.

J. C. Moreland and T. A. McBride, for appellant.

B. Rillen, for respondent.

By the Court, WATSON, J.:

This action is brought by the appellant, David Monastes, guardian of the estate of Peggy McLane, a person of unsound mind, against John Catlin, the respondent, to recover the possession of a tract of land situated in Columbia county. It is admitted that before the guardian's sale sought to be proven by defendant, Peggy McLane was the owner in her own right in fee-simple of the tract of land in dispute, and that unless the order of the county court for Columbia county, which we are about to examine, was valid and sufficient to constitute C. A. Bradbury her guardian, the subsequent proceedings including the guardian's deed through which the defendant claims title, are void, and should not have been admitted in evidence by the court below; and that the judgment must be reversed. On the other hand, it is admitted by appellant that if the order is valid, the subsequent proceedings were sufficiently regular, and that there was no error in their admission in evidence by the court. The following is a copy of the order in question:

"John West, agent for Peggy McLane, sole heir at law of John McLane, deceased, late of this county, came into court and presented his petition, praying that a guardian may be appointed for the said Peggy McLane, and after an

examination of the said Peggy McLane, and after a full hearing of the matter, finds that she is of unsound mind, and wholly incapable of managing her own business, or of nominating her own guardian. Therefore, it is ordered that Clement A. Bradbury be and he is hereby appointed guardian for the said Peggy McLane, and authorized and empowered to have the care and custody of his said ward, and the management of all of her property and estate; and that he execute a bond as such guardian in the sum of one thousand dollars; and the said Bradbury having executed and filed his bond, which is hereby approved by the court, it is further ordered that letters of guardianship be issued to him."

The above order was made on the sixth day of February, 1860. No proof was made or offered at the trial to show that any notice was ever served upon Peggy McLane. Whether the order is valid or not depends upon the decision of the question, whether or not the county court of Columbia county was, on the sixth day of February, 1860, in the exercise of its authority to appoint guardians for insane persons, a court of general jurisdiction. If it was a court of limited jurisdiction, its jurisdiction over the person of Peggy McLane not appearing on the face of the order, and not having been shown by proof *aliunde*, its proceeding was void. On the other hand, if it was a court of general jurisdiction, its jurisdiction is presumed, and its record "imports absolute verity, and cannot therefore be collaterally impeached from without," (*Hahn v. Kelly*, 34 Cal. 402) and "when the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done." (Id.) We decided in the case of *Tustin v. Gaunt*, 4 Or. 305, after a full examination of the question, that "county courts in the exercise of judicial powers," in probate business, "should be regarded as courts of general and superior jurisdiction, and that whenever their proceedings and judgments come in question collaterally, they are entitled to all the legal presumptions pertaining to the records of courts of superior jurisdiction."

We based our decision in that case upon section 1 of article VII., of the constitution of Oregon, which provides "that the judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record having general jurisdiction to be defined, limited, and regulated by law, in accordance with this constitution. Justices of the peace may also be invested with limited judicial powers." And upon section 12 of article 7, which provides that "the county court shall have the jurisdiction pertaining to probate courts and boards of county commissioners," etc. In that case we reviewed the cases of *Thompson v. Multnomah County*, 2 Or. 37; *State of Oregon v. Officer*, 4 Or. 180, and *Johns v. Marion County*, 4 Or. 46, and decided that the principle denounced in those cases that the county court is a tribunal of inferior and limited jurisdiction, should be confined to the class of cases "in which the county court was engaged as a board of county commissioners in the laying out of county roads, which was purely county business as contradistinguished from probate business," and "that the court in the use of the language above referred to only intended to be understood as holding that these courts were courts of inferior and limited jurisdiction, when exercising judicial powers in the particular class of cases then under consideration."

We think that the principles announced in *Tustin v. Gaunt* are applicable to and decisive of this case. The constitution, in clear and positive terms, makes the county courts "courts of record, having general jurisdiction." There is but little force in the argument that their jurisdiction over the persons and estates of persons of unsound mind is conferred upon them by express statute. The jurisdiction of all of the courts of the state is conferred upon them, and their very existence is derived either from the organic or statute law.

Section 1 of article VII. of the constitution, after providing "that they shall be courts of record having general jurisdiction," adds the words "to be defined, limited and regulated by law in accordance with this constitution." We think

that in the exercise of all jurisdiction conferred upon them by laws in accordance with the constitution, except in the class of cases where they act as boards of county commissioners, they are by the plain words of the constitution courts of superior and general jurisdiction.

In the argument before us, the question has been argued whether or not the jurisdiction of the county courts in appointing guardians for persons of unsound mind is "jurisdiction pertaining to probate courts" within the meaning of that phrase as used in section 12 of article VII. of the constitution. The phrase has no legal definition. Courts of probate had no existence at common law. Those courts have been created, and their duties and jurisdiction defined by law in most if not all of the states of the union. In the majority of the states, at the time of the adoption of the constitution of this state, the authority to appoint guardians of the persons and estates of insane persons was vested in the probate courts. Under the provisional government and territorial government of Oregon up to the time of the adoption of the constitution, the appointment of guardians for minors and for insane persons was a part of the jurisdiction pertaining to probate courts.

We think the framers of the constitution of this state so understood and used that language in section 12 of article VII., and that under the constitution of this state, the county courts exercising judicial powers in the appointment of guardians for minors and insane persons are courts of general and superior jurisdiction.

It follows from this opinion that there is no error in the proceedings of the court below, and the judgment is affirmed.

LEWIS SPORES, Appellant, v. DAVID BOGGS, Respondent.

REPLEVIN—TITLE IN STRANGER A GOOD DEFENSE.—In an action to recover the possession of personal property, the defendant may plead property in himself or in another in bar of the action, and if he obtains a verdict, he is entitled to a return of the property.

IDEM—DEMAND OF ADMISSIONS.—In such action, if plaintiff relies upon the admissions in the answer to recover, he should not deny such admissions in his replication.

APPEAL from Lane County.

This is an action to recover the possession of a certain mare of the value of sixty dollars, alleged to be the property of the appellant. The answer denies the ownership, and right of possession of appellant, and alleges that the daughter of respondent, Anietia Boggs, is and was at the commencement of the action, the owner of the mare, and in possession of her. The replication denies each allegation of the answer. The jury found for the respondent. The appellant moved for judgment, nothwithstanding the verdict on the ground that respondent's disclaimer of ownership in himself in the property in dispute, entitles appellant to its possession.

The motion was denied, and judgment rendered for respondent. Whereupon Spores appealed.

Fitch & Fagan and J. M. Thompson, for appellant:

The plaintiff also filed a motion for judgment on the pleadings, notwithstanding the verdict, except for costs and disbursements, on the ground that defendant by his answer disclaimed all ownership to the property in dispute, disclaimed all possession, right of possession, or any right, title, interest or claim therein.

The court erred in entering judgment for more than the pleadings showed the defendant was entitled to. (1 Van Santv. Pl. 175, 277, 362, 367, 369, 474 and 691; 5 Or. 447; Code 134, sec. 140; Code 158, sec. 258, 259; Story's Eq. sec. 838; Steph. on Pl. 149; 1 Chit. on Pl. 559, 680 and 673; 25 N. Y. 266; 2 N. Y. 506; 3 Estee's Pl. 508 and 509; 6 Seld. 370; 24 Pick. 25; 18 Pick. 427; 3 B. Monroe 464; 4 Wend. 217.)

R. S. Strahan, John Burnett, and G. B. Dorris, for respondent:

Plea of property in a stranger is a good plea either in abatement or in bar, and entitles the party to a return without avowry, for the possession was illegally taken from him. (*Harrison v. McIntosh,* 1 John 384; *Waldman v. Broder,* 10 Cal. 378; *Vose v. Hart,* 12 Ill. 378; *Edwards v. Talcott,* 1

Gilman, 365; *Morss v. Stone*, 5 Barb. 516; *Tuley v. Mauzey*, 4 B. Mon. 5; *Quincy v. Hall*, 1 Pick. 357; *Collins v. Evans*, 15 Pick. 63; *Hoffman v. Noble*, 6 Metc. 68; *Hill v. Fellows*, 25 Ark. 11; *Hoeffner v. Stratton*, 57 Maine, 360; *Underwood v. White*, 45 Ills. 437.)

By the Court, PRIM, C. J.:

It is admitted that respondent was entitled to judgment for costs and disbursements of the action; but it is claimed that that part of the judgment which requires the plaintiff to return the mare to defendant is erroneous. This claim of error is based upon the ground that respondent in his answer disclaims either the ownership or possession of the mare in dispute; and upon the further fact that respondent alleges that Anietia Boggs, the daughter of the respondent, is the owner of and was in possession of said property at the commencement of the action.

If appellant intended to rely upon the admissions in the answer of respondent for recovery, he should have asked for judgment thereon instead of denying such admissions in his replication. All the issues of fact made by the pleadings having been submitted to the jury, the presumption is in favor of the correctness of the verdict, and that is in accordance with the evidence produced at the trial. At any rate it appears that the jury found that appellant was not the owner of the mare, nor entitled to the possession of the same; and it is sufficient for a defendant in that class of actions that the right of property is not in the plaintiff.

In the case of *Edwards v. Talcott*, 1 Gilman, 365, which is a case like this, the court say: In this action the defendant may plead in bar, property in himself or in a stranger, and if he succeed on the trial, he will be entitled to a return of the property. It is not necessary that he should connect himself with the title of the stranger. It is sufficient for him that the right of property is not in the plaintiff. The plaintiff must recover on the strength of his own title.

The judgment of the circuit court is affirmed.

*H. H. LUSE, Appellant, v. THE ISTHMUS TRANSIT RAILWAY CO., Respondent.

FINDINGS BY THE COURT, PRACTICE CONCERNING.—Where there is a failure in the findings of fact by the court, to find upon material matters, the party wishing to take advantage of such failure to find, should apply to the circuit court for a further and more specific finding on such matters, or procure them to be embodied in a bill of exceptions.

PRESIDENT AND AGENT OF CORPORATION, POWERS OF.—A railroad corporation conferred upon its president, by a by-law, authority to act as "business and financial agent" of the corporation. Thereafter, such officer executed, under the corporate seal, a mortgage upon a locomotive belonging to the corporation to secure a debt of the corporation: *Held*, that the authority of the president was confined to the ordinary business of the corporation; that the execution of the mortgage was without the scope of his authority, and that such mortgage was not a lien upon the property in question.

APPEAL from Coos County.

The respondent is a private corporation, with William Utter as its president. In addition to the powers conferred upon such officer by the general incorporation act of the state, he was business and financial agent of the corporation by one of its by-laws. As such president and agent, he executed a promissory note and mortgage upon one of the locomotives of the corporation, in favor of the appellant.

This action was brought to recover, under the mortgage, possession of the mortgaged property. By consent of the parties, the cause was tried by the court.

Among other facts, the court found that there was no order or direction of the directors of the corporation to Utter to execute the note and mortgage, and that at the time the mortgage was executed the property mortgaged was used on the railroad of the corporation. As conclusions of law, the court found that Utter exceeded his authority in executing the mortgage, that such mortgage created no lien upon the property in question, and that the appellant was not entitled to recover its possession.

The respondent recovered judgment and the appellant appealed.

The grounds of error relied upon in the appeal are stated in the opinion of the court.

* See 25, Am. Rep. 506.

S. H. Hazard, W. W. Thayer and R. S. Strahan, for appellant:

When trial is had by the court the findings must cover every material issue made by the pleading, and the conclusions of law must be consistent with the findings. (19 Cal. 102; *Bayley v. Clark and Chambers,* 2 Id. 305-474; 28 Id. 305; 15 Wisc. 259; 29 Mo. 21.)

The fourth finding is insufficient. It does not find as a matter of fact whether the respondent did or did not execute the note and mortgage described in complaint. Upon this point the finding ought to be explicit—not left to any kind of conjecture or inference. The defendant did or did not execute those papers, and this was the ultimate fact to be found by the court. The matter contained in said finding, viz.: "That at said date said William Utter, president and agent aforesaid, executed a promissory note in writing to plaintiff, to cover the indebtedness mentioned in the second finding, and at the same time to secure said note," executed the mortgage, were circumstances to be weighed by the court in reaching a conclusion on the ultimate fact to be found by the court. But they are only matters of evidence, and not the ultimate fact alleged in the complaint and denied by the answer.

The fifth finding is also wholly defective and insufficient. It simply finds "that there was no order or direction of the directors of said defendant to said William Utter to execute said note or mortgage." This is not a finding upon the ultimate fact in dispute—the one which must be decisive of the rights of the parties to the action. The question is, did the defendant execute the papers described in the complaint? Upon that question there is no finding whatever. (Angell & Ames on Corp., sec. 224.)

This finding does not amount to a complete negation of authority in Utter to execute the note and mortgage described in complaint. It was not necessary to his authority that he should have had either the order or direction of the directors; simply permission, express or implied, or recognition thereof afterwards, was enough. In conferring authority by a

principal upon an agent, it is scarcely ever done either by an order, direction or command. (16 Conn. 398; 17 Ill. 40, 272.)

The agency may be created either by the express words or acts of the principal, or it may be implied from his conduct and acquiescence. (Story on Agency, sec. 45.) And so, in relation to the nature and extent of the authority. (7 Hill, N. Y. 95.)

The court ought to have found that the defendant did make the payment described in complaint, and it ought then to have declared the effect of such payment. We claim that such recognition and payment amounted to a ratification, even though there may have been no original authority. (Story on Agency, secs. 55, 56, 92.) The third finding of fact is the finding of a general agency. In such case the principal will be responsible for all acts ostensibly within the authority of the agent. (1 Story on Contr., sec. 134; Story on Agency, secs. 126, 127.) Corporations are responsible for the acts of their agents in like manner and with like effect as natural persons. (*Fink v. Canyon Road Co.*, 5 Or.; Angell & Ames on Corp., secs. 224, 231, 281, 282, 284, 286, 292, 293, 297, 298, 299; Story on Agency, sec. 26, 52, 53, 54, 61, 73, 74, 100, 102, 105, 106.) Corporation may ratify act of agent same as natural person. (5 Hill, N. Y. 137; Angell & Ames on Corp. 304.)

J. M. Thompson, for respondent:

As to the first ground of error there is no issue made in the pleadings in relation to the payment of the five hundred and eighty-two dollars and seventy-two one-hundredths. The powers vested in the corporation are exercised by the directors or by their officers or agents under their direction. The president shall preside at all meetings of the directors, and perform such other special duties as they may prescribe. (Mis. Laws, 526, sec. 9.) This confines his authority simply to presiding at the meetings of the board, and he can do nothing else by virtue of his office, except by special authority of the directors.

A general agent is not clothed with unlimited powers,

but only with authority to act generally within the scope, practice, usage and course of business, but no authority goes so far as to authorize an agent of a railroad company to mortgage its property to secure a pre-existing debt, an act that could only be done by the directors at a meeting called in accordance with the by-laws. (Dunlap's Paley's Agency, 156, 200.)

The corporate powers can only be exercised by the directors when duly assembled, acting as a board. Conferring authority to sell and convey the property of the corporation is the exercise of a corporate power (see *Gashwater v. Wilson*, 33 Cal. 16; also 38 Cal. 590); and the authority to mortgage is as high a power as to sell and convey.

Where the agent of a railroad corporation assumes to make a contract in relation to the business of the company beyond the ordinary line of his employment, such contract will not bind the company, although he may become personally liable. (2 Red. on Rail. 114, sec. 4; Angell & Ames on Cor. sec. 303.)

The general agent of a corporation is not authorized to sell or convey the real estate, or to mortgage or pledge, as a security for a loan, the machinery of the company, or to create a loan on the property of the corporation for the security of its debts without specific authority from the board of directors, though it may be incidental to his power as agent to borrow money, give promissory notes, and do many other acts in the ordinary course of its business. (Angell & Ames on Cor. sec. 298; 2 Red. on Rail. (3d ed.) 582; 7 Conn. 219; 19 La. Ann. 202; 12 N. H. 205; 8 Head. 619; 1 Cas. Cor. 613; 20 Vt. 446-7; 12 Mass. 241-2; Abb. Dig. Law Cor. p. 8, sec. 60; p. 236, secs. 229, 230, 233.) Officers of corporations are special, not general agents, and persons dealing with such officers are charged with notice of the authority conferred on them. (52 Barb. 399; Story on Agency; sec. 73.) The secretary and treasurer of a corporation have no right to make loans or borrow money for the corporation without special authority. (60 N. Y. 533.)

The president and cashier of a corporation, unless specially authorized by the board of directors, have no power

to assign its shares in action to its creditor as security for the payment of a precedent debt, and an assessment so made is absolutely void. They have no right to do any act requiring the use of the corporate seal without the assent and authority of the board of directors; and whether the purchaser acts *bona fide* or not makes no difference. The case stands on the same footing as if no assessment had been made. (5 N. Y. 320, 336.) If the ratification by the corporation of the unauthorized contract of their agents consist in their having received the consideration of the contract, it must be proved that the corporation, through its proper officers, knew the terms of the contract, and upon what account the money was received by them. (Angell & Ames on Cor., sec. 304; 20 Cal. 602; 2 Gill & J. 248; 20 Md. 117; 34 N. H. 230; 8 Mich. 526; 26 Mo. 102; 4 Robt. 675; Abb. Dig. Law. Cor. 674-5, secs. 18-20.)

By the Court, SHATTUCK, J.:

The assignments of error in this case are substantially as follows: 1. The court erred in failing to find that a payment had been made on said mortgage, the particulars regarding the same, as to when and by whom made; 2. The court erred in omitting to find that Wm. Utter had done the entire business for said defendant since its existence, and drawn drafts and promissory notes in its name, and with its consent; 3. The court erred in its conclusions of law. The arguments of appellant's counsel assumes and suggests that the circuit court should not merely have found that Wm. Utter was president and business and financial agent of the corporation under the by-laws, but should also have set out in the finding the by-laws themselves, so that the court might interpret them, and determine therefrom the nature and extent of Utter's authority; that the by-law was a fact in itself to be considered and found, and that without this fact no correct conclusion of law, relative to the authority of the agent, can be formed. The counsel also assumes and suggests that the circumstances attending the alleged payment on the note ought to have been set out and found in detail, and that the

court should have decided the effect of such payments to be a ratification of Uttter's act in executing the mortgage.

We find nothing in this record to sustain these positions of counsel. Every material issue made by the pleadings has been met and determined by the findings of the circuit court. The main issue was the authority of Utter to execute the mortgage. The findings of the court are in effect that there was a by-law making Utter business and financial agent of the corporation, thereby conferring such powers only as are incident to the office of president, and implied from the terms "business and financial agent," and the court also finds that there was no special order or direction by the directors of the corporation to Utter to execute the mortgage.

The pleadings admit the payment without any averment on either side concerning time or circumstances, so that, as to payment, there was no issue, and the court had nothing to find. If there was in the by-laws of the corporation any express grant of general authority to the president to mortgage the property of the corporation, or any power conferred which the finding of the court does not imply, or if there was in the conduct of the corporation, relative to the payment or relative to Utter's management of its affairs anything in the nature of acquiescence in or ratification of Utter's acts in making this mortgage more than is implied from the admitted fact of payment, which counsel desired should appear in the record, they should have applied to the circuit court for a further and more specific finding on these matters, or procured them to be embodied in a bill of exceptions. Now, if these particular matters appear to be necessarily involved in the issues made, or to be suggested by the pleadings, they were matters arising in the evidence, if at all; and the mere failure by the circuit court to find them in detail is no cause for reversing the judgment. The appeal must be decided by what the pleadings and the findings of the circuit court disclose.

Assuming that Wm. Utter, in the capacity of president, and financial agent, and pretending to act for the corporation; in its name and using its corporate seal, executed the

mortgage set out in the complaint, the question of the authority of Utter, and the validity of the mortgage, as a lien on the property of the corporation, is to be determined by the third and fifth findings of the circuit court. These findings in effect say that Utter, at the date of the mortgage, was president and business and financial agent of the corporation, and that there was no order or direction of the directors of the corporation to Utter to execute said note or mortgage. Do these findings authorize the conclusion that Utter had authority to mortgage the locomotive in question? If they do the judgment should be reversed. Otherwise it should be affirmed. The solution of the question requires a determination of what authority is implied by the terms "president, business and financial agent of the corporation."

Referring to the general incorporation law of this state, section 9, we find that the president of a corporation is authorized to preside at the meetings of the directors, and "to perform such other special duties as the directors may authorize." By section 11, he is authorized to act as inspector of corporation elections, and to certify who are elected directors. No other authority seems to be conferred by the general law, on the president of the corporation. All other authority, except to preside at the meeting, be inspector of elections, and certify who are elected directors, must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers under our law are exercised by the directors.

In this case then, the fact that Utter was president did not, itself, imply the authority claimed for him. What power he had must be found confirmed, as this case is presented, by the by-laws. These simply appoint him, according to the finding, "business and financial agent." Do these terms imply an authority to mortgage the property of the corporation? A great variety of acts may unquestionably be included within the function of a "business and financial agent." But this court in *Fink v. The Canyon Road Co.*, 5 Or. 305, indicated what ought to be the limitation of the authority of such agents. It said, "Corporations are certainly

bound by their simple contracts, and by other acts of their officers and agents made and performed in the discharge of their ordinary duties; and the courts have carried this doctrine so far as to hold, that they may take notice of the general nature of the duties of a cashier, in and about a banking office, and without evidence of usage or express authority, hold him authorized to do all incidental acts necessary to the performance of those general duties. (*Watson v. Bennet et al.*, 12 Barb. 196.) This case presses closely upon the very verge of the law, and further, we think the courts ought not to go."

The doctrine here recognized is that the acts of a general agent, which will be binding on the corporation without express and special authority, and acts done in the discharge of "ordinary duties." And Mr. Redfield holds, 2 Redfield on Railways, 582, that the general business agents of a company have only authority to transact those functions of the company which come under the general denomination of business. All the business of a company does not imply anything but ordinary business, "what is called the proper business of such a company," that is, in the case of a railway, the construction and operation of their road. It requires no argument or evidence, we think, to render it apparent that this attempt of Utter to mortgage—in effect to sell—the locomotive which was in actual use on the company's road, for a precedent debt, was beyond and outside of the ordinary business of the corporation. It was not necessarily incident to the construction or operation of the company's road, but was rather a stride in the direction of annihilating its business, and defeating the operation of the road.

The use of the corporate seal by Utter in his attempt to execute this mortgage, does not add anything to the validity of the instrument, when its validity, as the deed of the corporation, is disputed. It seems to be assumed, in this case, that the instrument was one that ought to be executed under the corporate seal, and something seems to be claimed for the instrument, because it was so executed. But the corporate seal affixed does not make the writing the contract of the cor-

poration, unless it was affixed by authority (Angell and Ames on Corp., secs. 223-24), and the courts have held that "it is safe to say that when the sale, assignment, or transfer of the property of the corporation requires the use of the common seal, it cannot be made without the assent and authority of the board" of directors. (*Hoyt v. Thompson*, 5 N. Y. 335.)

There was, then, no error in the conclusions of law found by the circuit court, and the judgment below should be affirmed. It should be stated, however, that we do not understand that the question as to the validity of the promissory note referred to in the pleadings, or of the debt evidenced thereby is involved in this appeal, and upon that point we express no opinion.

Judgment affirmed.

THE STATE OF OREGON, Appellant, v. ALFRED CARR, Respondent.

INDICTMENT DOES NOT CHARGE MORE THAN ONE CRIME, WHEN.—When the statute makes the commission of different acts a crime, and such acts are stated disjunctively in the statute, the indictment may, as a general rule, embrace the whole in a single count, but it must use the conjunctive "and" when "or" occurs, else it will be defective for uncertainty.

IDEM—WHAT EVIDENCE WILL SUPPORT.—Dealing and playing and carrying on a "game of faro," at one sitting, and between the same parties, constitute but one offense, and an indictment therefor is supported when the commission of one of such acts, conjunctively stated, is proven.

STATUTE—SUFFICIENT DESCRIPTION OF OFFENSE IN.—It is not necessary to the validity of a statute that it shall describe the manner in which the prohibited game is played. It is sufficient if the game is described by name.

DESCRIPTION IN INDICTMENT.—In an indictment for carrying on a game of faro, the indictment is sufficient if it is as explicit in describing the offense as the statute is which creates it.

STATUTORY CONSTRUCTION—SECTION 11 OF THE GAMBLING ACT CONSTRUED.—The act of 1876, to prevent and punish gambling, makes gambling a misdemeanor punishable by fine and imprisonment until such fine is paid. Section 11 of the same act provides that all fines and forfeitures under the act shall be recovered by "an action at law," to be brought in the name of the state: *Held*, that a proceeding by indictment is an action at law, within the meaning of this section.

APPEAL from Multnomah County.

The respondent was indicted in the circuit court for Multnomah county under the gambling act, for dealing, playing and carrying on, as proprietor, a game of faro. The charging part of the indictment is as follows: The said Alfred Carr, on the thirtieth day of October, A. D. 1876, in the county of Multnomah, and state of Oregon, and at divers times between that time and the finding of this indictment, in the county and state aforesaid, did willfully and unlawfully deal, play and carry on, as the proprietor thereof, a game of faro, a banking game, played with cards for money and checks as representatives of money and value.

The respondent demurred to the indictment upon the grounds: 1. That it did not state facts sufficient to constitute a crime; 2. That it charged more than one crime.

The court sustained the demurrer, and the state appealed.

Raleigh Stott, Prosecuting Attorney, and C. A. Ball, for appellant.

J. C. Moreland and T. A. McBride, for respondent.

By the Court, BOISE, J.:

In considering the questions presented by these demurrers we will dispose of them in their reverse order. The Criminal Code provides (page 350, section 74) as follows: "The indictment must charge but one crime, and in one form only, except that when the crime may be committed by the use of different means, the indictment may allege the means in the alternative." When the statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count, but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective for uncertainty. (1 Bishop Crim. Pro., sec. 586; 14 Cal. 566; 15 Mass. 273; 15 Pick. 275; 6 Black. Ind. 109.) True, the offense is committed by dealing or playing, but we apprehend that dealing and playing and carrying on a "game of faro" all at the same time and at one sitting, and between the same parties, would constitute but one offense; and such an indictment may be

supported by showing that the defendant has done one of these things. We think, therefore, that the indictment is not defective in this respect.

In support of the other objection, that the indictment does not state the facts sufficient to constitute a crime, it is claimed by the respondent that the act of 1876, under which this indictment is found is uncertain and void; and it becomes our duty to construe this statute. The language of the statute on which this indictment is drawn is as follows: "Each and every person who shall deal, play, or carry on any game of faro," etc. It is contended that the word "faro" is of too general a meaning to describe a crime; that the statute should have described how the game of faro was played. We think this designation of the game by name is sufficient. The case of the *State v. Mann*, 2 Or. 238, is relied on as an authority. But that case is not in point, for there it was held that the statute was uncertain for the reason that no game was named. (1 Bishop Crim. Pro., sec. 586.) It is also contended that if the statute is sufficiently explicit, the indictment is not; that it should set out the facts which constitute the game, that the court may judge whether the facts constitute a game of faro. We think that the indictment being as explicit in describing the offense as the statute which creates it, it is sufficient in a case like this.

In *Commonwealth v. Welsh*, 5 Gray, 324, Judge Metcalf states the rule as follows: "A charge in an indictment may be made in the words of the statute without a particular statement of facts and circumstances, when by using these words the act in which an offense consists is fully, directly and expressly alleged without any uncertainty or ambiguity." In this case the statute states what acts shall constitute the offense, and the statements of those acts in the indictment show to the court that the offense has been committed. The indictment must state the acts necessary to be proved. In this case a witness may be called, and if he swears that respondent dealt and played at faro, then the crime is proved as alleged, and these are all the acts necessary to constitute the crime.

There is still another objection urged, and that is that the penalty as provided for in the act of 1876 must be recovered by an action, as provided by section 11 of the said act. In construing an act of the legislature it is a rule to consider all its provisions, and so construe each section as to give effect to the whole if this can be done. It is a rule also that an act shall be so construed as to accomplish the object for which it was enacted. A law should never be so construed as to defeat its intent. (Smith on Construction of Statutes, p. 671, sec. 527.)

This act was passed to prevent and punish gambling. The first section defines the offense, and then says that the person committing the offense "shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid." This section provides a mode of enforcing the penalty which is by indictment and conviction under the code of criminal procedure, and the remedy is complete by virtue of this section, unless the same is qualified and weakened by section 11 of the same act, which is as follows: "All fines and forfeitures under the provisions of this act shall be recovered by an action at law to be brought in the name of the state of Oregon. We think the counsel may have misapprehended the meaning of this section and thought that the words "action at law" meant civil action at law, but such is not the necessary signification of these words. A proceeding by indictment is an action at law. The criminal code, p. 349, sec. 67, provides that "all forms of pleadings in criminal actions heretofore existing are abolished," and that "hereafter the forms of pleading and the rules by which the sufficiency of pleadings is to be determined" are those prescribed by the code. Section 68 provides that the first pleading in each action on the part of the state shall be the indictment. By the code all criminal actions are in the name of the state as plaintiff (Criminal Code, p. 349, sec. 69, 70), and the provisions of section 11 of this act are not inconsistent with these provisions of the code or of section 1 of this act, and this view not only makes the act consistent with itself but also with the

code of criminal procedure. Section 11 simply provides what shall be done with the fines and forfeitures that shall be recovered for violations of the provisions of the act, and perhaps for the recovery of such forfeitures as are not to be recovered by indictment. This disposes of the various questions submitted in this case, and from the views above expressed we think there is error in the judgment of the circuit court, and that the same should be reversed and the cause remanded to the court below for further proceedings.

A. J. WATSON, Respondent, v. R. C. JANION & CO., Appellants.

SUBSEQUENT CONTRACT—DECREE OF PROOF TO ESTABLISH.—A subsequent contract will not operate to extinguish a former one between the same parties, unless it is expressly accepted by them for that purpose. The evidence must be clear and satisfactory that such was the intention of the parties.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

W. H. Effinger, for appellant:

The decision in this court must turn upon the law applicable to such facts as appear to have been found by the court below; and if it is certain that the substituted contract was, by the consent of the parties, as above—or by acts unequivocally evidencing such consent, taken in lieu of the written agreement (accepted as a substitute for it), the authorities seem to be clear that the only remedy to the plaintiff was upon the new contract. The whole point of the appeal is here. We hold it to be clear from the findings of fact, that the appellant and respondents, before the action was brought, regarded their new promise as a complete satisfaction of the old agreement; in fact, it seems that they executed it in part.

Upon this state of facts we claim that there was error in allowing the plaintiff below to have his recovery upon the

written lease. If it be said that in any event the plaintiff was entitled to a recovery, we reply that if he had waited until his cause of action had accrued upon the substituted agreement, we would then have been permitted to explain or defend our default in performance of the same. The new contract, by intention and in fact, was substituted for the old one. It was such a one as could have been enforced, and there was certainly no right of election left to the plaintiff.

The true rule in such cases has been laid down by Mr. Justice Redfield in *Babcock v. Hawkins,* 23 Vt. 561: "In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract." (2 Para. on Cont. 681-6, and notes; *Billings v. Vanclerbeck,* 23 Barb. 546; *Goodrich v. Stanley,* 24 Conn. 613.)

J. H. Woodward, for respondent:

The findings of the court show that it was the performance of the conditions of the new contract by the defendant which stood as the consideration for plaintiff's waiver of full performance of the covenants of the deed by defendant, and not his agreement to perform those conditions. No party can escape the obligation of his covenant under a sealed instrument, on the ground of a subsequent parol agreement, unless he show an executed consideration. (*Cumber v. Wane,* 1 Smith's L. Cas. 624; *Miller v. Hemphill,* 4 Eng. 496; 1 Taunton, 430; 11 Wend. 30; 13 Id. 73.) Sec. 743 Civil Code is not to the contrary.

You cannot pay one hundred and thirty dollars with one hundred dollars. (*Cumber v. Wane,* 1 Smith's L. Cas.; *Ryan v. Ward,* 48 N. Y. 204; *Hendrickson v. Beers,* 6 Bosw. 639.)

By the Court, PRIM, C. J.:

This was an action at law to recover money on a written lease, for the use and occupation of a certain building in the city of Portland. It is alleged in the complaint that

defendant agreed to pay one hundred and thirty dollars in gold coin per month, on the last day of each month, from the first day of January, 1873, to and including the thirty-first day of December, 1875. That default was made for the rent, so stipulated for the month of December, 1875, and that there is due plaintiff for said month, the sum of one hundred and thirty dollars.

Defendant admits the making of the lease as alleged and sets up in avoidance thereof, an agreement alleged to have been made between plaintiff and defendant on or about the —day of June, 1875, whereby it was agreed, upon sufficient consideration from one to the other, that for the months of August, September, October, November, and December, defendant should become the tenant of plaintiff for the monthly rent of one hundred dollars per month, and that said written lease mentioned in the complaint, should be annulled and avoided by the mutual consent of the parties.

The subsequent agreement set up in the answer is denied in the replication, and it is alleged that in the month of June or July, 1875, it was agreed that, in consideration that defendant would continue to rent and occupy the said premises beyond the time expressed in said written lease, and would give plaintiff three months prior notice of his intention to quit the premises, plaintiff would rebate thirty dollars per month of the rent thereafter to fall due on said lease. And it is further alleged that defendant failed, and neglected to comply with these conditions and promises so made by him.

The case was submitted to the court by the consent of the parties without the intervention of a jury.

The third finding of fact by the court is, "that on the thirty-first day of May, 1875, the defendant and the plaintiff had an oral agreement, or understanding each with the other, that the defendant should and would hold over and remain in the occupation of said leased premises after the expiration of the time stipulated in said written lease, and should and would give the plaintiff three months' notice of his intention to quit and surrender, and that the plaintiff would and should make a rebate to the defendant of thirty dollars a

month of the rent reserved by the written lease, and would accept one hundred dollars a month as the rent from and after June 1, 1875. The court also found that on December 31, 1875, at the expiration of said written lease, the defendant quit said premises and refused further to occupy the same; and that defendant after June, 1875, each month, commencing with June 1, 1875, until October 30, 1875, paid the plaintiff one hundred dollars as rent, and the plaintiff receipted therefor in writing expressing that the one hundred dollars so received was one month's rent. That by the terms of said written lease the defendant had covenanted to pay one hundred and thirty dollars rent per month till the thirty-first of December, 1875, and there was no other or further consideration for the agreement of May 31, 1875, for a rebate of thirty dollars a month except as set forth in the third finding, above set out.

The court below rendered judgment against defendant for the sum of one hundred and thirty dollars gold coin, and defendant appeals from the judgment.

It is claimed by counsel on behalf of defendant that the subsequent oral understanding had by the parties on the thirty-first day of May, 1875, was substituted by them in lieu of the original lease, and was accepted by the parties in full satisfaction and extinguishment of the same; and therefore, it is further claimed, that plaintiff must rely upon the new contract for his remedy. The case of *Babcock v. Hawkins*, 23 Vermont, 5, is cited and relied upon to sustain this proposition. In that case the judge in rendering the opinion of the court said, "We think it must be regarded as fully settled, that an agreement upon sufficient considerations fully executed, so as to have operated in the minds of the parties as a full satisfaction and settlement of a preceding contract or account between the parties is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract."

Upon an examination of the facts found in that case, it will be seen that they differ very materially from the facts found in this. That was an action on book account, and after commencement of the action, the defendant agreed to

give his note for the amount of the account, and agreed to pay the costs. Defendant immediately executed his note, and plaintiff receipted him in full settlement of all accounts up to date. In that case the contract was executed, while in this it was executory. In that case there was strong evidence tending to show that the note was received in satisfaction and settlement of the old debt, while in this it is not strong and satisfactory. Here the plaintiff promised to rebate thirty dollars per month from the rent, in consideration of the promise of defendant to rent and occupy the premises of plaintiff after the expiration of the written lease, and to give him three months' notice of his intention to quit, neither of which promises it appears were executed by defendant.

This subsequent agreement or understanding of the parties being merely executory in its nature, and defendant having failed to execute the promises and conditions on his part, and there being no clear and satisfactory evidence showing that it was received by the parties in full satisfaction and extinguishment of the old agreement, the plaintiff had his election either to sue upon the original contract, or upon the new promise. (2 Pars. on Cont. 683.) We understand the doctrine to be well settled "that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment;" the evidence, at any rate, "must be clear and satisfactory that such was the intention of the parties." (*Peters v. Beverly*, 10 Peters, 568; *James v. Hackley*, 16 John. 277; 14 John. 404.)

In this case it was not expressly agreed "that the subsequent agreement should be accepted by the parties in full satisfaction and extinguishment of the old agreement," nor was the "evidence clear and satisfactory that such was the intention of the parties."

There being no substantial error in the judgment of the court below, it is affirmed.

ANDREW J. KNOTT and LEVI KNOTT, Respondents, v. JOSEPH KNOTT, Appellant.

STATUTE OF FRAUDS—PARTERSHIP AGREEMENT.—Appellant and respondents, being each the owner of different tracts of land and of certain personal property, entered into a verbal agreement to sell their personal property, sell or lease their farms, remove to the city of Portland, and go into business as partners. This agreement was carried into effect. They thereafter sold their personal property, and turned the proceeds into a common fund, removed to Portland and entered into business there together. After their removal to Portland they conveyed their several farms to one Rice as a part of the consideration for the conveyance by him to appellant of a farm in Washington county. This farm was afterwards exchanged by appellant for a ferry and ferry franchise at the city of Portland; the appellant, with the consent of respondents, taking the legal title thereto in his own name: *Held*, 1. That the partnership agreement though not in writing, was valid; 2. That the partnership agreement might be proven by parol; 3. That the ferry and franchise became partnership property, and the appellant took the legal title thereto in trust for the partnership.

APPEAL from Multnomah County.

This suit is for a dissolution of a partnership and an account and sale of partnership property. The respondents are sons of the appellant. The parties to the suit were, in 1857, the owners, respectively, of different tracts of land in the Umpqua valley, and of certain personal property. The land of the appellant consisted of six hundred and forty acres, and that of the respondents of three hundred and twenty acres each.

The respondents allege that in that year (1857) the parties to the suit made a verbal agreement to sell their personal property, sell or lease their farms, remove to Portland, Oregon, and go into business together; that this agreement was carried into effect; that thereafter their personal property was sold and the proceeds of such sale were turned into a common fund; that the parties then removed to Portland and engaged in various pursuits together; that the business of the partnership was carried on in Joseph Knott's name. These allegations of a partnership agreement and of partnership business are denied.

After the removal to Portland, the parties conveyed their

several farms to one Rice in part consideration of a conveyance by Rice to the appellant, Joseph Knott, of a tract of land near Portland, known in the case as the Rice farm. Afterwards, the Rice farm was conveyed by appellant to one Stevens as a part of the purchase price of a ferry and ferry franchise transferred by Stevens to the appellant. The respondents allege that the title to the ferry property was taken in the appellant's name with their consent. This ferry and franchise constitutes the principal property of the alleged partnership. The matter was referred to a referee, who found in favor of the respondents. His report was confirmed by the circuit court, and a decree rendered accordingly, from which this appeal is taken.

Dolph, Bronaugh, Dolph & Simon and Thayer & Williams, for appellant.

E. A. Cronin, H. T. Bingham and Hill, Durham & Thompson, for respondents.

By the Court, WATSON, J.:

Before passing upon the questions of fact, presented by the transcript in this case, it becomes necessary for us to examine a question of law which has been ably argued before us at the hearing of this appeal. The greater portion of the property in dispute is real property, and the legal title is in Joseph Knott, the appellant. It is admitted by the respondents that the legal title to this property was taken in his name by mutual agreement, and with their consent. It appears that one-half section of land belonging to A. J. Knott, and one-half section of land belonging to Levi Knott, together with one section of land belonging to appellant and his wife, were conveyed by them to James E. Rice as the consideration for the purchase of a tract of land in Washington county, which was conveyed to appellant, and afterwards conveyed by him to James B. Stephens, in part payment for the ferry, now alleged to be a part of the property of the partnership.

It is claimed by the respondents that these conveyances were made in accordance with the partnership agreement

set up in the complaint, and that the equitable title thereby vested in the partners, Joseph Knott holding the legal title in trust for the partnership. It is admitted that the partnership, if formed at all, was formed by a verbal agreement, and that there is no written evidence of its existence unless the signing of a certain promissory note, given by appellant to Sol. Abraham, June 29, 1861, for the purchase-money of a band of cattle, to which he admits he signed his own name and those of A. J. Knott and Levi Knott, the respondents, is written evidence of the existence of the partnership. This note is before us, but we do not think it tends to prove the existence of a partnership between appellant and respondents. It is a simple promissory note, in the usual form, by which the makers jointly and severally promise to pay to Sol. Abraham or order the sum of nine thousand four hundred and seventy-five dollars and forty-two cents. It does not refer to any partnership and is not signed by any firm name. There is no presumption that persons who sign jointly a promissory note are partners. There is then no written evidence of the existence of the alleged partnership or of the partnership trust in the real property in dispute. It is essential that a partnership which is alleged to be the owner of land the legal title of which is in one of the partners, shall be created or proven by a memorandum in writing. It is not necessary for us in this case to declare what would be the law, if the partnership had been formed for the purpose of dealing in land. There is no evidence tending to show that the partnership claimed to exist in this case was formed for the purpose of dealing in land. The agreement set up in the complaint was to "enter into a partnership for the purposes of trade."

The evidence of respondent, A. J. Knott, is that the agreement was "to sell off all property, household furniture, rent, or lease our farms, put our money together, move to Portland, and go into business together as equal partners." The evidence further tends to prove that it was not then definitely known or understood what business they would engage in.

To adopt the language of the able report of the referee before whom this case was first tried in the court below:

"There is no evidence whatever that the alleged partnership in this case was formed for the purpose of dealing in land. The contract, according to the testimony was that the parties should sell off their personal property, rent or sell their farms, put their money together, and go into general business together as equal partners. There is not a syllable of evidence giving to show that the parties at that time contemplated any speculation in real estate, and the proof is that the alleged firm did not in fact deal in land in any way for nearly four years after its formation in 1857."

It is true that the greater portion of the partnership capital to be contributed by each was to be derived from the leasing or sale of the donation claims owned by them separately. But it was not all to be derived from the sale or rent of the real property. Some personal property was owned by each. That and their labor was to go into the community. Even if the agreement to sell or lease the real property had never been performed, the partnership might well have been carried on with the proceeds of the sale of the personal property and the joint labors of the partners. We think there is no doubt that such a partnership can be both found and proven by parol. We are also of the opinion that a partnership formed by a verbal agreement may become the equitable owner of real property whenever the use and ownership of such property is a necessary incident to the partnership business or is a necessary investment of the partnership funds. Mr. Parsons, in his work on Partnership, p. 363, uses the following language: "The general rule is undoubtedly this: Real estate purchased for partnership purposes and appropriated to those purposes and paid for by partnership funds, becomes partnership property; nor does it seem to be material in what manner or by what agency the land is bought, or in what name it stands?" On page seven of the same work he uses the following language: "Sometimes, though rarely, the question occurs whether the provisions of a partnership come within the requirements of the statute of frauds, and

must therefore, according to some authorities, be in writing, but this may be doubted."

In note D. to the same page he, after citing *Smith v. Burnham,* 3 Sumner, 35, and numerous other English and American authorities concludes, "that the result of the cases as well as of true reasoning, would seem to be that of the vice-chancellor in *Dale v. Hamilton.*" Mr. Parsons shows what was his understanding of the case of *Dale v. Hamilton,* by his quotation from the opinion in that case set out in the note above referred to in which he says: "The vice-chancellor (after a statement of the question raised), said when the proposition was first advanced by the plaintiff. I confess it appeared to me that to admit the argument to the extent contended for, would be virtually to repeal the statute of frauds or nearly so, but upon examination of the authorities he felt himself bound to hold that the plaintiff might first prove by parol the existence of the partnership as an independent fact, and that being established might then show by the same evidence his interest in the lands, considered as the substratum of the partnership." (See, also, *Levi v. Brush,* 1 Sweney, N. Y., 650; *Bopp v. Fox,* 63 Ill. 450.)

While there is a conflict of the authorities, many of the courts having followed the decision in *Smith v. Burnham,* we regard the doctrine laid down in *Dale v. Hamilton,* as better adapted to the course of business in this country where mercantile, manufacturing and various other partnerships are necessarily compelled in the course of their business, the investment of their capital and the collection of debts due them, to become the owners of real property.

Many of the cases go further than is necessary to admit the proof and sustain the partnership in this case. The answer sets up the conveyance by respondents to James E. Rice of their donation land claims as a part of the consideration for the conveyance by him to appellant of the farm in Washington county, and admits that they, at the time, received no other consideration, and that no contract was made by which they were to receive any other consideration for their land.

If the partnership agreement was that this land should be conveyed to Joseph Knott as the trustee and representative of the partnership, and if so much of the agreement while it remained executory could not have been proven or enforced certainly its entire performance took it out of the operation of the statute of frauds. It could make no difference whether respondents sold their land and paid the money received for it into the partnership fund to be paid to James E. Rice for the farm conveyed by him to appellant, or conveyed the land directly to him in payment for the farm.

This being our opinion of the law, we do not think the partnership agreement alleged to exist in this case, or the ownership of the lands in dispute are affected by the statute of frauds. We next proceed to consider the evidence. The first question of fact, and the one upon which the decision of this case mainly depends is, does the evidence before us prove the existence of a partnership between appellant and respondents? The decision of this question is rendered difficult, not so much by the quantity as by the character of the evidence.

The suit is between a father and his sons concerning transactions which took place many years ago, when the confidence and affection which are due to that relation in life, had not been impaired, and when neither party contemplated the necessity of proving in the courts their mutual dealings, and neither was expected to stand upon his guard against possible fraud or wrong on the part of the others. That confidence and affection are now so thoroughly destroyed that we find father and sons flatly contradicting each other, on their oaths, in matters in which a contradiction cannot mean mere mistakes or difference of opinion, but a willful disregard of the truth in one or the other. We also have the parties going back upon the record of twenty years of life of each other to blacken and impeach chacacters, which the ties of blood and pride of family should prompt them to uphold and defend. Aside from these mutual contradictions, all of the parties are more or less contradicted by the evidence of disinterested witnesses.

Amidst these wholesale contradictions we are left in such doubt whether to believe the sons against the father, or the father against the sons, that we are driven as far as possible to ignore the testimony of all parties in interest and to decide the case upon the admitted facts and the evidence of the disinterested witnesses.

It is admitted that from the time the parties removed to Portland, in the year 1857, until some time in the year 1862, they lived a large portion of the time in the same house, and that respondents worked and dealt with the property nominally owned by appellant, without other wages than what they received from time to time for the support of their families. Appellant, in his answer, admits that in the year 1861 he traded the donation claims of respondents with his own to James E. Rice in exchange for a farm in Washington county, and that the legal title to the farm was taken in his own name.

Respondents conveyed their lands to Rice in consummation of this trade. He alleges that they were to receive no compensation. He was authorized to use their lands in trading for the farm. That was all. He claims it is true that he has since that time advanced to respondents money and property which was of greater value than their lands; but he does not claim that such advances were intended or accepted as a payment or satisfaction for the land.

We think these facts more consistent with respondents' theory that there was a partnership agreement between them and appellant, in accordance with which this transaction took place, than with that of appellant that he was merely permitted to use the claims without any agreement for compensation. It is not at all probable that these young men, with families depending upon them for support, thus gave away the principal part of their property. Even if there was no agreement for compensation or partnership in the land, a resulting trust would have arisen in favor of respondents in the Rice farm, and in the property purchased with that farm, to the extent to which their property constituted a part of the consideration for its purchase. When the purchase-money of land is paid by one person,

and a conveyance of the legal title taken in the name of another, such person will be deemed to take the legal title in trust for the person furnishing the consideration. (Story's Eq. Jur. sec. 1201.)

It makes no difference whether the purchase-money is paid in money or other property, if it be in fact paid. We think this fact tends to prove the alleged partnership. That the Rice farm was afterwards, without any change in the equitable rights of the parties, traded to James B. Stephens in part payment for the ferry is also a fact tending to prove the partnership.

There is evidence tending to show that appellant, at various times and to different persons, admitted the alleged partnership. A. P. Ankeny, who was in the fall of 1857 or 1858 engaged in the butchering business with appellant, testifies that he had a conversation with appellant and respondents about that business. The terms of the partnership were then agreed upon, and it was agreed that the business should be carried on in the name of appellant and Ankeny. He understood that respondents were interested, but the business was carried on in the name of appellant as a matter of convenience.

James E. Rice testifies that appellant frequently told him how they did business together, that they were all doing business in partnership. B. P. Smith testifies that appellant told him that they had sold or traded their farms for the ferry, and that it paid a good deal better than farming. Thomas Batty, Levi Estes, L. F. Mosher, W. F. Allen, Ben. Cornelius, and a number of other witnesses, testify to admissions of appellant that he and respondents were doing business together as partners.

We admit the general infirmity of this kind of evidence, and give full force to a rule that it should be received and weighed with caution. A witness may have misunderstood the language used, or may have incorrectly repeated it. If the admissions proven in this case had been made to but one or two witnesses, or at the same time, they might be entitled to but little weight as evidence. But they were made deliberately to a large number of witnesses at differ-

ent times running through a period of more than fifteen years. It is not possible that all of these witnesses are mistaken. Such admissions fully proven are very satisfactory evidence.

We are satisfied from the evidence of the existence of a partnership between appellant and respondents. But it does not follow conclusively that the interests of the partners are equal. Their interests are presumed equal in the absence of evidence showing a different agreement, but like all other *prima facie* presumptions, it may be overcome by evidence. Many of the admissions of appellant relied upon by respondents to prove the partnership, tend to prove that the partnership included the wife of appellant or R. J. Ladd. These admissions all taken together seem to go as far to establish the interest of Ladd or of Mrs. Knott in the partnership as that of respondents.

It may be objected that the wife of appellant being a married woman could not have been a partner. This is true. But if the agreement and understanding of the parties recognized her right to one fourth of the partnership property, respondents are not entitled to any portion of that fourth.

A. J. Knott, one of the respondents, testifies that his mother, in talking about the business would say that Mrs. Ladd should have her interest when she died. His propositions to compromise, which he admits he made to his sister, seem to assume that her interest in the partnership property was equal to his own. Several witnesses testify that R. J. Ladd in his life-time seemed to be a partner in the firm. Other witnesses testify to the admissions of respondents before the commencement of this suit that they were each entitled to but one fourth of the partnership property.

In some instances they state that the remaining one fourth belongs to their mother, and in others that it belongs to Mrs. Ladd. In either event they are each entitled to but one-fourth of the partnership property. If Mrs. Ladd is entitled as against appellant to one fourth of the partnership property in his hands, he is still entitled to retain it

against all the world but her. That the evidence shows each of the respondents to be entitled to but one fourth of the partnership property is no objection to their recovery of that interest in the suit. They have not proven their entire claim set up in the complaint but they have proven part of it, and for that part are entitled to a decree. There is no variance between the allegations and proof which could have prejudiced appellant at the trial, or prevent a proper decree from being made in this case. We find that respondents are each entitled to one fourth of the partnership property. As to the amount and description of the partnership property and the account taken, we agree with the court below.

As the dissolution of the partnership, the settling of the partnership account, and the sale and distribution of the partnership property are matters in which all the partners are mutually interested, the decree of the court below should be so modified as to make the costs and disbursements first payable out of the proceeds of the sale of the partnership property.

The decree of the court below will therefore be affirmed, with the following modifications: 1. That respondents A. J. Knott and Levi Knott be each decreed to receive one fourth of the moneys found by the court below to have been received by Joseph Knott, appellant, from the earnings of the partnership over the expenses, instead of one third as decreed by the court below.

2. That respondents A. J. Knott and Levi Knott be each decreed to receive one fourth, and that appellant, Joseph Knott, be decreed to receive one half of the proceeds of the sale of the partnership property and money in the hands of the receiver, after the payment of the costs and disbursements therefrom, instead of each receiving one third, as decreed by the court below.

3. That the costs and disbursements of this suit be first paid out of the proceeds of the sale of the partnership property and money in the hands of the receiver, before any distribution of the same between the parties.

STATE OF OREGON, Respondent, v. WILLIAM SPENCER, Appellant.

INDICTMENT FOR PERJURY—WHEN OFFICER BEFORE WHOM FALSE OATH WAS TAKEN NEED NOT BE NAMED IN.—In an indictment for perjury alleged to have been committed by a witness in the trial of a civil action in the circuit court, it is sufficient to allege that the oath was taken in that court, without designating the officer by whom it was administered.

ACT CONSTITUTING THE CRIME, HOW STATED.—The manner of stating the act constituting the crime, as set forth in the appendix to the code, is sufficient in all cases where the forms there given are applicable.

APPEAL from Wasco County.

The facts are stated in the opinion of the court.

P. C. Sullivan, for appellant.

L. B. Ison, Prosecuting Attorney, for respondent.

By the Court, PRIM, C. J.:

This was a criminal action for perjury, brought by the state of Oregon against William Spencer in the circuit court of Wasco county. Said Spencer was charged in the indictment with having committed the crime of perjury by swearing willfully false as a witness at the trial of a civil action for damages, pending in said court between one McCorkle and himself. Said Spencer having been tried and found guilty of said crime as charged in said indictment, and a motion for a new trial and arrest of judgment having been interposed and overruled by the court, an appeal has been taken to this court. The matters contained in the motion for a new trial having been addressed to the sound discretion of the court below are not urged here; but it is insisted that the court erred in refusing to sustain the motion in arrest of judgment. This part of the motion is based upon the ground that facts stated in the indictment do not constitute the crime of perjury in this, because it does not state by whom the appellant was sworn in the trial wherein the perjury is alleged to have been committed.

The indictment alleges that appellant was duly sworn in the circuit court of Wasco county, state of Oregon, to tes-

tify as a witness in the trial of a civil action pending therein between one McCorkle and himself, and that said court then and there had authority to administer said oath. It also contains a statement of the matter alleged to have been sworn to by said appellant, together with the further allegation that said matter was material to the action and wilfully false.

The criminal code provides that: "In an indictment for perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or person before whom the oath alleged to be false was taken, and that the court or persons before whom it was taken had authority to administer it, with proper allegations of falsity of the matter on which the perjury is alleged." (Crim. Code, 351, sec. 87.)

The indictment alleges that the oath was taken in the circuit court for Wasco county, state of Oregon, which is in strict compliance with the case just cited. The circuit court is a court of record and has a clerk, and when a witness comes into that court to testify as a witness in the trial of an action, he may be sworn either by the judge or by the clerk and when so sworn it may be alleged that the oath was taken in the circuit court; and the court may admit evidence, under such an allegation, to prove that the oath was administered either by the judge presiding at the trial, or by the clerk. But if the oath in which perjury was assigned had been administered by the clerk in some outside matter, then it would have been necessary to allege that it was taken before the clerk. It is further provided by our criminal code, that "the manner of stating the act constituting the crime, as set forth in the appendix to this code is sufficient in all cases where the forms there given are applicable." (Crim. Code, 350, sec. 71.) The indictment in this action appears to have been copied by the pleader from a form found in the appendix to the code, on page 460, and under the provisions contained in the sections referred to in this opinion, we think is sufficient in law.

The judgment of the court below is affirmed.

D. W. BURNSIDE, Respondent, v. MARY SAVIER et al., Appellant.

ADMINISTRATOR CANNOT PARTITION, WHEN.—The administrator of a partnership cannot partition the real estate of the partnership, it is the province of a court of equity so to do.

THIS is an appeal from the Circuit Court sitting in Clackamas county. The respondent in his own right as surviving partner of the two firms of La Rocque, Savier & Co., and Savier & Co., and in his capacity as administrator of the property of each of said partnerships, filed his complaint in equity in said court against said George La Rocque, surviving partner of said firm of La Rocque, Savier & Co., and against Mary A. Savier, as widow, and as administrator of the estate of Thomas A. Savier, deceased, who in his lifetime was the third and only other member of said firm, and against Sarah B., Mary L., Florence A., and Lydia H. Savier, minors, the only children and heirs at law of said Thomas A. Savier, deceased, all of whom were made parties defendant to said suit.

The complaint alleges that respondent was duly appointed administrator of the property and estate of said firm of La Rocque, Savier & Co., after the death of said T. A. Savier, and is now such administrator, as well as one of the surviving partners of said firm. That as such administrator he has proceeded to collect all the debts due said firm, and has paid all demands against it; that he has sold all the personal property of said partnership and received the money therefor; that there now remains in his hands, belonging to said firm, in cash, the sum of thirty-one thousand two hundred and forty-three dollars and twenty-four one hundredths, and that there is real property belonging to said partnership of the apprised value of fifty thousand six hundred and eighty-three dollars and twenty-five one hundredths, consisting of the flouring mill property at Oregon City and some town lots of small value in Butteville and Dayton. The complaint further alleges that the one-half of this property by the terms of said partnership belongs to said La Rocque, and one-fourth of it to each of said other members of said firm.

That Burnside and Savier were also the members composing another firm at Portland, Oregon, doing a mercantile business under the firm name of Savier & Co., and that respondent is administrator of the estate of the said firm. That said Burnside and Savier, as members of said firm of La Rocque, Savier & Co., have drawn from the assets of said partnership the sum of seventy-eight thousand one hundred and twenty-four dollars and seventy-five one hundredths in coin, and advanced the same to said firm of Savier & Co., and that La Rocque is entitled to receive from said firm of La Rocque, Savier & Co., a like sum of seventy-eight thousand one hundred and twenty-four dollars and seventy-five one hundredths before said Burnside, or the estate of said Savier shall receive anything further of the said copartnership; and that after said La Rocque shall have so been made equal with said Burnside and Savier's estate, then any balance of assets of said partnership of La Rocque, Savier & Co. should be divided, the one-half thereof to La Rocque, the one-fourth thereof to respondent, and the remaining one-fourth to Mary A. Savier, as administratrix of the estate of T. A. Savier, deceased. That the real estate of La Rocque, Savier & Co., will have to be sold in order to such distribution and settlements, a decree authorizing which is prayed.

A guardian *ad litem* was duly appointed for said minor defendants, who interposed a demurrer to the complaint. Defendants La Rocque and Mary A. Savier, each likewise demurred separately to the complaint. The demurrers were overruled. La Rocque and Mrs. Savier rested. The minor defendants answered by their guardian *ad litem*. Evidence was taken and heard by the court sustaining the allegations of the complaint and decree rendered in accordance with the prayer thereof. From said decree this appeal is taken.

W. W. Upton, for the appellants.

Dolph, Bronaugh, Dolph & Simon, for the respondent.

By the Court, MCARTHUR, J.:

The question presented by this record for determination

is as to the extent of the power and jurisdiction of the county court, sitting in probate under section 1071 of the Code. After defining the powers and duties of the "administrator of a partnership" in a very general way, the section concludes as follows: "In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator." Under our law the general administrator of an estate has no power or authority, nor can any be conferred upon him to sell any more of the real estate of his intestate than is necessary to pay debts. Nor can he by any order of the court to which he owes his appointment, and by whose orders he is generally directed, partition the remaining realty among those entitled thereto. Such partition can only be made pursuant to a decree of a court of equity. (Code, sec. 419.)

In view of the limitations placed upon the administrator of a partnership, and the want of jurisdiction in the county court, sitting in probate, to partition the remaining realty, we are inclined to the opinion that the power of such an administrator extends only to the collection of the debts due the partnership and the payment of demands against it, with the incidental power invested by order of the court, after proper steps taken, of selling the personal property, and so much only of the real estate as may be necessary to pay debts of the partnership, leaving the questions that may arise among the partners and their representatives on settlement of the affairs of the partnership between themselves, and the partition of the partnership realty or its sale, and the distribution of the proceeds, to the determination of a court of equity.

Decree affirmed.

W. H. DODD & CO., Respondent, v. JOSEPH DENNY, Appellant.

VARIANCE NOT MATERIAL UNLESS PARTY IS MISLED.—Under the code no variance between the allegations of a pleading and the proof is material unless the adverse party has been actually misled by it to his prejudice in maintaining his action or defense upon the merits.

IDEM.—When such variance occurs, it should be shown to the satisfaction of the court, and in what respect in order that the pleadings may be amended upon such terms as may be just.

PROMISSORY NOTE—WHEN TIME OF PAYMENT NOT STATED.—When no time of payment is expressed in a note, the law adjudges it to be due and payable immediately.

APPEAL from Benton County.

This is an action by the respondent upon a promissory note executed by appellant in respondent's favor for one hundred and twenty-seven dollars and interest. The complaint alleges the execution of the note, and that it was made payable "— days after date" (there being no time of payment expressed.) It alleges that the note was made September 23, 1876; that no part of it has been paid, and that it is due.

The answer denies the execution of the note described in the complaint, and for a further defense alleges that appellant executed and delivered to respondent, on the said twenty-third day of September, 1876, at the city of Albany, Oregon, for value received, his certain promissory note for the sum of one hundred and twenty-seven dollars in gold coin, and which said note was made payable ninety days after date. That such note is not due and that it is the only note made by him in respondent's favor. Respondent offered in evidence a note signed by appellant which read as follows:

"$127. Albany, Oregon, Sept. 23, 1876.

"— after date, without grace, for value received I promise to pay to the order of W. H. Dodd & Co., at the office of Hawley, Dodd & Co., at Portland, Oregon, one hundred and twenty-seven dollars, payable in gold coin of the United States of America, with interest thereon in like coin from date until paid, at the rate of one per cent. per month, for value received, etc."

Appellant objected to the introduction of this note as evidence on the ground of variance between the evidence offered and the pleadings. The objection was overruled, and respondent recovered judgment. The admission of this

paper in evidence is relied upon by the appellant as a ground for reversing the judgment.

D. Vineyard, John Burnett and R. S. Strahan, for appellant.

F. A. Chenoweth, for respondent.

By the Court, PRIM, C. J.:

Under the code "no variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." And if appellant was so misled, he should have proven that fact to the satisfaction of the court, and in what respect he had been misled; and thereupon the court could have allowed the pleadings to have been amended upon such terms as should be just. (Civ. Code, 124, sec. 94.)

It was further contended that the note was not due until ninety days after date. It will be observed that the note bears date "Albany, Oregon, September 23, 1876," and reads: "—— after date, without grace, for value received, I promise to pay," etc. No time of payment having been expressed in the note, the law adjudges it to have been due and payable immediately. (8 John. 190; *Herrick v. Bennet,* 8 John. 189; *Pearsol v. Frazer,* 14 Barb. 564.)

Judgment affirmed.

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*PHILOMATH COLLEGE, Appellant, v. E. HARTLESS Respondent.

CONSIDERATION—WHEN PROMISE MADE FOR A PUBLIC OBJECT WILL BE ENFORCED.—**While a naked promise to pay money for a public object cannot be enforced for want of consideration, yet if the promise itself or any other promise upon which it is founded contains a request, or that which can be construed as a request, to those representing the institution for whose benefit the promise is made, to do any act or to incur any expense, or to undergo any inconvenience, and such institution does the act or bears the expense or submits to the inconvenience this request and performance on the behalf of the institution is a sufficient consideration to support the promise.**

APPEAL from Benton County.

* See 25 Am. Rep. 510.

This action was brought by Philomath College for the collection of a promissory note executed by Hartless, the respondent, for seven hundred and sixty-four dollars and interest. It is alleged that the note was for a valuable consideration; that prior to its execution Hartless had induced the college corporation to purchase a large quantity of land, and to erect college building thereon, and to expend large sums of money upon his promise that he would pay the college one thousand and five hundred dollars, and that the note in question was given in settlement of that promise.

Hartless denied that there was any consideration for the note, but alleges that in executing it he intended to make a gift of the sum expressed in the note for the endowment of the college.

The cause was tried by the court below without the intervention of a jury, and the following findings rendered, to wit:

1. That about the middle of the month of March, A. D. 1865, the defendant, with others, signed a paper, in writings, as follows:

"State of Oregon, County of Benton.

"We, the undersigned, severally agree to pay annually, for five years ensuing, the amount placed opposite our names, as appended below, for the purpose of purchasing a tract, viz., the tract owned by David Henderson, for a site for an institution of learning, and for the permanent endowment thereof; payments to be made in coin, and to the order of the board of managers, who may hereafter be regularly chosen to take charge of said institution, and the payments to become due on the first day of May, annually, commencing May 1, 1865. This subscription, together with any property that may be secured, to be offered to the Oregon Conference of the United Brethren church on such conditions as are usual in such cases, provided said church will give it her patronage, and assist us in building up an institution of learning in our midst, and if not accepted by the church aforesaid, this obligation to be void, otherwise to remain in force."

2. That the defendant Hartless signed his name to said writing as follows, "Eldridge Hartless, 300."

3. That the plaintiff is a corporation duly organized under the laws of Oregon, and that it became such corporation the fifteenth day of November, 1865.

4. That the defendant signed his name to the writing or promissory note set out in plaintiff's complaint, on the seventeenth day of June, 1870.

5. That at the time he signed said note he delivered the same to N. W. Allen.

6. That before that time plaintiff had adopted a by-law, creating the office of treasurer in said corporation—the plaintiff.

7. That at the time of the delivery of note to N. W. Allen he was the treasurer of plaintiff.

8. That at said time the plaintiff had no by-law in force, making it the duty of said treasurer to receive promissory notes in his name, or name of his office.

9. That on the first day of May, 1865, the piece of land referred to in the first finding above, was purchased and paid for by a portion of the proceeds of said subscription, and the title thereto was vested by deed in Alfred M. Witham, Julius Brownson, Presley Tyler and T. J. Conner, trustees of Philomath College, and their successors and associates in office on the first day of May, 1866.

10. That on the seventeenth day of June, 1870, the defendant executed the note mentioned in the fourth finding in settlement of the amount then unpaid on the subscription papers set out in the first finding; that the following is a copy of said note:

"$764. COTTAGE FARM, June 17, 1870.

"One year from date, I promise to pay to the treasurer of Philomath College the sum of seven hundred and sixty-four dollars, in United States gold or silver coin, for value received, with ten per cent. per annum from date till paid.

"E. HARTLESS."

That said note has the following words written on the back of it: "E. Hartless, Note, $764, Endowment Fund."

11. That there has been no settlement of said note.

12. That said note was given towards an endowment of said Philomath College, and there was no consideration for the same.

13. That the plaintiff erected a college on the tract of land mentioned in the ninth finding herein, in the years 1866-7, at a cost of about eight thousand dollars, and have kept and maintained a school therein since that time.

14. That said plaintiff has two funds: One known as the "building fund," or "building subscription;" and the other as the "endowment fund;" and that they are kept separate; and said note belonged to the endowment fund.

Conclusions of law: 1. That there was no consideration passed to the defendant for signing said note; 2. That the defendant is entitled to a judgment for costs and disbursements.

In accordance with the findings of law of the court, a judgment was entered in favor of defendant for his costs and disbursements. The plaintiff appeals, and assigns the following errors:

1. The said judgment is not given on the merits, and is a nullity.

2. The court did not find all the issues of fact in said action. His honor, the judge, neglected to find whether or not the appellant was induced by the respondent to incur indebtedness, and create expense at the instance of the respondent, as set out in the reply in said action.

3. The finding of the conclusion of law by the said judge that there was no consideration for the note in suit was unauthorized by the findings of fact.

4. Neither finding of the conclusions of law was justified by the findings of conclusions of fact found by the said judge and conclusions of law are found as conclusions of fact.

5. The conclusions of fact found by the judge are inconsistent.

W. B. Higby and Thayer & Williams, for appellant.

R. S. Strahan, John Kelsay and F. A. Chenoweth, for respondent.

By the Court, WATSON, J.:

The errors assigned in this case are in the findings of the court, and its failure to find upon certain issues. Of the five assignments it would be necessary for us, with the conclusion at which we have arrived, to examine only the third and fourth, but that the final disposition of the case requires that we shall also briefly refer to the first, second and fifth. The first is that the judgment was not given on the merits, and is a nullity. We do not agree to this. The action was brought to recover the amount of a promissory note. The answer denied the existence of plaintiff, the execution and consideration of the note, and the conclusion of indebtedness, and set up as a defense that it was intended merely as a gift, and was without consideration. The reply set out what plaintiff claimed to be the consideration. The important questions submitted to the court were whether plaintiff was a corporation, whether the note was executed by defendant, and whether or not there was a sufficient consideration. The court found that plaintiff was a corporation; that defendant executed the note, but that it was without consideration. These findings are sufficient to dispose of the case on its merits.

The second assignment is that the court did not find all of the issues of fact in the action. We think it found every material issue and every fact necessary to the rendition of a final judgment. It found that plaintiff was incorporated, and that defendant signed and delivered the note. It also found what was the consideration; that there was such an officer as the treasurer of Philomath College, and what was done by plaintiff in compliance with the subscription request. These were all the material issues in the pleadings, and only the material issues need be found. (*Fink v. Canyon Road Company*, 5 Or. 301.) Counsel for appellant insists that the court did not pass upon the issue made by the allegation in the reply that plaintiff was induced by the request and subscription of defendant to purchase a large quantity of real property and to build a college thereon, and the denial of that allegation which the law presumes. This allegation merely fortifies the allega-

tion in the complaint that the note was made for a valuable consideration by specifying what the consideration was, and was sufficiently passed upon in the finding that there was no consideration, but if it was necessary to find upon it specially, it was fully passed upon by the first, ninth and thirteenth findings, which find the original subscription, request the purchase of the land, the erection of the building, and the establishment of the school. The court, having found the request and performance, we do not think it was necessary for it to find in words that the one induced the other. It would be presumed. The fifth assignment is that the facts found by the court are inconsistent. No inconsistency has been pointed out to us, and we have not been able to discover any. The third and fourth assignments allege in different language the same error, and will be considered together. They state in substance that the court erred in its conclusion that the facts found did not constitute a valid consideration for the note given by defendant to plaintiff.

These facts are, that defendant with others subscribed an agreement to pay three hundred dollars a year for five years to the board of managers of an institution of learning to be "built up" upon a tract of land described in the agreement; the tract of land to be purchased and the institution to be endowed with the funds so subscribed; the subscription to be tendered to the Oregon Conference of the United Brethren Church, provided that church should give her patronage and assistance in building up an institution of learning so endowed. That after said agreement was signed on the first day of May, 1865, the tract of land was purchased with a portion of the proceeds of the subscription, and the legal title vested in "trustees for Philomath College." That thereafter the plaintiff was incorporated under the name of Philomath College; and from the time of its incorporation acted as the beneficiary of the subscription, built a college building on the land at the expense of about eight thousand dollars, and has ever since kept and maintained a school therein; that the defendant long after the plaintiff was incorporated and commenced to

act as the beneficiary and administrator of the subscription and its proceeds, in part payment of the sum subscribed by him, executed and delivered to the treasurer of plaintiff the note in dispute.

If these facts constitute a sufficient consideration for the note, plaintiff is entitled upon the findings of fact before us to a judgment. On the other hand if they do not constitute a sufficient consideration for the note, the judgment of the court below in favor of defendant is correct, and should be affirmed. The court below found that the note was given to the "endowment fund," and seemed to have adopted the theory that a note given for the "endowment" of an institution of learning is without consideration, and cannot be enforced. The question is a new one in this state, and it is important that it shall be correctly decided, for the reason that many of our institutions of learning are supported by the interest upon notes given for their endowment, and if such notes cannot be enforced their revenues may be diminished, and their usefulness impaired. The law should be settled in order, not only that those already established may be provided with other means of support, but that others may not be founded upon endowments of void and worthless promises.

At first view it would seem that when a person signs his name to a promise to pay money, or to convey property to an institution of learning, the public advantage and the fact that others have been induced by their reliance upon his co-operation to give their money and property to the same object ought to be a sufficient consideration; but the courts, acting upon the principle that every promise to be enforced must have a good or valuable consideration to uphold it, have held that something more than the naked promise to give is necessary, and that the public advantage is not of itself a sufficient consideration to support a promise. (*Trustees of Hamilton College v. Stewart,* 1 N. Y. 681; 2 Pick. 80.) Yet while the courts rather than violate an old and established rule of law hold that a naked promise to pay money for a public object cannot be enforced for the want of a consideration, they have also decided with great una-

nimity, that if the promise itself, or any other promise, upon which it is founded contains a request, or that which by any fair construction can be construed as a request to the trustees, or others representing the institution for whose benefit the promise is made to do any act, or to incur any expense, or to undergo any inconvenience, and such institution does the act, or incurs the expense, or submits to the inconvenience, this request and performance on the behalf of the institution, is a sufficient consideration to support the promise. (*Barnes v. Perine,* 12 N. Y. 18; 5 Am. Rep. 51; 20 Johns. 89; 40 Ill. 379.)

Applying these principles to the facts in this case, we are of opinion that the agreement set out in the first finding implies a request to the managers of the institution of learning to be founded to purchase the tract of land therein described, and to establish thereon an institution of learning.

The findings also show that Philomath College, the plaintiff herein, was founded and incorporated in order to comply with the request, and that plaintiff has in further compliance built a building at a great expense, and maintained a school therein. The defendant in giving his note to the treasurer of plaintiff, after plaintiff's incorporation, in payment of the balance of his subscription, recognized plaintiff as the institution built up in accordance with the subscription, and as the beneficiary of the subscription. We are, therefore, of the opinion that there is a sufficient consideration for the note in dispute. An objection was made in the argument by respondent's counsel that a college could not be incorporated at the time plaintiff is found to have been incorporated, under the first section of the act of 1864, entitled "An act providing for the incorporation of churches and religious and benevolent societies." We do not think there is anything in the objection. Even if the respondent here could raise the objection, we are of opinion that plaintiff was legally incorporated under that act as a literary society.

We are of the opinion, also, that the note given to the treasurer of the corporation inured to the benefit of the corporation.

It follows from the views expressed in this opinion that the judgment of the court below must be reversed, and this action be remitted to the court below, with direction to enter its judgment upon said findings in favor of the plaintiff for the amount due upon said note, with interest.

J. M. DICK, Administrator, et al., Appellants, v. FRANCIS L. KENDALL et al., Respondents.

SUIT PENDING.—A suit is to be deemed pending until an appeal is perfected, or until the period for taking an appeal has expired.

CONTINUANCE BY REPRESENTATIVES.—The representatives or successors in interest of a deceased party, have one year after his death, within which to make application for a continuance; and the application if made within the year, is in time, although the order granting the continuance be not made until after the expiration of the year.

SUSPENSION OF SUIT.—The suit is suspended during the period between the death and the order granting a continuance, and this period is not to be deemed any part of the time limited for taking an appeal.

APPEAL from Linn County.

This is an appeal from a final decree of the circuit court, in a suit for a specific performance of an agreement to convey real property, brought by one Craig.

After the decree had been rendered, and before the expiration of six months—the time allowed for appeal—from the date thereof, Craig, the original plaintiff, died. Before the expiration of the six months from the date of the decree, Dick, the appellant, qualified as Craig's administrator, and with the other appellants, who were the heirs at law of Craig, served notice of appeal from the decree, and filed the necessary undertaking therefor. No order was made in the court below substituting them as parties in the suit, or allowing the cause to be continued in their names.

The respondents moved to dismiss the appeal on the ground that the appellants have no authority to prosecute the same without first obtaining an order of the circuit court therefor.

Powell & Flynn and N. B. Humphreys, for the motion.

Strahan & Burnett, contra.

By the Court, SHATTUCK, J.:

1. That the suit is to be deemed pending in the circuit court until an appeal is perfected, or until the period for taking an appeal has expired. (Civ. Code, 213, sec. 505.)

2. That the alleged service of notice of appeal and filing the same with an undertaking for appeal, by the representatives of the deceased plaintiff, before any order under section 37 of the civil code, allowing the suit to be continued by such representatives and heirs, did not operate to give the court jurisdiction of the cause.

3. That the representatives or successors in interest of a deceased party have one year after the death of the party to apply for leave to continue the suit; and the application to the proper court, by proper petition and proofs of service of notice, is in time, if made within one year, although the court may not in fact make the order allowing the motion until after the expiration of the year.

4. That the suit is suspended during the period between the death and the order allowing the representatives to continue the suit, and that this period is not to be deemed any part of the time limited for taking an appeal.

ELIZABETH ARRIGONI, Executrix, Respondent, v. A. H. JOHNSON, Appellant.

NEW TRIAL—DECREE IN VACATION.—When the decision is rendered in vacation, the party desiring a new trial has twenty days from the filing of the decision within which to file a motion therefor.

MEASURE OF DAMAGES.—When a vendee, with covenant of warranty buys in an outstanding paramount title, the measure of damages for breach of the vendor's covenant is the amount so paid.

APPEAL from Multnomah County.

This was an action on covenants contained in a deed made by S. N. Arrigoni during his life-time (June 22, 1865) to the south half of block two hundred and forty-nine in the city of Portland. The case came on to be heard on

August 13, 1875, at a regular term. After a jury had been impanelled and a portion of the testimony taken, counsel for the respective parties prepared, signed and presented a stipulation as follows: "Now at this time, the thirteenth day of August, 1875, the trial of this cause having been begun and a portion of the testimony taken, we, the undersigned attorneys for the parties, do hereby agree and stipulate: 1. The court may order the discharge of the jury without prejudice, and waive for each of us a trial by jury; 2. We agree and stipulate that the Hon. E. D. Shattuck, judge of this court, may take the case and decide it in the city of Portland, after the end of this term of the court, such judgment to be so rendered to have the same force and effect as if pronounced in term-time as of this term; 3. We further agree and stipulate that upon the day designated by his honor for further proceedings herein, either party may offer such further and additional proof as may be desired, the understanding being that the testimony already taken shall be regarded as in the case, subject, however, to the exceptions asked and allowed by and to either party, with the right to plaintiff and defendant to offer further testimony; 4. We agree and stipulate that the hearing shall be had at Portland, on the tenth day of September, 1875, or such other day as the court may order." Pursuant to this stipulation the case was tried, the final agreement and submission taking place on September 15, 1875. Two days thereafter the court rendered a decision and judgment in favor of Johnson, for thirty-three hundred and fifty-five dollars and twenty-nine cents with legal interest, and also ordered that defendant have ten days within which to file bill of exceptions.

On September 28, 1875, plaintiff caused the decision and judgment to be filed in the office of the clerk of Clatsop county, and that officer entered the same in the journal of the court. On the same day an execution was issued and levy was made on a certain amount of gold coin which had been previously attached (May 26), and the execution was returned October 1, fully satisfied. On October 13, respondent filed motion to set aside the decision and for a

new trial. After due consideration of the argument thereon the court, on February 1, 1876, set aside the judgment and granted a new trial. This the appellant charges as error. The re-trial of the cause resulted in a judgment in appellant's favor for eighteen hundred dollars and seventy cents.

It is alleged that at this second trial the court committed three errors: 1. In refusing to admit testimony offered by appellant to show the value of the four fifths of south half of block 249; 2. In permitting respondent, for the purpose of reducing the value of lots 4, 5, 6, 7, 8, and 9, in block 1 in Johnson's addition to Portland, to prove that it would require a large expenditure of money to grade and construct a street adjacent to lots 4, 5 and 6; 3. In rendering a judgment for eighteen hundred dollars and seventy cents in currency.

Page and Yocum, for appellant.

W. W. Upton and W. H. Effinger, for respondent.

By the Court, MCARTHUR, J.:

In considering the first error complained of, it is necessary to construe the stipulation. By the second paragraph of that instrument the counsel agreed that the case, after being taken from the jury, should be tried by the judge at his chambers in Multnomah county, during vacation between the terms of the circuit court held in and for Clatsop county, and that the judgment so rendered by him should have the same force and effect as if pronounced at the term which was being held at the time the stipulation was signed.

Counsel for appellant contended that as the judgment to be rendered at chambers was to have the same force and effect as though rendered during term time, the motion for a new trial filed on October 13, 1875, was a violation of the stipulation, for the reason that the code (sec. 233), limits the time for filing a motion of that character, when the decision sought to be set aside has been rendered or given during term, to one day. This position is illogical and incorrect. The stipulation must be construed with reference to the object to be attained, which was simply to give the

judge the power to hear and determine the cause at his chambers in another county, and to give the judgment rendered the force and effect it would have had if it had been rendered during term time. As there is no question raised as to the right of the judge to hear and determine an action at law in another county, than that in which it was brought, we shall assume for the purpose of this case, that such a cause may be taken where a stipulation to that effect is signed by the parties, and duly filed.

By the use of the words "such judgment to be so rendered, to have the same force and effect as if pronounced in the term time as of this term," the parties simply agreed that they would not question the regularity of the judgment upon the ground that it was entered in vacation, but would regard it as binding upon themselves and upon the subject-matter of the action, as though it were a judgment entered during a regular term.

This is, that they would respect it as a valid judicial judgment, given by a competent judge or court, at a time and place appointed by law. The language employed cannot possibly be construed as having reference to the time within which either party should file a motion for a new trial, for that is a matter entirely extraneous to, and in no manner connected with, the force and effect of a judgment. We are of opinion that the respondent had a legal right to avail herself of the provision of the code (sec. 234), allowing twenty days from the filing of a decision rendered in vacation, in which to file a motion for a new trial. The decision was filed on September 28, 1875, the motion for a new trial was filed October 13, 1875, which was within the time allowed by law in such cases. By entering the judgment immediately upon filing the decision the respondent could not be defeated of her right to file a motion for a new trial. Indeed the immediate entry of the judgment by the clerk, was in contravention of section 262, subd. 4 of the code. We are unable to discover any error whatever in the filing of the motion for a new trial, or in the order of the court granting the same.

The first error complained of on the retrial was the re-

fusal of the court below to admit testimony offered by appellant tending to prove the value of the four fifths of the south half of block 249. To reject such testimony in this case was not error, because the value of the land conveyed by Arrigoni, during his life-time, to the appellant was not an issue in the case. Appellant had bought in the outstanding paramount title, and when a vendee with covenants of warranty buys in an outstanding paramount title, the measure of damages for breach of the vendor's covenant is the amount so paid. (*Hard v. Hull,* 12 Wis. 112; *Bailey v. Scott,* 13 Wis. 618; *Fawcett v. Woods,* 5 Iowa, 400; *Lawless v. Collier,* 19 Mo. 480; Rawle on Cov. 65-80.)

The court below, notwithstanding an objection, permitted the respondent to show that it would require a large expenditure of money to grade and construct a street adjacent to lots 4, 5, and 6, in block 1 of Johnson's Addition. The admission of such evidence is charged as error. It was admitted that the value of the land to which the title failed was more than the value of lots 4, 5, 6, 7, 8, and 9, in block 1 of Johnson's Addition, and which the appellant exchanged to quiet the outstanding title to the south half of block 249. The appellant could only recover the value of those lots. They were located upon an addition to the city of Portland, and were dealt with as, and were admitted to be, town lots, and we are of opinion that it was not error to admit evidence tending to show their nearness to the city of Portland, and to the streets, and the cost of grading and constructing streets adjoining them, for in that way only could their value as town lots be properly ascertained.

The question of the right to a judgment for gold coin is settled by reference to the character of the action. It does not sound in contract, hence the judgment could only be for money generally, and such judgments are satisfied by the payment of legal tender notes.

Judgment affirmed.

GRANGERS' MARKET COMPANY, Respondent, v. J. S. VINSON, Appellant.

STOCKHOLDER—WHAT WILL CONSTITUTE.—Defendant subscribed the following writing: "We, the undersigned, hereby authorize J. J. Imbrie, secretary of the Grangers' Market Company, to affix our names to the capital stock of the said company for the number of shares of said stock set opposite to our respective names. Names, J. S. Vinson; No. shares, 5; amount, $100; name of Grange, Lena: post-office, Umatilla county, Oregon." The said J. J. Imbrie, secretary of said corporation, thereafter wrote the name of defendant in what was headed "stockholders" in a list purporting to be a list of the stockholders of said corporation, in a book which he testified was the stock-book of said corporation. The name was written with the following addition: "J. S. Vinson, Lena, Umatilla county, Oregon," "5," "$100:" *Held*, that such signing and subscription did not constitute defendant a stockholder of said corporation.

APPEAL from Umatilla County.

Lucian Evarts, for appellant.

T. H. Tongue, for respondent.

The facts are stated in the opinion of the court.

By the Court, WATSON, J.:

This is an action brought by a corporation against a person who is claimed to be one of its stockholders, to recover delinquent assessments to the amount of one hundred dollars. The defendant, by his answer, denies that he ever became or is a stockholder in the corporation plaintiff, or liable to pay its assessments. The bill of exceptions purports to contain all of the material evidence offered by plaintiff tending to prove defendant's subscription to its capital stock. The court below instructed the jury that "the signing by the defendant of the printed agreement produced in evidence, and the subsequent signing of his name in the stock-book of the corporation, by J. J. Imbrie, the secretary thereof, was a sufficient contract on the part of the defendant to render him liable as a stockholder of said corporation in an action brought against him by the plaintiff to recover assessments."

This instruction was excepted to by counsel for defendant.

The printed agreement produced in evidence is incorporated in the bill of exceptions, and the following is a copy of the agreement, with the signature of defendant and additions:

"We, the undersigned, hereby authorize J. J. Imbrie, secretary of the Grangers' Market Company, to affix our names to the capital stock of the said company, for the number of shares of said stock set opposite to our respective names:

Names.	No. Shares.	Amount.	Name of Grange.	Post-office.
"J. S. Vinson.	5.	$100.	Lena.	Umatilla Co., Or."

Printed upon the same sheet and above the printed agreement, are the articles of incorporation of the plaintiff.

J. J. Imbrie, secretary of the corporation, subsequent to the subscription by defendant to the printed agreement, wrote the name of the defendant, with the names of other stockholders, in a list headed "Stockholders," in the stock-book of the corporation, and in that list wrote opposite the name of defendant the following words and figures: "Lena, Umatilla Co., Oregon." "5." "$100." It nowhere appears in the stock list that it was intended as a subscription to the capital stock, or that it was other than the ordinary list of stockholders kept by the secretary for reference. It discloses no agency or intention on the part of Imbrie to act as agent for any one. It is not a subscription list. It does not purport to be such a list. Imbrie testifies that "his authority for so doing was set forth in a printed paper or document signed by defendant, with the addition of five shares and one hundred dollars attached to his name," referring to the paper already mentioned. Did defendant thereby become a stockholder of the Grangers' Market Company? Upon the answer to this question depends the correctness of the instruction under review, and plaintiff's right to recover. If he did not become a stockholder, the other questions presented in the argument are immaterial.

After a careful examination of the pleadings and the evidence contained in the bill of exceptions, we have arrived

at the conclusion that while the printed paper signed by defendant was sufficient to authorize J. J. Imbrie to subscribe for defendant for five shares of the capital stock of the corporation, he did not act under that authority, and did not, in the name of the defendant, subscribe for or agree to take said stock.

The printed paper signed by defendant, was but the mere appointment of an agent for a special purpose. Before the principal could be bound, it was necessary that the agent should act under his appointment, and affix his name to a subscription of the stock. This he did not do. He wrote the name of defendant in the stock-book as the holder of five shares of stock; but he wrote it in a mere list of stockholders, such as it was necessary for the secretary to keep in order to know who were stockholders. It nowhere appears that he did this as agent for defendant, or intended it as a subscription to the stock. A subscription to the capital stock of a corporation is a contract between the subscriber and the corporation, by which the subscriber agrees to take a certain number of shares of its capital stock, and we think that where a bare subscription is relied upon to prove that a person is a stockholder, there should be enough in the subscription list itself to show his intention to take that number of shares.

It was the duty of the corporation to keep a stock-book in such a manner as to show intelligibly the original stockholders, their respective shares, etc. (Stats. of Or. 527, sec. 12.) This duty being clerical, is necessarily performed by the secretary. To keep such a book as secretary of the corporation is all that Imbrie appears to have done. Had he signed the name of his principal to a regular and valid subscription-list it would have been proper that the signature should appear to have been made by him as agent. His agency might have been shown by extrinsic evidence, but the evidence fails to show that the writing of the name of J. S. Vinson in the stock-book, was made or intended as a subscription to the capital stock. The instruction was, therefore, erroneous, and for that reason the judgment of the court below should be reversed.

Defendant not being shown to be a stockholder of the Grangers' Market Company, it is unnecessary to decide whether or not a stockholder is liable without an express agreement to pay assessments, to an action on the part of the corporation to recover such assessments. This is an important question in the law of corporations, and different rules have been adopted by the courts of different states. We are not prepared, without further argument, to decide which is the better rule.

We think there was no error in the rulings of the court below excluding the statements of William Jolly. The allegations of fraud in the answer were insufficient. It should not only have alleged that the representations of Jolly were false, but that he knew that they were false; or that he asserted them as facts within his own knowledge. This was our conclusion in the case of *Rolfes v. Russell,* 5 Or. 400, and we have found no reason for changing the opinion therein announced.

Nearly all of those statements were mere matters of opinion, and are not such statements of facts as if false would avoid the contract. A number of other questions are raised on this appeal, but with our opinion already given upon the first question decided, it is not necessary to pass upon them.

The judgment of the court below will be reversed.

THE WILLAMETTE FALLS CANAL AND LOCK COMPANY, Respondent, v. JOHN GORDON, JAS. M. MOORE et al., Appellants.

EVIDENCE—DONATION—CERTIFICATE.—A donation certificate is evidence of residence, cultivation, and all other facts recited therein.

DEPUTY CLERK—DISTINCT OFFICE UNDER TERRITORIAL ACT.—The "deputy clerk" under the territorial act of 1856 was an independent officer, and not a mere deputy in the ordinary sense of that term, and was clothed with certain powers and duties separate and distinct from the clerk. "Deputy clerk" being the title of his office, was therefore his proper official signature.

WILLS—PROBATE OF, NECESSARY TO MAKE THEM ADMISSIBLE AS EVIDENCE.—In this state county courts have exclusive jurisdiction in

the first instance to take the probate of wills. Therefore a deed cannot be admitted in evidence to establish title under a will until such will has been admitted to probate in the county court.

APPEAL from Clackamas County.

The facts are stated in the opinion of the court.

Johnson & McCown and Thayer & Williams, for appellants.

Hill, Durham and Thompson, for respondents.

By the Court, PRIM, C. J.:

The respondent is a private corporation and brought this action to recover the possession of certain real property alleged to be in the possession of John Gordon, and withheld by him from respondent. Gordon filed an answer admitting that he was in the possession of the land in controversy, but denying the ownership of respondent.

He further alleged in his answer that James M. Moore, Maria M. Moore, and Robert M. Moore, were the owners in fee of said land, and that he was in the possession thereof as their tenant. Upon the filing of this answer, the above parties were made defendants by an order of the court, who also filed an answer setting up substantially the same state of facts contained in the answer of Gordon.

The land in controversy is admitted to be a part of the donation claim of Robert Moore, deceased, and that all of the defendants except Gordon are his children. They claim as his heirs, and respondent claims as the grantee of Daniel H. Furgeson, to whom it is claimed the land was devised by the said Robert Moore, deceased. Respondent obtained a verdict and judgment in the court below, and appellants have appealed to this court.

The errors complained of arose on the trial of the action in the admission of certain documentary evidence against the objections of appellants, which are fully set out in the bill of exceptions.

The court admitted in evidence three papers purporting to be copies of certain papers on file in the local land-office

at Oregon City, relating to the donation land claim of Robert Moore, deceased; these papers purported to be the notification and affidavit of said Moore and two other persons, showing the residence and cultivation of said Moore on said land claim.

The original notification and affidavits having been sent to Washington city, under the rules and regulations adopted by the general commissioners of the land department, the papers in question were mere copies thereof which had been filed in the local land-office.

Exception was taken by appellants to the admission of these papers, on the ground that they were not copies of the original papers.

This regulation having been adopted in pursuance of an act of congress, it is difficult to understand why such copies thus retained in the local land-office should not be treated as records, and why certified copies thereof should not be admitted in evidence. It would certainly be a matter of great convenience to litigants to be allowed to do so, instead of being compelled to send to Washington city, in order to obtain certified copies of the original papers. But in this particular case, we regard it as immaterial whether these papers were properly admitted in evidence, or not, as no injury could have resulted to appellants in consequence of their admission.

A certified copy of the original patent certificate having been offered and admitted in evidence, operated in establishing all the facts which could have been shown by these papers. It has already been held by this court that, "a certificate is evidence of residence, cultivation, and other facts which it recites." (*Keith v. Cheney*, 1 Or. 285.)

Respondent offered to read in evidence a certain original paper purporting to be a deed executed by Robert Moore and wife to Daniel H. Furgeson, dated December 1, 1852. This deed was admitted by the court below, so far as to allow the respondent to connect it with any will that said Robert Moore should be shown to have made, and to show under what color of right the possession of respondent may have been commenced.

The admission of this deed in evidence was excepted to, on behalf of appellants, on the ground that it was void for the reason that it was made during the period when settlers under the act of congress, commonly called the donation law, were prohibited from making any contract for the sale of their land claims before patent issued. Whatever view may be taken as to the validity of this deed on account of having been executed prior to the repeal of the proviso contained in the fourth section of the said act, we think it was properly admitted in evidence, for the purpose of identifying the land devised by the will of said Robert Moore which refers to said deed for a description of the land devised.

The court also admitted in evidence a certain original deed, purporting to have been made by Daniel H. Furgeson to the Willamette Falls Canal, Milling and Transportation Company, dated March 19, 1853. The ruling of the court in admission of this deed was excepted to by appellants on the ground that it was void for uncertainty in the description of the land therein conveyed. The land is described as "beginning at the falls on the west side of the Willamette, thence by a line extending westwardly with the course of the north boundary of the basin upon the bluff to a point thirteen rods from the edge of said bluff, thence sixty-two and one-half rods in a southerly direction to a point thirteen rods from the edge of said bluff, thence easterly in a line parallel to the first described course to the bank of said river; and the main channel thereof; thence by said main channel to the northerly line of said basin." It is claimed that this description is so indefinite as to render the land described in the deed uncertain; so much so that the land intended to be conveyed cannot be found by a surveyor with the deed to guide him. Evidence could be introduced to show where the falls are, and also where the north boundary line of the basin is and its course. There is such a place as the basin, and it has a north line, and it is near the falls, in fact the water falls into it on the south side, and but a short distance from this north line. This north line is on the west side of the river. Now the falls can be found, and the north line of the basin can be

found; now run westerly with the corner of the north line of the basin and run that course until you are thirteen rods west of the edge of the bluff; thence sixty-two and a half rods in a southerly direction to a point thirteen rods west of the edge of the bluff; thence easterly by a line parallel with the first described line to the center of the river; thence down the main channel of the river to the northerly line of the basin. The basin is on the west side of the river, and its north line runs east and extends into the river so the main channel sweeps past it. When we speak of the main channel we mean the center of the stream; still that being a course named in the deed, and the north line of the basin being a fixed monument extending to the water of the river on the west side, and the rule being that when the monuments and courses are at variance, the monuments must govern. The last course of the deed would be a line running from the center of the river at the end of the third corner to the north line of the basin, where it reaches the water of the river on the west side.

This deed, we think, is not void for uncertainty in the description of the land conveyed. The description, we think, is not so indefinite but what a surveyor might find the land with the deed before him. The court admitted in evidence the record of a deed dated November 1, 1857, executed by James K. Kelly to George Abernathy and Leander Holmes. The certificate of acknowledgment of said deed was signed by "F. S. Holland, deputy clerk." The admission of this deed was also objected to by appellants, on the ground that the certificate of acknowledgment fails to disclose who was the principal of such deputy clerk. Under the statute in force in the territory of Oregon, at the time when the acknowledgment of this deed was taken, a deputy clerk was an independent officer, and not a mere deputy in the ordinary sense of that term. He was clothed with certain powers and duties separate and distinct from the clerk. "Deputy clerk" being the title of his office was therefore his proper official signature. Then this certificate, we think, discloses on its face that it was made by an officer with authority to take the acknowledgment of deeds under

August 13, 1875, at a regular term. After a jury had been impanelled and a portion of the testimony taken, counsel for the respective parties prepared, signed and presented a stipulation as follows: "Now at this time, the thirteenth day of August, 1875, the trial of this cause having been begun and a portion of the testimony taken, we, the undersigned attorneys for the parties, do hereby agree and stipulate: 1. The court may order the discharge of the jury without prejudice, and waive for each of us a trial by jury; 2. We agree and stipulate that the Hon. E. D. Shattuck, judge of this court, may take the case and decide it in the city of Portland, after the end of this term of the court, such judgment to be so rendered to have the same force and effect as if pronounced in term-time as of this term; 3. We further agree and stipulate that upon the day designated by his honor for further proceedings herein, either party may offer such further and additional proof as may be desired, the understanding being that the testimony already taken shall be regarded as in the case, subject, however, to the exceptions asked and allowed by and to either party, with the right to plaintiff and defendant to offer further testimony; 4. We agree and stipulate that the hearing shall be had at Portland, on the tenth day of September, 1875, or such other day as the court may order." Pursuant to this stipulation the case was tried, the final agreement and submission taking place on September 15, 1875. Two days thereafter the court rendered a decision and judgment in favor of Johnson, for thirty-three hundred and fifty-five dollars and twenty-nine cents with legal interest, and also ordered that defendant have ten days within which to file bill of exceptions.

On September 28, 1875, plaintiff caused the decision and judgment to be filed in the office of the clerk of Clatsop county, and that officer entered the same in the journal of the court. On the same day an execution was issued and levy was made on a certain amount of gold coin which had been previously attached (May 26), and the execution was returned October 1, fully satisfied. On October 13, respondent filed motion to set aside the decision and for a

new trial. After due consideration of the argument thereon the court, on February 1, 1876, set aside the judgment and granted a new trial. This the appellant charges as error. The re-trial of the cause resulted in a judgment in appellant's favor for eighteen hundred dollars and seventy cents.

It is alleged that at this second trial the court committed three errors: 1. In refusing to admit testimony offered by appellant to show the value of the four fifths of south half of block 249; 2. In permitting respondent, for the purpose of reducing the value of lots 4, 5, 6, 7, 8, and 9, in block 1 in Johnson's addition to Portland, to prove that it would require a large expenditure of money to grade and construct a street adjacent to lots 4, 5 and 6; 3. In rendering a judgment for eighteen hundred dollars and seventy cents in currency.

Page and Yocum, for appellant.

W. W. Upton and W. H. Effinger, for respondent.

By the Court, MCARTHUR, J.:

In considering the first error complained of, it is necessary to construe the stipulation. By the second paragraph of that instrument the counsel agreed that the case, after being taken from the jury, should be tried by the judge at his chambers in Multnomah county, during vacation between the terms of the circuit court held in and for Clatsop county, and that the judgment so rendered by him should have the same force and effect as if pronounced at the term which was being held at the time the stipulation was signed.

Counsel for appellant contended that as the judgment to be rendered at chambers was to have the same force and effect as though rendered during term time, the motion for a new trial filed on October 13, 1875, was a violation of the stipulation, for the reason that the code (sec. 233), limits the time for filing a motion of that character, when the decision sought to be set aside has been rendered or given during term, to one day. This position is illogical and incorrect. The stipulation must be construed with reference to the object to be attained, which was simply to give the

The admission of this deed in evidence was excepted to, on behalf of appellants, on the ground that it was void for the reason that it was made during the period when settlers under the act of congress, commonly called the donation law, were prohibited from making any contract for the sale of their land claims before patent issued. Whatever view may be taken as to the validity of this deed on account of having been executed prior to the repeal of the proviso contained in the fourth section of the said act, we think it was properly admitted in evidence, for the purpose of identifying the land devised by the will of said Robert Moore which refers to said deed for a description of the land devised.

The court also admitted in evidence a certain original deed, purporting to have been made by Daniel H. Furgeson to the Willamette Falls Canal, Milling and Transportation Company, dated March 19, 1853. The ruling of the court in admission of this deed was excepted to by appellants on the ground that it was void for uncertainty in the description of the land therein conveyed. The land is described as "beginning at the falls on the west side of the Willamette, thence by a line extending westwardly with the course of the north boundary of the basin upon the bluff to a point thirteen rods from the edge of said bluff, thence sixty-two and one-half rods in a southerly direction to a point thirteen rods from the edge of said bluff, thence easterly in a line parallel to the first described course to the bank of said river; and the main channel thereof; thence by said main channel to the northerly line of said basin." It is claimed that this description is so indefinite as to render the land described in the deed uncertain; so much so that the land intended to be conveyed cannot be found by a surveyor with the deed to guide him. Evidence could be introduced to show where the falls are, and also where the north boundary line of the basin is and its course. There is such a place as the basin, and it has a north line, and it is near the falls, in fact the water falls into it on the south side, and but a short distance from this north line. This north line is on the west side of the river. Now the falls can be found, and the north line of the basin can be

found; now run westerly with the corner of the north line of the basin and run that course until you are thirteen rods west of the edge of the bluff; thence sixty-two and a half rods in a southerly direction to a point thirteen rods west of the edge of the bluff; thence easterly by a line parallel with the first described line to the center of the river; thence down the main channel of the river to the northerly line of the basin. The basin is on the west side of the river, and its north line runs east and extends into the river so the main channel sweeps past it. When we speak of the main channel we mean the center of the stream; still that being a course named in the deed, and the north line of the basin being a fixed monument extending to the water of the river on the west side, and the rule being that when the monuments and courses are at variance, the monuments must govern. The last course of the deed would be a line running from the center of the river at the end of the third corner to the north line of the basin, where it reaches the water of the river on the west side.

This deed, we think, is not void for uncertainty in the description of the land conveyed. The description, we think, is not so indefinite but what a surveyor might find the land with the deed before him. The court admitted in evidence the record of a deed dated November 1, 1857, executed by James K. Kelly to George Abernathy and Leander Holmes. The certificate of acknowledgment of said deed was signed by "F. S. Holland, deputy clerk." The admission of this deed was also objected to by appellants, on the ground that the certificate of acknowledgment fails to disclose who was the principal of such deputy clerk. Under the statute in force in the territory of Oregon, at the time when the acknowledgment of this deed was taken, a deputy clerk was an independent officer, and not a mere deputy in the ordinary sense of that term. He was clothed with certain powers and duties separate and distinct from the clerk. "Deputy clerk" being the title of his office was therefore his proper official signature. Then this certificate, we think, discloses on its face that it was made by an officer with authority to take the acknowledgment of deeds under

the law in force at that time, and the deed therefore was properly admitted.

The respondent also offered to read in evidence a certain instrument purporting on its face to be the last will and testament of the said Robert Moore deceased, and purporting to have been executed on the tenth day of March, 1857. An objection was also interposed by appellant to the admission of this paper on the ground that there was no proof that it had ever been admitted to probate or proven in the county court as required by law. Respondent was then allowed to call witnesses, and after having proved the execution of the will, was allowed to read it in evidence. Appellants excepted to this ruling of the court and assign it as another ground of error upon which they rely to reverse the judgment. The admission of this will without first having been admitted to probate in the county court, we think, was error.

In this state, under the provisions of our code, county courts have the exclusive jurisdiction in the first instance to take the proof of wills. (Civ. Code 282, sec. 869.) Before the paper purporting to be the last will and testament of said Moore could have been admitted in evidence to support title under it, respondents should have shown that it had been admitted to probate in the county court and there proven to be the last will of the said deceased. Then the record thereof would have been admissible to establish title under it in any other court. This seems to be the general doctrine in all the states where they have probate courts with exclusive jurisdiction pertaining to the proof of wills. In *Castro v. Richardson*, 18 Cal. 480, the court says: "We understand it to be the settled doctrine of the courts of this country, that where the proceedings in probate are conclusive of the validity or invalidity of the will, it cannot be received in evidence to maintain title founded upon it until it has been admitted to probate."

The same doctrine is held in *Dublin v. Chadburn*, 16 Mass. 433; *Loughton v. Atkins*, 1 Pick. 535; 30 Miss. 416; Ohio, 8 Hammond, in *Tompkins v. Tompkins;* 1 Story, 66, 547. In the last case, Judge Story, in speaking of the

character of the statutes of Massachusetts, said: "They contain no exclusive words, but merely declare that a court of probate shall be held within each county, and a judge appointed for taking the probate of wills, and granting administrations on the estates of persons deceased." And this has been universally understood as giving that court, not merely concurrent, but exclusive jurisdiction as to probate of wills.

The court below having erred in the admission of the original will of said Moore, deceased, the judgment is reversed, and the cause remanded for a new trial.

F. R. HILL, Appellant, v. J. T. COOPER, Respondent.

POSSESSION UNDER IMPERFECT DEED—SPECIFIC PERFORMANCE.—Possession under an imperfect deed gives an equitable title which a court of equity, on a proper bill filed, will enforce by directing a specific performance of the contract to convey. In such case the deed will be construed as a contract to convey.

CROSS-BILL — EQUITABLE TITLE, HOW ASSERTED. — Under the statute which allows an equitable defense by cross-bill in actions at Law, a party may rely upon a legal defense in an action without being thereby precluded from afterwards asserting his equitable title in an original suit.

APPEAL from Douglas County.

This suit is brought to enforce a deed executed without witnesses.

The complainant alleges in substance, that on the twentieth day of August, 1856, one Riley E. Stratton being the owner and in possession of one hundred and forty acres of land in Douglas county, conveyed the same to J. J. Patton for the sum of one thousand three hundred and twelve dollars and fifty cents, which sum was paid Stratton at the time of the sale, and Patton immediately took the possession. Stratton and his wife then made a deed to Patton for said land, which deed was good in form, except there were no witnesses to its execution. The deed was delivered to Patton and recorded in the record of deeds in said county of Douglas. It is alleged in the complaint that the omission to have the deed witnessed was a mistake. Afterwards,

February 4, 1862, Patton became indebted to Stratton in the sum of five hundred and ninety-one dollars, and gave him a mortgage on eighty acres of this land as security. Patton remained in the possession of the land until the second day of April, 1869, and made improvements thereon to the amount of five hundred dollars.

In February, 1869, one John Smith obtained a judgment against Patton for the sum of five hundred and two dollars and seventeen cents, besides costs, which became a lien on this land. On this judgment the sheriff sold all the right and interest of Patton in the land, and Smith, the judgment creditor, became the purchaser and received a sheriff's deed for the same in due form and went into possession under said deed, and continued in such possession until he sold the same to the appellant Hill, and gave him possession. Riley E. Stratton died November 26, 1866, intestate, and his widow, Sarah M. Stratton, became his sole heir, and R. H. Dearborn his administrator.

Dearborn, as such administrator, brought suit on the mortgage above named of Patton to Stratton, and foreclosed the same by obtaining a decree for that purpose. In February, 1871, Dearborn assigned said decree to Cooper for seven hundred dollars. John Smith, who had before purchased Patton's interest in the land subject to the mortgage, which was the foundation of this decree, paid the full amount of the decree, and discharged the same. After this, April 22, 1871, John Smith sold to appellant Hill this land, for the sum of one thousand two hundred and fifty dollars and thirty cents, and gave him a deed therefor in due form, under which Hill entered into possession.

After this, April 8, 1872, Sarah M. Stratton, who was the sole heir of Riley E., made a quitclaim deed of this land to Cooper, the respondent, the consideration being one dollar. Cooper then brought an action against Hill to recover the possession of this land, and having the legal title by virtue of this quitclaim deed, recovered the possession of the land from Hill and ousted him from it. Stratton and wife never had any other title to the land than as above stated. It is alleged that Cooper, at the time he obtained

said quitclaim deed, had full knowledge of all the facts in the case, and that said deed was without consideration.

The bill prays that said imperfect deed from Stratton to Patton be enforced as a contract to convey, and that Cooper may be required by decree to convey the land to appellant Hill. The defendant Cooper interposes to this suit as a separate defense, this judgment at law, in which he recovered this land from Hill, claiming that this judgment is a bar to the suit. To this answer appellant demurred and the court below overruled the demurrer and sustained the answer.

From the decision on this demurrer the appellant appeals to this court.

Addison C. Gibbs, W. B. Gilbert and R. S. Strahan, for appellant:

The deed from Stratton to Patton being without witnesses did not fulfill the requirements of the law, and the legal title still remained in Stratton; but the price agreed upon for a valid conveyance having been paid by Patton in the manner agreed upon, and the intention of Stratton to convey to Patton the legal title having failed through mistake, Stratton held only the naked legal title, and Patton held all the beneficial interest; and as between Stratton and his grantees, a court of equity would correct this mistake, supply the defect, and carry the intention into effect by investing Patton with the legal title. (Story's Eq. secs. 165-7.)

Cooper took with actual notice of all the facts as to the Patton title and its conveyances down to Hill, and having paid no consideration for the deed to him, is bound by all that would have bound Mrs. Stratton. (Story's Eq. secs. 165-6; *Morrison v. Moulton,* 24 Penn. 12; *Hawkins v. Lambert,* 18 B. Mon. 99; *Bube v. Elliott,* 4 Barb. 457; *Calkins v. Allaton,* 3 Id. 171.)

The judgment in the action at law, in case of *Cooper v. Hill,* set up in the answer, is no defense to this suit. The answer sets out the pleading in that ejectment suit, and shows that an adjudication of, and upon, the same facts set up in this bill has not been had. As the answer demurred

to shows, the only question involved in the case of *Cooper v. Hill,* was the fee-simple title at law. Here it is admitted that the fee-simple title is in Cooper, and Hill is seeking relief by showing himself entitled to have that fee-simple title transferred from Cooper to himself. At common law a judgment in ejectment cannot be pleaded in bar or given in evidence by way of estoppel—it was between fictitious persons. (Herman's Law of Estop., sec. 68; Tillinghast's Adms. 3 Tyler on Eject. 584-592.)

Under our statute a judgment is conclusive only "so far as the same is hereby determined," and of course only affects the estate or title put in issue by the pleadings. (Laws of Or. 177, sec. 326; Id. 254, sec. 723; Id. 255, sec. 726; Freem. on Judg., secs. 249, 252, 256, 257, 258, 259, 260, 271, 281, 295, 299; *Mosby v. Wall,* 23 Miss. 81; *White v. Crew,* 16 Geo. 416; *Arnold v. Grimes,* 16 Clark, 1; *Pollock v. Gilbert,* 16 Geo. 398.)

A matter cannot become *res judicata* until it can be tried upon its merits, that a failure at law does not affect a remedy or defense cognizable only in equity. (Freem. on Judg. sec. 281; *Lorraine v. Long,* 6 Cal. 452; *Hough v. Waters,* 30 Id. 309; *McCrerey v. Casey:* 45 Cal. 128; 4 Pac. L. R. 179; 38 Cal. 643; 3 Leading Cases in Eq. 183.) Even then the parties in their pleadings may limit their controversy to a particular title, and if so are bound by it. (29 Cal. 521; *Marshall v. Shafter,* 32 Id. 176, 195-198.)

Hill was not required to file a cross-bill, and stay the action at law. It is only a privilege, whereby he could save time and a summons. He might let judgment go at law, and file his bill in equity for relief at any time. (*Lorraine v. Long,* 6 Cal. 452: *Hobbs v. Duff,* 23 Cal. 596, 627; *Stoddard v. Treadwell,* 26 Cal. 300, 307-8; 2 Estee, 765, sec. 55; *Burdeck v. Post,* 12 Barb. 168; *Weck v. Hazelton,* 14 How. Pr. 99; *Leguat v. Redding,* 4 E. D. Smith, 285; 17 Abb. Pr. 467; 43 Barb. 628; 1 Duer, 667; 3 Hill, 174; 3 Sandf. 743; *Joes v. Van Epps,* 23 Wend. 157; 6 N. H. 481; *Barber v. Rose,* 5 Hill, 81; 14 Wend. 257; 16 Id. 583; 6 Dure, 667; *Hough v. Waters,* 30 Cal. 309; Barb. on Set-off. 91; *Dotz v. Brown,* 4 Com. 756; *Davis v. Talcott,* 14 Barb.

620; 25 Cal. 271; 30 Cal. 311; 5 Denio, 678 and 689; 11 Paige's Chan. 298.)

John Kelsay and W. W. Thayer, for respondent.

The entire title was included in the action and judgment mentioned in the answer. (32 Cal. 196; Code, 255, sec. 726; 26 Cal. 479; 15 Pick. 285; Cal. Code, sec. 1911; Freem. on Judg. sec. 299, 302; 1 Johns. Cas. 502; 44 N. Y. 12; 25 Wend. 431; 11 Conn. 248; 38 N. Y.; 4 Barb. 358; 12 Id. 567; 54 Ill. 79.) The action at law mentioned in the answer was to recover the possession of the real property described in the complaint and answer. In that action each party claimed to be owner in fee. The judgment was conclusive as to the estate. (Code, 176, sec. 313; Tyler on Eject. 592.)

A fee-simple is the largest possible estate which a man can have in the land, it includes both the legal and equitable title. (1 Wash. on Real Prop. 66, sec. 33; 4 Kent, 3; 1 Hil. on R. Prop. 54, sec. 7; 2 Wall. 410; 2 Wash. on R. Prop. 454; 6 Penn. 299.) The judgment establishes the title in fee and is of the same form as if Cooper had a deed in fee-simple at the date of the judgment from Hill. It cannot be impeached in a collateral proceeding. (Freem. on Judg. sec. 334.) If a party defendant at law is entitled to relief arising out of facts requiring the interposition of a court of equity, and material to his defense, etc., he may file a complaint in equity, in the nature of a cross-bill, etc. (Code, 630, sec. 377.) If he neglects to do this, *prima facie* at least, it is a bar. (9 Paige, 630, and cases.) And we claim that it is an absolute bar. Plaintiff had a full defense at law, as appears from the complaint in this suit. (9 Cow. 81; 18 John. 97.)

By the Court, BOISE, J.:

The facts stated in the plaintiff's bill show that Patton paid Stratton the full purchase price of the land and took possession under the imperfect deed; this proceeding would give Patton an equitable title to the land as against Stratton, which a court of equity on a proper bill filed would

enforce by declaring a specific performance of the contract to convey; for the imperfect deed in such a case will be construed as a contract to convey, and may be enforced. (Story's Eq. 165.) And the same is true of all who succeed to the naked legal title which commenced in Stratton, if they took with notice; and it appears that Cooper, who succeeded to this title by said quitclaim deed knew all the facts, and had actual notice of the equity then in the appellant, and he was bound to take notice of this equity, for Hill was in actual possession of the land. (*Stannis v. Nichols*, 2 Or. 332.) But we understand that respondent's counsel do not strenuously contend that Hill might not have obtained the relief he now seeks in this suit, had he interposed the same as a defense by the way of a cross-bill in equity to the action by Cooper against him to recover the possession of this land. But counsel for respondent now insist that having a right under the statute to interpose this equity in that action, appellant having failed to avail himself of such a defense, cannot now, after having asserted in his answer in that action that he was the owner of the fee-simple title, and that having been determined against him, come and assert his equity derived through the deed from Stratton to Patton. It is insisted by the counsel for respondent that it is the duty of a party defendant who has an equitable defense to an action at law to interpose the same by way of cross-bill, as allowed by the code, and if he fails to do so, his right is lost and the determination of the action at law against him will forever bar his equity. The determination of this question depends upon the construction of our statute conferring on litigants the right to interpose equitable defenses in actions at law. The statute is as follows:

"Where the defendant is entitled to relief arising out of the facts requiring the interposition of a court of equity and material for his defense, he may, upon filing his answer therein, also as plaintiff file a complaint in equity in the nature of a cross-bill, which shall stay the proceedings at law."

The statute says the defendant may on filing his answer

also as plaintiff file a complaint in equity, which opens to him the door to let in equitable defenses, without the expense and trouble of commencing an original suit in equity to enforce his claim; it may be that his equitable defense is a full defense, and in effect defeats the claim of the plaintiff, and it may be that it is only a partial defense, and, as is the case in many real actions, only offers partial relief by seeking to have a return of the purchase-money where there has been a failure to convey the title, and the court of equity cannot decree the title to defendant as in cases of sales by executors and guardians.

In such cases it often happens that doubts arise as to whether the legal title has been conveyed, and the defendant when sued at law for the possession, may, when called on to answer, desire to try the legal title, and fully believe he has it by virtue of the sale, though doubts have been cast on it by claim of the heir. In such a case, if he yields to the title of the heir, and files his cross-bill to recover the purchase-money, he must abandon the hope of holding the land, though bought in good faith and greatly enhanced in value by improvements made by him.

In such cases it would be vastly more conducive to justice that the law remain as it was before the enactment of the statute referred to, if the construction contended for by the respondents prevail. It has been held by this court, in the case of *Dolph v. Barney,* that where a defendant in an action to recover real property files an answer at law asserting title in himself or another, he cannot also file a bill in equity in the nature of a cross-bill, he must therefore abandon his right to defend his title at law before he can avail himself of any defense in equity.

We think it was not the intention of the statute to place defendants in a worse position by giving them a right to interpose equitable defenses in legal actions than they were before. It was the intention of the statute to simplify legal proceedings and save expenses to litigants, and at the same time save to them all their former remedies if they saw fit to omit them. And such a construction has been given a similar statute in other states. (*Lorraine v. Long,* 6 Cal.

452; *Hobbs v. Duff*, 23 Cal. 596.) We think the proper construction of this statute is that it confers on a defendant in an action at law the privilege to interpose an equitable defense if he has one, but that if he fails to so interpose he may avail himself of his equity after a judgment against him in the same manner as before this statute was enacted.

There is another matter which was presented and insisted on by the respondent as conclusive in this case, that is that inasmuch as the appellant Hill in his answer in the action for possession by Cooper against him, set up title in fee-simple in himself, which was denied in the replication, and this issue being determined against him, this determination was a final adjudication of title in the premises between him and Cooper, for the fee-simple includes and merges all other title and equities, the same being inferior to and included in the fee-simple. It is true when the appellant asserted a fee-simple title in his answer in the ejectment he claimed a title which if he possessed included all inferior titles, and he had no need to assert this equity claimed in the suit. But the determination in that action was that he had not a fee-simple title, that such title was in respondent Cooper. This determination in that action showed that appellant was mistaken in supposing he possessed a fee-simple title, in that action. He could not assert his equity under the pleading on which it was tried; and consequently his equity asserted in this suit was not adjudicated in that action.

A matter cannot be said to be adjudicated in an action which was not in issue therein. (Civil Code, p. 255, sec. 720.)

HATTIE JONES, by her Guardian JAMES JONES, Appellant, v. BETHUEL DOVE, Respondent.

EVIDENCE—WILL.—Before a will can be admitted as evidence it must be admitted to probate by the county court.

STATUTE CONSTRUED.—Section 769 of the code of civil procedure construed.

PAROL EVIDENCE—WILLS.—Parol evidence is admissible to make certain the person or the thing described in a will.

APPEAL from Polk County.

This was an action for the recovery of real property. Penny and another were the original defendants, but they claimed to hold under the present respondent, who was substituted in their stead. The appellant had a perfect chain of title from Bethuel Dove, the respondent, down to the last will and testament of one Oliver M. Hurt, deceased, through whom appellant claimed title. This will had been regularly admitted to probate by the county court of Jackson county, and the whole record was offered. The court below sustained an objection to its admission as evidence, for the reason that the land in controversy did not appear to be described by the will. The appellant then offered extrinsic evidence to show that the land in controversy was included in the land referred to in the will. To the admission of such evidence the court below also sustained an objection. To these rulings proper exceptions were taken, and allowed. Respondent had a verdict and judgment, from which this appeal is taken. All other necessary facts are stated in the opinion.

R. S. Strahan, Ben. Hayden, and J. J. Daley, for the appellant:

The record of the probate of Hurt's will was a judicial record properly authenticated, and ought not to have been excluded. (Code of Proc. sec. 559; 33 Barb. 188.) The order of probate of a will is conclusive evidence of the execution of the will in the trial of any matter involving such an inquiry in any other court. (3 Wash. on Real Prop. 431; 1 Green. Ev. sec. 518; 2 Green. Ev. sec. 672.) Extrinsic evidence is admissible to identify the lands. (1 Ed. Ch. 189, 4 Paige, 271; 2 Dana, 47; 3 Watts. 385; Wigram on Wills, 142.) Parol evidence is admissible to identify the lands. (51 Me. 581; 10 Met. 26; 12 Penn. 144; 14 Id. 27.)

R. Williams, Hill & Thompson and P. C. Sullivan, for respondent:

Parol evidence cannot be admitted to show testator's intention. (Red. on Wills, 496.) The transcript of the probate of the will in the Jackson county court, was incompetent.

The will itself was the only competent evidence that could be offered. (Code, secs. 749; 2 Phil. Ev. 377, and note.)

By the Court, McARTHUR, J.:

The points for review, consist mainly in the rulings of the court below in the exclusion of evidence. The appellant had presented a number of deeds showing a perfect chain of title in one Oliver M. Hurt, through whom she claimed title by last will and testament. The will had been admitted to probate by the county court of Jackson county, and the whole record properly authenticated was offered in evidence, and excluded on the objection of respondent's counsel. The reason for the ruling, it seems, was that the land in controversy did not appear upon the face of the will to be included or described therein. An offer was then made to show by extrinsic evidence that the land was so included, and upon objection the court below excluded such evidence also.

These rulings, the respondent insists, were correct, and as an additional reason for excluding the record of the probate of the will, it is urged that the English rule (2 Phil. on Ev. 377) obtains in this state, and that the original will should have been offered and its execution proved in this action, it being an action real. If this position is maintainable this judgment should be affirmed, otherwise the opposite result must be reached. In order to arrive at a correct conclusion, a brief examination of the jurisdiction of our county courts sitting in probate becomes necessary. By virtue of statutory enactment, those courts are invested with exclusive jurisdiction, in the first instance, to take proof of wills (Code, sec. 869), and their judgments or decrees, in respect of the probate of wills, are conclusive upon the question of the execution thereof. (Code, sec. 723.) In England the ecclesiastical courts were the only tribunals in which wills were established, and the decrees were only conclusive evidence of the *factum* of wills of personalty. Hence the reason of the English rule requiring the production and proof of execution of original wills in all actions, real either in the common law or equity courts. With us, the courts of common law and equity have no orig-

inal jurisdiction or right to determine whether a will has been legally executed or not.

If a county court having jurisdiction admits a will to probate, the fact of the execution thereof by the testator cannot be called in question, and if the decree is not vacated by an appeal, or successfully impeached in some known and recognized legal method, it is final and conclusive upon all persons. It is very apparent to us from the broad jurisdiction of our county courts in matters of probate, that a naked will, unaccompanied by a decree of one of those courts admitting it to probate, cannot be received in evidence as a muniment of title in an action of ejectment in the circuit court, even though the party offering the same stands ready with the subscribing witnesses to prove the execution thereof by the testator. The proceedings of probate must all be taken in the county court, and under the conditions above expressed, its decree is final, and being a judicial record may be proved by the production of a certified copy thereof. (Code, sec. 720.)

In reaching the conclusions arrived at, we have not overlooked section 769 of the code, wherein it is declared that "a last will and testament, except when made by a soldier in actual military service, or by a mariner at sea, is invalid, unless it be in writing, and executed with such formalities as are required by law. Evidence, therefore, of such will shall not be received other than the written instrument itself, or secondary evidence of its contents, in cases prescribed by law." This section does not raise an exception to the general rule, in relation to the admissibility of certified copies of the record of the proceedings in probating a will, and as we understand, it does not authorize the admission of an unprobated will as evidence of title in an action for the recovery of real property. It is simply a general principle of the law of evidence furnishing a rule for the guidance of the probate court in ascertaining whether a will has been executed with the formalities required by law, and authorizing the admission of secondary evidence of the contents of a lost will, or of one improperly destroyed and the like.

Section 1969 of the code of procedure of the state of California is identical with section 769 of our code. The jurisdiction of the probate courts of that state is derived from a statute based upon a constitutional provision. The constitution of California, art. 6, sec. 8, declares generally: "The county judges shall also hold, in their several counties, probate court, and perform such duties as probate judges, as may be prescribed by law," and the code declares, section 97, that "the probate court has jurisdiction to open, and receive proof of last wills and testaments, and to admit them to proof." With these provisions of fundamental and statutory law, very similar to our own, though not so strongly stated as in our code (sec. 869); to guide and control them the courts of our sister state have declared the law to be that before a will can be read in evidence to support a title under it, the regular probate thereof must be shown (18 Cal. 479), and in announcing this doctrine they have but followed the uniform decisions of the courts of those states in which the original jurisdiction is vested in the probate courts. Nowhere have we been able to find any expression of opinion warranting the construction sought to be placed upon section 769. On the contrary, the language of the opinion of the case cited, and of the cases following and approving it, clearly indicates that the courts of that state have never regarded section 1969 of the California code as furnishing authority for admitting an unprobated will to be offered, and its execution proved in an action in a common law court, and confirms and strengthens us in the interpretation placed upon the like provision of our code.

The objection urged by respondent that notice of the proceedings in probate was not given is of no weight whatever, for the defendant in this action was an absolute stranger to the adjudication in the probate court. As has been stated, an offer was made to prove by extrinsic evidence that the land in controversy was included in the will. This the court refused. The language of the will is: "I give, devise and bequeath unto Ellis Lerelle Jones and Hattie Jones, children of James Jones and Elizabeth Jones,

my real estate, situated in Polk county, state of Oregon, being the north half of the donation claim of Bartholomew Dove, and bounded on the north by the land of James Jones, and on the south and east by the land of Benj. Hayden." The evidence offered tended to prove the complete boundaries of the land, and to show that it was the land claim of Bethuel instead of Bartholomew Dove. The rejection of this evidence was error, for parol evidence is admissible to identify the lands and to show what particular property was intended to pass, or to make certain the person or the thing described. (Wigram on Wills, 142.)

Judgment reversed and a new trial ordered.

JOSIAH STEPHENS, Respondent, v. STEPHEN MURTON and JAMES WALTON, Appellants.

MISTAKE—DEGREE OF PROOF REQUIRED TO REFORM INSTRUMENT ON THE GROUND OF.—In order to warrant a court of equity in reforming an instrument on the ground of mutual mistake, the proof of the mistake and that it was mutual must be very clear.

PLEADINGS—MUST ALLEGE FRAUD, WHEN.—Where the complaint alleges mistake and asks relief on that ground alone, the court will not reform the instrument on the ground that one of the parties to it was guilty of a fraud in executing it.

COMPLAINT, IN SUIT TO REFORM, MUST SHOW WHAT THE TERMS OF THE TRUE CONTRACT ARE.—The complaint should point out the mistake and show in terms what the tenor of the instrument ought to be. It is not sufficient to say that it was the intention of the parties to make an instrument that would accomplish a certain object and then ask the court to make a writing that will accomplish that object. The complaint should show the true contract in its terms.

APPEAL from Douglas County.

This is a suit to reform and enforce a written instrument. The court below decreed the relief prayed for. The facts are stated in the opinion of the court. The following is the instrument sought to be reformed:

"This agreement made and entered into the twenty-second day of July, 1872, between Josiah Stephens of the first part, and Stephen Murton and James Walton of the second part,

all of Douglas county and state of Oregon, witnesseth: That the said Josiah Stephens for and in consideration of the yearly payment to him by the said Stephen Murton, of the sum of three hundred and thirty-six dollars, gold coin of the United States, hereby rents, leases and lets to the said Murton, all his real estate on Deer Creek, containing one thousand two hundred and forty acres, together with the appurtenances and hereditaments thereto belonging, for the term of five years from the first of August next, and the said Murton hereby agrees, on or before the expiration of each year, from the said first day of August next, well and truly to pay to the said Josiah Stephens, his agent or order the aforesaid sum of three hundred and thirty-six dollars gold coin of the United States, and to keep all buildings, fences and other improvements in as good repair as he receives them; and so to deliver them up at the expiration of his lease, and, provided the said Stephen Murton shall relinquish the lease at or before the end of the said five years, he shall pay an additional sum of one hundred dollars, gold coin, annually over and above the rent, and the said Josiah Stephens shall, at all times during the continuance of this lease, have full liberty to enter into and upon the land hereinbefore leased, for the purpose of cutting and hauling timber therefrom, and the said Stephen Murton is at liberty to cut and haul timber for sale, on paying to the said Josiah Stephens, the sum of one dollar per cord for each cord of wood so sold.

"In witness whereof we have hereunto set our hands and seals, the day and year first above written.

"JAMES WALTON,
"STEPHEN MURTON,
"JOSIAH STEVENS."

James Walton, the appellant, appeared in his own behalf.

E. G. Hursh and W. W. Thayer, for respondent.

By the Court, BOISE, J.:

The facts as proven by the defendants in the case are about as follows: Stephen Murton, one of the respondents,

desired to rent or lease a farm of the plaintiff, and it was agreed by parol between Stephens, Murton and Walton that Stephens should lease the farm to Murton and that Walton would become security for Murton to Stephens for the payment of the rent, and it was agreed that this agreement should be reduced to writing and executed by the parties. Then one Tustan drew up a lease from Stephens to Murton and also an undertaking to be executed by Walton, whereby Walton was to become security to Stephens for the payment of the rent. The parties then met at the store of — Marks in Douglas county, for the purpose of signing the papers and completing the contract of renting which had been before agreed upon.

When Stephens examined the lease and undertaking of Walton to be security for the rent, which undertaking was appended to the lease, he objected to the papers, and desired that Walton should be a party to the lease, and after some talk on that subject, the lease was interlined by the consent of both parties and the name of James Walton inserted after the name of Murton, as it now appears. There were some other alterations; the rent was raised from three hundred dollars to three hundred and thirty-six dollars per year, and some other alterations which do not affect the questions involved in this suit.

The testimony shows that some hours were spent in discussing and making these alterations. Stephens says that he then thought the instrument as executed by them, bound Walton to pay the rent. He says he does not remember whether he read it as executed or not, but that he thought he understood it and that it bound Walton.

The evidence tends to show that Stephens intended to have Walton bound by this agreement to pay the rent. The evidence also tends to show that Stephens critically examined the instrument before it was interlined and excepted to it and directed the interlineations to be made, and knew what they were, and the tenor of the instrument after it was signed, but he was mistaken as to the obligations it imposed on Walton. That is, he was mistaken as to the legal construction of the instrument. He thought the language of

the instrument would bind Walton to pay the rent, when in fact it did not bind him to pay anything. This then being a misapprehension as to the meaning or construction of a written instrument was a mistake of law.

As to whether the court of equity will interpose to reform and enforce a written instrument when the parties understood its tenor, but were mistaken as to its legal import, there is much conflict of authority; it is a rule *Ignorantia legis non excusat,* (3 Parsons on Contracts, p. 398.) But there are many well considered cases where courts of equity have reformed instruments of this kind. But the view we take of the evidence in this case does not render it material to now determine whether this court will or not in any case reform an agreement in which there is a mistake of the parties as to its legal effect.

While there is evidence sufficient to show that this instrument is not in legal effect what Stephens thought it was, in order that the court shall have authority to reform it, the mistake must be mutual. (1 Story's Eq. Juris., sec. 155.) That is, Stephens and Walton must both have been mistaken as to its legal effect. Walton in his testimony swore that he fully understood the instrument when he signed it, and that there was no mistake on his part. And there is no evidence which shows he was mistaken, and thought himself bound by its terms to pay the rent. In order to warrant a court of equity in reforming an instrument on the ground of mutual mistake, the proof of the mistake must be clear, for its object is to alter a written contract which the parties have deliberately reduced to writing, and which is supposed to contain their mutual understanding of their obligations at the time; and to alter it on the ground of mistake, in effect avoids the rule that no evidence can be admitted to change a written agreement. For this reason courts have required very clear proof of a mutual mistake in written agreements before they have interposed to reform them. (1 Story's Eq. Juris., sec. 157.) The evidence tends to show that Stephens sometime after the execution of the instrument showed it to Williams, one of the witnesses, who expressed doubts as to the validity of the contract to bind Walton, but thought it

might bind him, and it appears that Stephens was, long after the execution of the contract, uncertain as to its construction, but there is no evidence which shows that Walton executed the agreement thinking he was executing one of different import.

It is claimed by the plaintiff's counsel that it is sufficient to show that a particular object was to be accomplished by the instrument to be executed, and that the instrument as executed is insufficient to effectuate the intention of the parties. This proposition may be true, but to sustain the case of the plaintiff it must be shown by the evidence that Stephens thought the instrument bound Walton, and that Walton thought it bound him by its terms as executed. But Walton denies this, and it is not shown that he thought the instrument bound him. It is claimed by respondents that if Walton knew the instrument did not bind him when he signed it, that then he was guilty of fraud, and the instrument should be reformed; whatever may be the law as to reforming instruments when one of the parties has been guilty of fraud, it is not in this case, for the complaint alleges that both parties are mistaken and ask relief on the ground of mistake alone. There is no fraud alleged, and for the court to reform the instrument on that ground, would be going outside of the case made by the parties in their pleadings.

There is an objection to the decree reforming this instrument which is urged by the appellant as decisive of this case, and that is, that the complaint does not make a case which entitles the plaintiff to the decree rendered reforming the instrument; that is to say, the complaint does not set out and show in terms what the instrument agreed on should be when reformed. The complaint should point out the mistake, and show in terms what the tenor of the instrument ought to be to express the contract, which by mistake there was a failure to execute. It is not sufficient to say that it was the intention of the parties to make an instrument that would accomplish a certain object, and ask the court to make a writing that will accomplish that object. That would be asking the court to act as scrivener for the parties, and then to construe the con-

tract favorable to the plaintiff. The complaint should show the true contract in its terms, and ask the court to decree that such was and is the contract agreed on, and then enforce it; in this complaint the plaintiff in effect asks the court to make for the parties such a contract as should make Walton jointly responsible for the rent, and then enforce the same against Walton.

The complaint says on this subject, it was further negotiated and agreed upon by said parties that the defendant, James Walton, should become a joint contractor and obligor with the said Murton, for the performance of the terms aforesaid to be performed by said Stephen Murton, but it does not show what language was intended to be used to express this joint obligation, and the court could not tell whether such an obligation would result from the contract intended to be executed, until the true contract was exhibited to the court for its construction. We think that one alleging a mistake in a written instrument, the mistake being in the wrong use of certain words, or the omission to use them, the words must be set out either in tenor or substance. (1 Abbott's Forms, 586; *Lamoroux v. Atlantic Ins. Co.*, 3 Duer, 680.)

From these considerations, we conclude that the decree of the court below must be reversed and the plaintiff's bill dismissed.

JAMES TAYLOR, Respondent, v. JAMES WELCH et al., Appellants.

WATER RIGHTS, WHERE STREAMS FLOW OVER OR THROUGH WELL DEFINED CHANNELS.—Every proprietor of land through which flows a stream of water has a right to the use of the water flowing in its natural channel without diminution or obstruction. The same rule applies to water which flows in a well defined and constant stream in a subterranean channel, but not to water percolating through the soil, or even flowing through an unknown and undefined channel.

APPEAL from Clatsop County.

This is a suit in equity for an injunction and for damages. The complaint alleges that plaintiff is the owner of certain

real property in the city of Astoria, upon which is situated his dwelling. That from time immemorial a spring branch has been wont to flow through this land, from which he has hitherto obtained water for his domestic, household and other purposes, and that he has no other suitable and convenient supply of water upon his land. That up to the time of the grievances alleged in the complaint, this spring branch supplied, during all seasons of the year, sufficient water for all necessary and convenient uses upon said land. That this spring branch does not rise upon the lands of plaintiff, but comes from a spring pond or swale above upon the land of the appellant, Nancy Welch, the wife of defendant, James Welch. That defendants have dug and are now continuing open upon the land of Nancy Welch, a ditch, or artificial channel from the before mentioned pond or swale so as to divert the water from the premises of plaintiff, and to convert the same entirely to the use of defendants, to plaintiff's injury, etc.

The answer denies all of the material allegations of the complaint, except that it admits that there is on the lands of the appellant, Nancy Welch, a pond or swale, and that defendants, partly for the purpose of reclaiming said swale, and partly for the purpose of securing a greater flow of water for their own use, through the only natural outlet from the swale, did clear out the natural outlet from the swale, and the only channel by which the waters of the swale could escape, or ever did escape, but denies that they thereby in any way diverted any waters which were accustomed to flow to the premises of plaintiff.

The reply denies all allegations of new matter in the answer, and alleges that at the time of the digging of the ditch complained of, there was and now is and ever has been a natural outlet and channel from the swale or spring described in the complaint, by which the waters thereof were accustomed to flow over and upon the lands of plaintiff.

The court below decreed a perpetual injunction in accordance with the prayer of the complaint, but without damages, and from that decree defendants appeal to this court.

Dolph, Bronaugh, Dolph & Simon and W. D. Hare, for appellant.

F. J. Taylor and F. R. Strong, for respondent.

By the Court, WATSON, J.:

The rules of law applicable to this case seem to be well settled. Every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel without diminution or obstruction. (Wash. on Ease. 215.) The same rule applies to water which flows in a well defined and constant stream in a subterranean channel. (Angel on W. C., sec. 112; Wash. on Ease. 364); but it does not apply to water percolating through the soil or even flowing through an unknown and undefined channel. (Wash. on Ease. 210; Id. 364.) These rules, together with the maxim that every person may use his own property as he pleases, provided such use is not an injury to another, are, we think, all the principles of law necessary to a decision of the case. The only question to be decided by us is one of fact. Does the evidence before us prove the existence of a constant and well defined stream of water flowing in a subterranean channel, swale, spring or basin on the land of defendants described in the pleadings and evidence to the spring described as Taylor & White's spring, in the evidence and upon the maps used in the argument before us, prior to the digging of the ditch complained of. It appears from the evidence, that the distance from the basin to Taylor & White's spring is about three hundred and thirty feet; that the spring is about seventy feet lower than the basin, and that between them is a ridge rising from eleven to fifteen feet above the basin, composed of trap rock and earth. It is the theory of respondent that the waters of the basin, prior to July 28, 1874, the date of the construction of the ditch complained of, flowed in a well defined channel through this ridge to the spring known as Taylor & White's spring. No witness testifies that he ever saw such a channel, or that he knows of its existence. Several witnesses for plaintiff swear

that they believe such a channel exists, but none of them attempts to define it or trace its course. The reasons they give for their belief are that immediately after the ditch was dug the water partially ceased to rise in Taylor & White's spring, and that about the same quantity of water flows in the ditch complained of as formerly rose in the spring. These facts, if admitted to be true, are altogether as consistent with the theory that Taylor & White's spring was fed by water percolating through the earth and rocks from the basin as with that of the existence of a regular channel from the basin underground to the spring. There is a conflict in the evidence upon the point whether the water in Taylor & White's spring failed in dry seasons before the construction of defendant's ditch, and whether the natural outlet of the swale is along the line of the ditch? Whether it is the natural outlet or not, or whether a subterraneous stream flowed in the same direction from the basin, is like the claim of plaintiff, also a theory. Taking into consideration the fact that the ground in that direction is many feet lower; that there is in that direction a depression in the ground around the basin, and that it terminates in a ravine, and that the waters of the basin have in certain seasons of the year been discharged in a surface channel in that direction, this theory seems to us as probable as that of plaintiff.

One witness for plaintiff, it is true, testifies that there was formerly, at a point about thirty feet above Taylor & White's spring a hole six or eight inches in diameter through which water could be seen flowing in a full strong channel in the direction of the spring. When we consider that this point was three hundred feet from the basin and only thirty feet from the spring, and that a wet, boggy place intervened, we cannot attach much importance to the evidence. This fact is entirely consistent with the waters being derived from percolation through the hill from the basin, or with the water being derived from some other source. A number of other theories, more or less probable, have been suggested, but as in our opinion the evidence fails to establish that of plaintiff with sufficient certainty to warrant us in decreeing against defendants

a perpetual injunction, it is not necessary for us to consider them. We do not think the right of plaintiff is sufficiently clear upon the evidence to warrant us in interfering with defendants' use and enjoyment of their own property. Courts of equity will not interfere by injunction where the rights of plaintiff are doubtful. (Hill. on Injunc., sec. 16; Will. Eq. Jur. 392.) It follows that the decree of the court below must be reversed and that the complaint be dismissed.

LEAH LINNVILLE, Respondent, v. GREEN B. SMITH, Appellant.

MARRIED WOMAN—RIGHTS OF UNDER DONATION LAW, HOW AFFECTED BY ACT OF LEGISLATURE OF 1852—NOT AFFECTED BY SUBSEQUENT REPEAL OF ACT.—An act of the Territorial Legislature of 1852 provided that all right and interest of a wife in land donated by the act of Congress, known as the "Donation Law," "should be secured to the sole and separate use and control of the wife." The act was repealed in 1853: *Held*, that a notification and settlement made while this act was in force, operated to make half of the claim settled on the separate property of the settler's wife from the date of the notification, and that the repeal of the act did not divest her of such right.

CONVEYANCE TO HUSBAND OF LAND PURCHASED WITH THE WIFE'S MONEY—EFFECT OF.—Where a conveyance is taken by a husband in his own name, without the wife's consent, of land purchased with the wife's money, and with the understanding on her part that the conveyance is to be made to her, she is in equity the owner of the land, and the husband is her trustee.

APPEAL from Douglas County.

The respondent was the owner of one half a donation land claim under the act of congress of 1850. The settlement and notification was made upon the claim about December, 1850, by William Linnville, respondent's husband. Subsequently the title was perfected to the land claimed, and the wife's half designated as provided by law. The wife's half was, in 1871, sold by the husband and wife. The husband subsequently bought other land with the money derived from this sale, the understanding between Linnville and his wife at the time of this purchase being that the land purchased should be

conveyed to the wife. Contrary to this understanding and without the wife's consent, the husband, Linnville, had the conveyance made to himself. Afterwards, at her request, he conveyed the land to his wife, but in the meantime the appellant, Smith, had levied upon it for a debt of the husband.

The appellant brought suit praying for a decree declaring her the owner of the land levied upon, and for an injunction against the appellant in his proceedings to subject the land to the payment of his debt. The court below rendered a decree in accordance with the prayer of the complaint, whereupon Smith appealed.

Kelsay, Yantis and Herman, for appellant.

F. A. Chenoweth, for respondent.

By the Court, BOISE, J.:

The main question in the case is as to whether the donation land claim named in the complaint was the separate property of the plaintiff. This claim was held under the fifth section of the act of twenty-seventh of September, 1850, and it is claimed by the appellant that as the common law was in force in Oregon at the time of settlement and notification, the husband, by virtue of his marital rights, became on settlement on the claim vested in a life estate in the land, and became the absolute owner of the use of the land for his life, and that the wife had only a reversionary interest, to accrue to her on the death of her husband. Whatever construction may be given to the act of September 27, 1850, it will not, as we think, affect the rights of the parties to this suit. For on the twentieth day of January, 1852, the legislature of Oregon passed an act providing "that all right and interest of the wife in land donated by said act of twenty-seventh September, 1850, should be secured to the sole and separate use and control of the wife, and that she should have to her own use the rents and profits thereof, and that such land should in no manner be made liable to the debts of the husband." This act was in force at the time of the settlement and notification

on said land claim, and operated to make the plaintiff's half of said claim separate property.

It is claimed by the appellants that the repeal of this act in 1853 divested the plaintiff of her separate rights to this property. It is a general rule that the repeal of a law does not affect rights acquired under it, if the same are executed and not inchoate. Puffendorff says the law itself may be disannulled by the author, but rights acquired by virtue of that law while in force must still remain. (Smith on Statutory and Constitutional Construction, 895, sec. 775; also 881, secs. 760, 761.)

The plaintiff in this case became invested with the title to this land from the date of the notification, *Starr v. Starr*, 6 Wallace, 402, and by the operation of the statute she took the property to her separate use, if not under the donation law, at any rate under the act of the legislature. For there was nothing in the act of congress that limited her rights in this respect, and she took it under the law as absolutely as she could under a deed declaring it to be to her separate use, and the land was vested in her and the grant executed, and not executory or inchoate.

This view disposes of the only important question in the case. That the land in controversy in this case was deeded to the husband without her consent does not affect her right to it, as it was paid for with her money, and with the understanding by her that she was to have the deed made to herself. Under such circumstances, her husband would become her trustee, and she would be the owner of the land in equity. (21 Ohio, 547; 15 Barb. 276; 13 Cal. 494.)

In the argument of this case considerable discussion was had by counsel relative to the rights of a wife in her portion of a donation claim as to the matter of it being her separate property, and it was claimed by counsel for plaintiff that by the operation of the donation law the wife's half of a donation claim is separate property, and also that it is made such by the constitution of the state. These questions are of great interest to the people of the state, as they affect a large portion of the real estate of the country, and many important interests rest on the determination of these questions.

questions. The general understanding of the people has been that the wife's portion of a donation claim is separate property, and it has been generally treated as such. But the matter has not as yet been adjudicated by this court, and we do not feel called upon to determine it in this case, the discussion of which is placed in this court, as in the court below, on the statute of 1852 above referred to.

The decree of the circuit court will be sustained.

WM. TICHENOR, Respondent, v. RACHEL KNAPP, Appellant.

SUIT TO QUIET TITLE—POSSESSION MUST BE LAWFUL.—Under section 500 of the civil code, which allows any person in possession to bring a suit to quiet title, the possession of a party to entitle him to maintain such suit, must be lawful.

APPEAL from Curry County.

The facts are stated in the opinion of the court.

W. W. Thayer and S. H. Hazard, for appellant.

Knight & Lord and B. F. Bonham, for respondent.

By the Court, BOISE, J.:

It appears from the pleadings in this case that the respondent Tichenor is the owner of a land claim in Curry county.

Rachel Knapp, the appellant, owns a lot which joins the land claim of Tichenor on the east; and the south-east corner of Tichenor's claim and the south-west corner of Rachel Knapp's lot are common to both parties. The controversy between the parties is as to the location of this corner. And a strip of land claimed by each which will belong to one or the other of the parties as the east line of the Tichenor claim is established by the location of this corner.

Prior to the commencement of this suit Mrs. Knapp brought an action of forcible entry and detainer against

Tichenor to recover from him this strip of land, and obtained a verdict and judgment against him. Tichenor being in possession of this land, immediately, on the obtaining of this judgment, brought this suit to quiet his title to said land against said Rachel Knapp, setting up title in himself, and asking that she be enjoined from proceeding to enforce said judgment against him. To this complaint Rachel Knapp answered, denying the title of Tichenor, and alleging that she is the owner of the land in question. This proceeding is prosecuted under section 500 of the code; and the appellant claims that this section does not apply to a case like this, and does not authorize the court to enjoin the execution of a judgment of forcible entry and detainer; that the judgment shows that Tichenor's possession is wrongful, and cannot be made available, as the ground on which a standing in a court of equity can be obtained; that to give a right of suit under section 500, the possession must be lawful, and we think this position is correct. If an unlawful possession be used to give a party a standing in a court of equity to quiet a title, then a person who is a tenant of another can enter under his landlord and then set up an equity in himself and dispute his landolrd's title, and abrogate the well established rule that a tenant cannot dispute his landlord's title.

So, also, if such a rule prevails, one who claims an equity in land can dispossess the owner of the legal title by force, and then take advantage of his tortious entry to try his equity and make his forcible entry and possession lawful; such a construction would encourage entries on land by force, and breakers of the peace. We have examined the evidence in this case and think it is insufficient to sustain the plaintiff's bill. The evidence is conflicting, there being different surveys showing different results and the testimony of several witnesses, who swore to statements of Tichenor to the effect that the south-east corner of the claim was at the mouth of Gold run and near where the appellant claims it to be. The corner seems to have been washed away by the action of the waters of the ocean, but the corner which was established directly north of this, as another corner of the land claim, is

still standing and recognized by both parties as correct. So there is no apparent difficulty in finding the correct location of the south-east corner, by running a line south from this ascertained and agreed corner. And we cannot see any difficulty in determining that matter. If the court could entertain this case under the statutes, we think the evidence on the part of respondent is too uncertain to sustain his bill.

From these considerations it follows that the decree of the court below will be reversed and respondent's bill dismissed.

BRIDGET BRINEY, Appellant, v. LEWIS M. STARR, Respondent.

NOTICE OF APPEAL—PROOF OF SERVICE OF.—In order to perfect an appeal the notice of appeal on its filing must be accompanied by proof of service in the form of an indorsement thereon.

IDEM—AMENDMENT OF PROOF, WHEN NOT ALLOWED.—A subsequent making or amendment of such proof can only be made by leave first obtained from the court below.

APPEAL from Multnomah County.

The respondent obtained a judgment in the court below for seven thousand four hundred dollars, on the twenty-eighth of June, 1870. On the second day of July following, a notice of appeal was filed with the clerk of the circuit court, but no proof of service thereof was made, nor was any indorsement of service placed on said notice. On the third day of September, 1870, one of the attorneys for the appellant made an affidavit of the fact that on the second day of July, 1870, he served the notice of appeal herein on J. C. Moreland, one of respondent's attorneys, and attached that affidavit to the notice. Respondent's attorneys filed counter affidavits denying any such service, and filed a motion based thereon for dismissal of appeal.

J. C. Moreland, for the motion.

D. Logan and W. W. Thayer, against.

By the Court, PRIM, C. J.:

Subdivision 1 of section 527, page 280, of the Civil Code, provides that "the appellant shall cause a notice to be served on the adverse party, and file the original, with the proof of service indorsed thereon, with the clerk where the judgment, etc., is entered." Subdivision 5 of same section declares that "an appeal shall be taken by serving and filing the notice of appeal within sixty days from the entry of the judgment," etc.

These parts of that section indicate that the notice of appeal on its filing, must be accompanied by the proof of service in the shape of an indorsement thereon. In case an amendment is desired, or further time required to perfect the appeal we have held it necessary to apply to the court below for such grant or permission. In no event could an attorney, without such leave, by his act change the legal effect of a paper then on the files. In this case the time within which an appeal must be taken had expired before any service appeared upon the papers; and we hold that without any leave obtained below, the act of the attorney was unauthorized, and of no effect; and, no proof of proper service existing, the appeal is dsimissed.

W. W. SPAULDING, Respondent, v. FRANCIS KENNEDY, Appellant.

LEVY—HOW MADE ON PERSONAL PROPERTY—IN THE HANDS OF THIRD PERSONS HAVING NO INTEREST THEREIN.—Where an officer levies an execution upon personal property, in the hands of a third person, the bailee of the person claiming to be the owner, he is a trespasser. He cannot justify under such attempted levy in an action to recover possession of the property by the person so claiming. The fact that the bailee had no lien in the property is not material. The officer, when he finds the property, which he supposes belongs to the judgment-debtor in the possession of third persons, has no right to determine the right of possession, except in the manner provided by law.

APPEAL from Multnomah County.

Litchenthaler and Simpson were, on the ninth of November, 1875, the owners of a certain mare, the property in dispute, upon which they executed a chattel mortgage of that date in favor of the Granger Market Company. This mortgage was duly recorded and remained unsatisfied at the commencement of this action. Subsequently Litchenthaler and Simpson delivered the mare to the plaintiff, upon a second chattel mortgage, by them in his favor, executed subsequently to the one in favor of the Granger Market Company.

In March, 1876, one James Welch obtained a judgment against the Granger Market Company, upon which an execution was issued and placed in the hands of Kennedy, the appellant, who was a constable. Kennedy under this execution levied, as it is claimed, upon the mare, as the property of the Granger Market Company, by taking her from the possession of one Stemme, the bailee of the plaintiff Spaulding. Spaulding brought this action to recover possession.

On the trial the appellant Kennedy, to justify his taking, offered to prove the execution of the mortgage to the Granger Market Company, the judgment in favor of Welch, and the execution and proceedings had thereon including the alleged levy by himself, having shown that he was a constable.

To the introduction of the execution and indorsements thereon, among other objections was the following: "That the service of said execution should have been made on the plaintiff, he being in possession of said mare," as provided in Code, subdivision 3 of section 147, ch. 1, tit. 15. The court sustained this objection, and ruled that said execution was not proper evidence, to which ruling defendant excepted.

W. W. Thayer, and R. F. Hamill, for appellant.

Page & Yocum, for respondent.

By the Court, BOISE, J.:

This section of the statute (Civ. Code, subd. 3, sec. 147,)

provides in substance that where personal property of the judgment-debtor capable of manual delivery is not in possession of said judgment-debtor, but in the possession of another person, the property shall be attached or levied on by leaving with such person a certified copy of the writ and a notice specifying the property attached or levied upon.

The question presented is, who was in the lawful possession of this mare at the time of the levy? It is contended by the appellant that the mortgagee of personal property has the lawful constructive possession of the same by virtue of the mortgage as the owner thereof. And that as the Granger Market Company, the defendant in the execution, held this unsatisfied mortgage on the mare, the lawful possession was in them at time of the levy.

Whatever may be the rule before condition broken, it is certain, that in this case by the terms of the mortgage and by virtue of our statute after condition broken, the Granger Market Company had a right to take possession of this mare, and the condition of the mortgage was broken. But the Granger Market Company had not taken possession at the time of the levy, but the possession was in Spaulding, and was coupled with an interest as second mortgagee. The Granger Market Company could take this possession from him, but until that was done or a demand made on him by them, his possession was both actual and lawful.

It was the object of the levy to subject the right of the Granger Market Company to execution, and in order to do so, and by a levy and sale, transfer this right to an execution purchaser, the officer must pursue the course pointed out by the statute. That course is pointed out in the statute as follows:

"Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his possession. Other personal property shall be attached by leaving a certified copy of the writ and a notice specifying the property attached, with the person having possession of the same."

This property not being in the possession of the Granger

Market Company at the time of the levy, the officer could not, by virtue of his writ, lawfully take it from the possession of a third person in whose possession he found it, and he committed a trespass in so doing. It is claimed that this statute is simply intended to protect those in possession of property who may have a lien on it by virtue of which they may be entitled to redeem it. This may be the object of the statute. The statute provides that such persons when summoned as garnishees, shall answer and show by what title they hold the property; but the sheriff when he finds the property which he supposes belongs to the judgment-debtor in the possession of third persons has no right to determine the right of that possession, except in the manner provided by law.

It is further claimed that the court erred in instructing the jury to find for the plaintiff, for the reason that the lawful ownership of the plaintiff was denied in the answer, and it was a question of fact for the jury on the evidence, and that the jury are the judges of the weight of the evidence.

In this case the plaintiff testified that he took possession of this mare from Litchenthaler and Simpson on a subsequent mortgage, and Stemme testified that at the time she was taken by the constable she was in his possession, as the bailee of Spaulding. The defendant offers no evidence to rebut the presumption of lawful possession raised by this evidence, but offered evidence of his levy to justify his taking possession from plaintiff; and all the evidence offered by defendant to rebut the presumption of the lawful possession of plaintiff was the mortgage to the Granger Market Company. It is acknowledged that the possession was in Stemme, and it would be presumed to be lawful, unless there was proof to the contrary. This evidence would make a *prima facie* case to the jury, and under the circumstances, we think, the court might say, in the absence of all evidence to the contrary, that the possession was proved, and the defendant having failed in his plea of justification that the jury should find for the plaintiff. It is also insisted by the appellant that the court erred in directing the jury that they might find damages for the plaintiff. As this property was wrongfully taken from

the possession of the plaintiff he would at any rate be entitled to nominal damages, and to such other damages as he could prove. He proved that at the time of the taking of the mare from him she was earning him one dollar per day. The question of the amount of damages was one exclusively for the jury, and when they have authority to find according to their judgment it is not a matter of review in this court.

B. N. LEVERICH and ANN R. LEVERICH, Respondents, v. EMIL FRANK, Appellant.

WITNESS—WHAT TESTIMONY NOT ADMISSIBLE TO IMPEACH.—A party being a witness in her own behalf cannot be impeached by a letter written by her to another person, containing language which would indicate she was unchaste.

IDEM—PARTICULAR ACTS NOT ADMISSIBLE.—The moral character of a witness cannot be impeached by showing particular act of immoral conduct.

SLANDER—IN ACTION FOR WHAT ACTS OF DEFENDENT MAY BE PROVEN.—In an action for slander it is proper for the court to charge that the jury could consider the acts and manner of the defendant at the time of speaking the words complained of, both on the question of malice and as to the amount of damages. That the manner and acts of defendant at the time of speaking the words complained of, may be considered to explain the words.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

W. H. Effinger and B. Killen, for appellant.

Charles Gardner, A. C. Gibbs and W. B. Gilbert, for respondent.

By the Court, BOISE, J.:

This is an action for slander for words spoken by defendant, saying that plaintiff Ann R. Leverich was a thief, and other words of like import. The plaintiff recovered a judgment in the court below, and the defendant appeals to this court.

On this trial of this case in the circuit court plaintiff, Anna R., was a witness. And defendant to show that her moral character was bad, and to show that she was not worthy of belief as a witness, offered in evidence a letter written by said Ann

to a Mr. Russell, which letter defendant claims was such as tended to show that said Ann was unchaste. The court excluded this letter as evidence, and the question is, was this an error. Our statute, page 274, section 830, provides: "A witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts." It is claimed by the appellant that character can be shown under this statute by proving particular wrongful acts, for this letter was, as claimed, a confession of improper intimacy between plaintiff, Ann R., and Russell. Character and reputation are not syonymous terms. Character is what a man or woman is morally, while reputation is what he or she is reputed to be. Yet reputation is the estimate which the community has of a person's character; and it is the belief that moral character is wanting in an individual that renders him unworthy of belief. That is to say that reputation is evidence of character, and if the reputation is bad for truth, or reputation is bad in other respects affecting the moral character, then the jury may infer that the character is bad and the witness not reliable. General character has always been proved by proving general reputation. Mr. Greenleaf says that character can be attacked or supported by proof of general reputation, and particular facts cannot be proven to affect the character of the witness, for the reason that a person is supposed to be able at all times to support his general character by evidence in its support, but is not supposed to be at all times and without notice ready to disprove or explain certain particular acts. (1 Greenl. sec. 461.)

And we think our statute has adopted the same rule (Civ. Code, sec. 830, cited above). There are also exceptions to the charge of the court to the jury which were argued by the counsel: 1. The court charged the jury, "That they could consider the acts and manner of the defendant at the time of making the charges and speaking the words complained of, both on the question of malice and as to the amount of damages the plaintiff was entitled to recover."

There was evidence which had gone to the jury tending to show that when defendant made the charges and spoke the words complained of, he was excited, and took hold of the plaintiff, and tore from her some cloth fastened to her person. Such evidence being properly before the jury, it was proper for the court to speak of it to the jury, and say to them that it was proper for them to consider it. These acts were a part of the *res gestae,* and such attendant acts may always be shown to a jury to qualify and explain the principal fact (1 Greenl., sec. 108). That is, acts and manner may be shown to explain words spoken, or words may be shown to explain acts, as in cases of trespass, assault, etc., and we think there was no error in making these statements to the jury. There is another objection to another part of the charge of the court. The court said there may be cases where one extremely selfish, imagining his own interest some way concerned, regardless for the time of the rights of others and of the proprieties of life, will in temporary excitement unjustly and falsely charge another with crime; or there may be cases where one habitually a reckless and careless talker, without any particular ill will falsely charges another with crime. In these cases the law is, that the falsity of the charge raises an implication of malice and it is for the jury to judge of the degree of malice from the evidence.

The evidence having shown the defendant, pretending and perhaps believing that the plaintiff, Ann R., had stolen certain articles from his store accused her of it, and asserting that she had them hid under her dress, attempted to take them from her in an immodest and violent manner, and did take from her certain articles, which she had bought and paid for at other stores. We think the case was such on the evidence as to make the charge of the court in this respect justifiable and pertinent, for the jury on the questions of malice and damages have a right to consider the motives and conduct of the defendant in speaking the words. We have considered all the questions raised by this bill of exceptions and do not find any error.

The judgment of the court below will therefore be affirmed.

JAMES B. CROSSEN, Appellant, v. WASCO COUNTY, Respondent.

JAILOR, COMPENSATION OF.—A sheriff may appoint a jailor for whose acts he shall be responsible, but there is no law requiring the county to pay for the services of such jailor.

APPEAL from Wasco County.

The facts are stated in the opinion of the court.

B. Witten and N. H. Gates, for appellant.

L. B. Ison, Prosecuting Attorney, for respondent.

By the Court, PRIM, C. J.:

This was an action brought by appellant as the sheriff of Wasco county, to recover compensation for the services of his jailor. It is alleged in the complaint that subsequent to the election of plaintiff to the office of sheriff of said county, and prior to the commencement of this action, there were confined in the county jail of said county from one to three prisoners; and in order to guard them properly, he had to appoint and keep a jailor for a period of four months. That the services of said jailor were reasonably worth seventy-five dollars per month, amounting in the aggregate to three hundred dollars. That said amount is legally chargeable to and due from defendant. The plaintiff had presented said claim to the county commissioners of said county for allowance, and that the same has been disallowed and rejected by them. To this complaint the respondent demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and rendered judgment against plaintiff for costs and disbursements, from which judgment he has appealed.

The question presented on this appeal is whether the sheriff of Wasco county is entitled under the laws of the state to recover a reasonable compensation from the county for the services of the person appointed by him to be keeper of the county jail. We think not. Section 995 of the Civil Code

provides that the sheriff may appoint a keeper of the county jail, to be denominated the jailor, for whose acts as such he is responsible. The authority to appoint given by this section is relied upon by appellant as implied authority to receive compensation for services performed under the appointment. But it will be seen that section 962 also provides that a sheriff may appoint a deputy, for whose acts he shall in a like manner be responsible. Now, if he is entitled to compensation for the services of his jailor by virtue of his authority over him, why may he not by the same reasoning claim compensation for the services of his deputy? No provision of statute has been pointed out, and we apprehend none can be, requiring the counties to pay for such services.

The judgment of the court below is affirmed.

DECEMBER TERM, 1877.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT,

DECEMBER TERM, 1877.

THE BOARD OF CANAL AND LOCKS COMMISSIONERS, Respondents, v. THE WILLAMETTE TRANSPORTATION AND LOCKS COMPANY, Appellants.

REMEDY—ACT CREATING CANAL COMMISSIONERS—ENFORCED BY MANDAMUS.—The writ of mandamus is the proper remedy to compel the owners of steamboats and other water craft to furnish certified lists of the tons of freight and number of passengers passed through the locks as prescribed by section 12 of the act entitled "An Act to provide a Board of Canal Commissioners," etc., approved October 19, 1876.

LEGISLATIVE AUTHORITY—REGULATION PRESCRIBED CONCERNING WATER CRAFT.—The regulation provided by section 12 of the act creating canal commissioners is a reasonable regulation imposed upon the owners of steamboats and other water craft, in behalf of the public, and is within the power of the legislature.

IDEM.—Appellant being an incorporated company, with the right of having the power of eminent domain exercised in its behalf, and being the owner of boats engaged in carrying freight and passengers for hire upon the waters of a navigable river in which the public have a proprietary interest, is subject to regulations by legislative authority, in behalf of the public.

IDEM.—The fact that the appellants own the canal and locks, and that no tolls are collected or charged against their boats, does not except them from the regulation prescribed by the act. They are subject to like regulations as other owners whose boats pass through such canal and locks.

APPEAL from Multnomah County. The facts are stated in the opinion of the court.

Wm. Strong and W. H. Effinger, for appellant:

Our first position is that the facts stated in this petition

are not sufficient to entitle the party to the remedy sought. This petition is brought under section 583 of the civil code, which only authorizes the writ to issue to an inferior court, corporation, board, office or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.

This whole proceeding is based upon the assumption that sec. 12 of the act creating the board of canal commissioners, approved October 10, 1876, has imposed a duty upon the owners of boats using the locks and canal which can be enforced by a mandamus. Even where such a duty lawfully imposed upon the owners of vessels, it is not a duty resulting from an office, trust or station; it results from their being the owners of property and engaged in transporting freight and passengers through the locks; that is, from being the owners of particular property engaged in a particular business. The exercise of this power of the court can only be set in motion upon the petition of the party beneficially interested. (Code, sec. 384.) Is the state, whom the petitioners professedly represent, such a party?

In the particular provisions of section 12 of the act of October 19, 1876, perhaps the owners of the canal and locks may be interested; but they have it in their power to ascertain the facts as to the number of tons freight and the number of passengers carried through the locks without applying to the court for its assistance. They may require satisfactory information before permitting the boat to enter or pass through. It is provided in section 583 of the code, that the writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. But how does the state have such an interest in knowing the number of tons freight and the number of passengers which pass through the locks? (See 42 Md. 203.)

The preamble and title, as well as the entire body of the act of October 19, 1876, show that its object and the intention of the legislature in passing it was to put a construction upon the act of October 21, 1870, entitled "An act to

appropriate funds for the construction of a steamboat canal at the Willamette Falls," and also to provide special modes and new penalties for enforcing that construction. This act of October 21, 1870, has been adjudged by the supreme court of this state to be a contract. (*Goldsmith v. Brown,* 5 Or. 418.)

The state, therefore, if interested in these proceedings at all, is interested as a party to a contract, and the commissioners of the canal appointed under this act of October 19, 1876, represent the state as a contractor and not as a sovereignty in this matter of the canal and locks. This does not, it seems to us, give the plaintiff in this petition the right to set in motion the special powers of the court to issue this writ. The state is not beneficially interested in the issuing a mandamus, when it has plain, adequate and complete remedy by due course of law. States, as contractors, are bound the same as individuals. Under our constitution, or any other free, fundamental law, a state cannot construe and enforce its contracts by virtue of its powers of sovereignty. It must resort to the ordinary laws, the same as a citizen. (18 Cal. 590; 47 Me. 189; 2 Beasley N. J. 81.)

The answer in this case shows that the defendant owns the boats, and owns the canal and locks, which it holds for the use of its own boats as a part of its line of transportation upon the Willamette river, above and below the falls; and further, that no tolls are charged or payable on the boats, so that the state has not even the claim of its alleged contract to excuse the calling for this information, as the state is only interested, if at all, in the toll-paying freight which passes through the locks. There is nothing to prevent the owners of the locks from carrying freight for nothing if they choose. (21 Pa. 131.)

This is merely an attempted interference with the private business of the defendant, and is not within the scope of legitimate legislation. Counsel for plaintiff, in the court below, virtually abandoned all claim of right to the exercise of the power on the part of the legislature to pass a law of this nature under any other constitutional authority except the po-

lice power of the state. This power, which has been exercised under all governments, is variously defined by law writers.

Blackstone defines it to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations." (4 Com. 162.) It is defined by Jeremy Bentham in his works: "Police is in general a system of precaution, either for the prevention of crime or of calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offenses; 2. Police for the prevention of calamities; 3. Police for the prevention of epidemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration."

These definitions, among the oldest that have been given of this power, and of the subjects of legislation to which it is applicable, do not specifically treat of it as materially interfering with the use of property by its owner.

Judge Cooley, in his Constitutional Limitations, defines it: "The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." (Cooley Const. Lim. 572, n. 1.) But acts which can only be justified on the ground that they are police regulations, must be so clearly necessary to the safety, comfort or well-being of society or so imperatively required by the public necessity, that they must be taken to be impliedly excepted from the words of the constitutional provision." (*People v. J. & M. P. R. Co.*, 9 Mich. 285.)

It must appear, first, that plaintiff has a clear legal right to the performance of the particular act or duty at the hands of the defendant; and, second, that the law affords no adequate remedy. (High. on Ex. Legal Rem., sec. 10, and notes; Id. sec. 12-22, and notes.) The tendency of the courts of the United States is to adhere to the well-established rules of the common laws. (Id., sec. 30.) It is not a proper process for the enforcement of rights resting in contract. (Id., sec. 25, and notes; Id., sec. 28.) Duties imposed on a corporation by contract will not be enforced by mandamus. (Id., sec. 321; 16 Ohio St. 308.) The right of property does not derive its origin from constitutions; it is above and beyond all constitutions. (Cooley on Con. Lim. 36, 354; 13 Wend. 328.) Due process of law, due course of law, and the law of the land, all mean the same thing. (Cooley on Con. Lim. 351.) Forfeitures of rights and property cannot be adjudged by legislative act. (Id. 362.)

Laws attempting to control parties as to the manner in which they shall use their property are not binding. (Id. 385.) A statute which selects particular individuals from a class or locality and imposes upon them special obligations from which others in the same locality or class are exempt, is unconstitutional. (Id. 390 and notes; *Whalley's Heirs v. Kennedy,* 2 Yerg. 554.) No man has a right to judge in his own cause. (Cooley on Con. Lim. 410.) It is not within the legislative authority to empower a man to judge for himself. (Id. 412.) Police regulations do not extend to an amendment of the charter, or the curtailment of the corporate franchise. (Id. 576, and notes; 5 Hill, 209; 7 How. 283; 20 Cal. 534; 11 Pet. 102; 12 How. 299.)

The contract between the government and a corporation created by its charter, is to be construed upon the same principles which are applied to a contract between individuals. (*State v. Noyes,* 47 Me. 189.) It is immaterial whether the instrument by which the public faith is pledged is in terms a contract, or in form a mere legislative enactment; in either case it is equally a contract within the meaning of the constitution. (*Bridge Co. v. Hoboken & Co.,* 2 Beas. N. J. 81.) An act cannot govern the decision of a case which is based on

a contract made prior to the passage of the act. (*Weaver v. Maillet*, 15 La. An. 395; 20 Cal. 143.)

W. W. Thayer and Strahan & Burnett, for respondent.

The only question in the case for determination is the validity or invalidity of the act of the legislature before mentioned. It involves the authority of the legislature to require the appellant and other owners of steamboats who use the canal and locks at Oregon City, to furnish a list of the tons of freight and number of passengers, as in said act specified. The enterprise of building the canal and locks was intended as a public benefit and undertaken as a public necessity. It had its origin with the legislature. That legislature appropriated funds out of the internal improvement fund to aid in their construction. One of the conditions upon which the appropriation was made was that the locks company should pay to the state ten per centum of the net profits arising from the tolls collected for freight and passengers passing through the canal and locks, which should become a part of the common school fund. (Laws of 1870, 16.) The same act limits the price for tolls and provides in favor of an appropriation forever of the works by the state at the end of twenty years upon payment to the "said corporation the actual value thereof."

In view of these various provisions, it can hardly be contended that the act of 1870 was a mere private grant, and beyond legislative control or interference. The object and design of the act, its various provisions, and the reasons which induced the legislature to adopt it, clearly indicate a purpose to secure to the public the unobstructed navigation of the Willamette river for all future time, constructing and maintaining the canal and locks tended to facilitate the transportation of the products and merchandise which affected the interests of the larger portion of the population of Oregon. It was a public enterprise set on foot by public sentiment, carried on by public aid, and set apart and devoted to public use.

In *Munn & Scott v. People of Illinois*, the supreme court of the United States held that all property which is affected

with a public interest, ceases to be *juris privati*, only, and becomes subject to regulation for the public benefit, and property is affected with a public interest whenever it is devoted to such use as to make it of public consequence and to directly affect the public at large. (Am. Law Reg., Sept. 1877, p. 526; 4 Otto, 113.)

If that principle is correct, then there can be no question in regard to the canal and locks being the subject of legislative control. But the case last referred to goes much farther, for it renders private property the subject of regulation for the public benefit whenever its owner devotes it to such use as to make it of public consequence, and to directly affect the community at large. Then *a priori* should property of great public consequence, brought into existence by legislative action, for the public benefit, materially affecting the public at large, and held by a party owing its origin to legislative authority. There are no limits to legislative power except those contained in the constitution of the United States and of the state.

As long as the legislature steers clear of the inhibitions contained in those instruments, its acts are absolute and uncontrollable, and it cannot, we submit, be successfully maintained that any of the provisions of the act of 1876, regulating the use of the canal and locks, trenches in the least degree upon any prohibition contained in either constitution; it impairs no contract, for the state reserved certain rights in the act of 1870, with respect to that notorious institution, among which is the right to appropriate it as before mentioned. As incident to that right, has not the legislature authority to preserve statistical information as to the number of tons of freight and number of passengers that pass through it upon the various steamboats employed in navigating the Willamette? Has not the public the right to be informed as to its importance? How else could it be ascertained as to whether or not it would be sound policy to appropriate it and pay therefor its appraised value? Is the exercise of such authority any more arbitrary than to require that a taxpayer furnish a sworn list of his property

for the purposes of taxation, or an inhabitant to give the number and names of the members of his family for the census, and may it not be about as important? (46 Cal. 589; 11 Pet. 102.) Again, the state is entitled to ten per centum of the net earnings of the institution. Should it not therefore have authority to adopt measures to ascertain the probable amount of those earnings? It is no more than providing a mode of evidence.

The appellant claims to own the canal and locks; whether as a matter of fact it does or not makes no difference, as it could only take the title thereto subject to all the conditions imposed by the act of 1870 upon the original company. (4 Otto. 155, 164.) That is a public act, and every one is bound to take notice of its provisions. But we deny the right of the Willamette Falls Canal and Locks Co. to sell the canal and locks. We submit that said act of 1870 cannot be construed so as to authorize it to sell out the work; the grant was to that company; it was that company that was limited in its charges of tolls, and to that company the state was to pay the appraised value in event it appropriated it; the payment of the ten per centum net earnings is to be made by that company; and that company alone undertook the performance of the conditions upon which the grant was made, and which conditions were perpetual; it was a personal trust imposed upon the Willamette Falls Canal and Locks Company, and no other corporation can be substituted in its place without the consent of the state of Oregon. (2 Otto, 237, and cases cited.) If we are correct in this view, then the appellant's plea that it owned not only the said steamboats, but also the canal and locks, is sham. But admitting that it owns the canal and locks, that it has become substituted in the place of the original company, are not its relations with the state the same as those of the former company? Or will it be contended that it was in the power of the Willamette Falls Canal and Locks Company, by a sale of its franchise and property rights, without the assent of the state, to destroy in effect the conditions upon which the grant was made, and the obligations which constituted the consideration of it?

By the Court, PRIM, C. J.:

This proceeding was commenced in the circuit court of Multnomah county, to compel appellant, as the owner of certain steamboats, by writ of mandamus to furnish the secretary of the board of canal commissioners with a list of the tons of freight and number of passengers passed through said canal and locks, as prescribed by section 12 of an act entitled "An act to provide a board of canal commissioners for the canal and locks at the Willamette Falls, and to otherwise regulate the passage of steamboats and other water craft through the same," approved October 19, 1876. (Ses. L., 1876, 14.)

A demurrer was interposed to the petition and writ, by appellant, on the ground that they do not contain a statement of facts sufficient to entitle respondent to the writ. This application is based upon section 583 of the civil code, which authorizes the writ "to be issued to any inferior court, corporation, officer or person, to compel the performance of an act which the law specially enjoins as a duty, resulting from an office, trust or station." Section 12 of an act entitled an act to provide a board of canal commissioners, etc., approved October 19, 1876, provides that "it shall be the duty of boat owners, using the said locks, to make out two certified lists of tons of freight and number of passengers passing through the said locks, which lists are to be tendered, one to the agent of the locks company, and one to the secretary of the board of canal commissioners, and by both preserved for reference," etc.

Section 16 of said act provides that "the board shall annually certify to the secretary of state the number of tons of freight and the number of passengers passing through said locks, * * * to the end that knowledge of the receipts of the said locks company may be authoritatively had." While it is admitted by appellant that section 12 of said act imposes a duty upon all boat owners, who may pass their boats through said locks, to furnish a list of freight and passengers, as therein provided, yet it is claimed that such duty cannot be enforced by the writ of mandamus, because it is not a duty, as they contend, resulting from an

office, trust or station, within the meaning of section 583 of the code. By reference to Webster's Dictionary, we find that the word station is defined to mean employment, occupation or business.

Steamboats, when engaged in the transportation of freight and passengers upon a navigable stream for hire, are common carriers, which is a business in which the public has an interest. And the owners of boats engaged in such business may be said to occupy a sort of public office, station or business, upon whom the legislature in the exercise of its sovereign power has seen fit to impose this regulation in behalf of the public. And we see no reason why such regulation may not be enforced by this writ, for the want of any other adequate remedy.

In the state of Illinois it has been held to be the proper remedy to compel a railway company to deliver to a particular warehouse or grain elevator grain consigned thereto in bulk along the line of said railway. The right to relief in such cases is based upon the duty or obligation of such companies to perform such duty as common carriers, and the want of any other adequate remedy. (*C. & N. W. R. R. Co. v. State of Illinois*, 56 Ill. 565.)

But it is further claimed by counsel on behalf of appellant that section 12 of the act of 1876, which imposes the regulation in question upon the owners of steamboats and other water craft, is an unwarranted attempt on the part of the legislature to interfere with private business, and is not within the scope of legitimate legislation, and therefore should be treated as void. The position of the appellant is based upon the theory that the locks as well as the steamboats in question are the private property of the appellant, and therefore subject only to its control and private management, the same as any other private business, without regard to such regulations as may be imposed by the legislature in behalf of the public. This theory, we think, is not well founded, either in law or fact.

To say nothing of the assistance granted by the state by the passage of an act entitled "An act to appropriate funds for the construction of a steamboat canal at the Willamette

Falls," approved October 21, 1870, we find that the canal and locks were constructed by a company incorporated and organized under the laws of the state for that purpose. They were constructed upon the waters of a navigable stream, in which the public have an interest. The right of eminent domain has been put forth in its behalf by the state, through which private as well as public property has been condemned and appropriated to its use. It has been placed in the possession of an important and valuable franchise not possessed by other private individuals. In fact, it may be said to have been placed in the possession of a valuable property "standing in the very gateway of commerce," which not only "affects a great public interest," but in which the "public have a proprietary interest as a part owner."

In such matters we are not aware of any limitation upon the legislative power of a state, except such as are imposed by the constitutions of the United States and this state; and no particular provision in either of those instruments has been pointed out by counsel on behalf of appellant by which the legislation in question is prohibited. Under our fundamental law, as we understand it, every state has the right to exercise the power of sovereignty within the limits of its dominion; that is to say, the power to govern men and things within such limits; and it is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. (Lic. Cas. 5 How. U. S. 583.)

In *Munn & Scott v. The State of Illinois,* Mr. Chief Justice Waite, in speaking of these powers, says: "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-

keepers, etc., and in so doing to fix a maximum of charges to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all of these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against the interference with private property." In this connection, he further says that "when private property is effected with a public interest, it ceases to be *juris privati* only, * * * but becomes clothed with a public interest when used in a manner to make it of a public consequence, and affects the community at large. When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created." (*Munn & Scott v. The State of Illinois,* 4 Otto, 125.)

Thus appellant having been the owner of certain steamboats engaged in the transportation of freight and passengers, for hire, upon the waters of a navigable river in which the public have a proprietary interest as part owner, and having devoted its said boats to a use in which the public have an interest, it must submit to such commercial regulations as may be imposed by legislative authority for the public good.

The regulation imposed by section 12 of said act, we think is a reasonable one, and not beyond the scope of legitimate legislation. But it is further urged on behalf of appellant that it is a private corporation duly incorporated under the laws of the state for the purpose, among other things, of carrying on the business of navigating the waters of the Willamette river, with steamboats and other water craft, for the transportation of freight and passengers for hire, and that since the first day of January, 1876, it had been engaged in said business; and that ever since the eighth day of March, 1876, it has been the sole owner of said canal and locks, which it holds for the use of its own boats as part of its line of transportation upon said river,

above and below the falls; and that no tolls are charged or payable on said boats, or freight and passengers shipped therein, and passed through said canal and locks.

To this proposition of appellant we have to say that notwithstanding the said canal and locks may now be and have been owned by appellant ever since the eighth day of March, 1876, nevertheless we are of the opinion that it is subject to the regulation in question, and is obliged to furnish certified lists of the amount of freight and the number of passengers carried through the same on its boats, the same as the owners of other boats and water craft.

It follows from the views herein expressed that the judgment of the court below should be affirmed.

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*NANCY C. RUGH, Respondent, v. SAMUEL OTTENHEIMER, Appellant.

MARRIED WOMEN—EXEMPTION IN FAVOR OF.—Section 5, article 15, of the constitution of this state, exempts from execution for the husband's debts, the lands of a married woman, who was married before the adoption of the state constitution.

CONSTRUCTION.—In construing different parts of the constitution, effect should be given to all the words.

MARRIAGE CONTRACT.—Marriage is a contract *sui generis* and *juris publici*, and is not subject to the constitutional inhibition of legislative acts impairing the obligation of contracts.

ESTOPPEL—PLEADING.—An estoppel, to be relied on as a defense, should be pleaded.

APPEAL from Baker County.

The facts are stated in the opinion of the court.

I. D. Hains, Jas. H. Slater and E. A. Cronin, for appellant.

Sterns and Lichtenthaler, for respondent.

By the Court, BOISE, J.:

This suit is in the nature of a cross-bill to an action of ejectment. It is claimed in the complaint that on the eleventh day of October, 1857, the plaintiff was married to

*See 25 Am. Rep. 513.

one William C. Rugh, whose wife she now is; 2. That on the * * day of August, 1856, the plaintiff, then a *feme sole*, purchased of one Daniel Sebastion a farm of one hundred and sixty acres of land situated in Washington county in this state; 3. That about the first day of March, 1869, plaintiff made a contract with one Nelson Gardner, whereby it was agreed that said land in Washington county should be exchanged for the land in controversy in this suit.

That in pursuance of said agreement to exchange lands this plaintiff, on the twenty-ninth day of March, executed to said Nelson Gardner a deed in due form of law, conveying said land in Washington county to him. And then demanded of him a deed to herself of the land in controversy. But that said Gardner refused to execute to her said deed, but executed the same to her husband, W. C. Rugh. Plaintiff alleges that with her said husband she went on to the land in controversy, and that her husband soon after the execution promised to deed said land to her, but neglected to do so, and finally refused to so deed it. From these facts she claims that the land in controversy was her separate property. These allegations, except as to the marriage, are denied by the answer. There are other issues raised as to the title of the defendant, who claims under a sheriff's deed based on an execution and judgment against W. C. Rugh, the husband of the plaintiff, but the questions presented on the issues above stated were the basis of the decree of the circuit court, and are all the issues which it will be necessary to examine in coming to a conclusion in this court.

From the testimony reported in this suit it appears that the plaintiff at the time she purchased the land of Sebastion in Washington county was a single woman, and paid for it with her own money, but the deed was not executed and delivered to her until January, 1858, after her marriage with W. C. Rugh. It further appears from the testimony that she lived on this land in Washington county, with her husband until she traded it to Gardner in 1869. The weight of the testimony shows that she negotiated the trade with Gardner, though her husband assisted, and that

Gardner afterwards agreed to execute a deed to her. After this exchange of farms was made she and her husband moved on to the land in controversy and made their home there. That about March, 1873, said W. C. Rugh, the husband of plaintiff, left the state, and has not resided with her since that time. It is claimed that the evidence shows that the money with which the plaintiff purchased the land in Washington county was the proceeds of the sale of a donation land claim, which she formerly owned in Washington Territory.

It seems to us that it is immaterial where this money came from. She was then a *feme sole,* and could do as she pleased with her money, and the source from which the money was derived would not affect the rights of her future husband. The deed was given to her, and whatever interest W. C. Rugh, the husband, acquired to this land, was derived through his marital rights in his wife's land. That interest at common law was the right to enjoy the rents and profits during their joint lives, and the right of curtesy (in case of issue born alive) after her death. And on the marriage of plaintiff and W. C. Rugh, during our territorial government, the husband acquired the rights and profits of the land in Washington county, and such were the relations of plaintiff and her husband at the time of the adoption of our state constitution. And had this relation continued after the adoption of the state constitution, and until the exchange of this land for the land in question, the same right would have attached to the land in question had the same been conveyed to plaintiff, unless some words in the deed had limited it to her separate use.

The deed from Sebastion to plaintiff did not limit the land to her use, and the evidence does not show that in her trade with Gardner such a limitation was to be inserted in the deed. And if the rule of the common law is not abrogated or modified by the state constitution, then W. C. Rugh had an interest in this land which was liable to execution for his debts. It becomes therefore necessary to consider how far the real estate of women who were married at the time Oregon became a state, was affected by section 5,

article 15 of the state constitution. This section provides: "The property and pecuniary rights of every married woman at the time of marriage or afterwards, acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband."

It is claimed that this clause is only prospective and applies only to future marriages, or property acquired after the establishment of the state government, and that it should not be construed so as to divest husbands then married of their marital rights in the real estate of their wives. The simple natural construction of the words used in this section, read by scholars unrestrained by legal technicalities or rules of construction of statutes, would include the property and pecuniary rights of married women who were then married and owning property which could be made subject to this provision. It did not refer exclusively to property then separate property and already secured to them, for that would have accomplished nothing in favor of married women whose status as to property was intended to be affected. It is contended that the words property and pecuniary rights of every married woman at the time of marriage, refer only to future marriages, for the marital rights of husbands then married were already vested and could not be changed, while rights by gift, devise and inheritance could come to women then married and be protected. Such is not the natural and obvious meaning of the section. The plain meaning of the section is that it applies in all its force to women then married, and protects their lands and their property from the debts and contracts of the husband, and such should be the construction given to it, unless we are compelled to restrain its full import to protect the marital rights of the husbands then married. It is a rule in construing constitutions and statutes that we look at the circumstances which surrounded the law given at the time it was enacted, and ascertain, if we can, the object of the law and the right to be protected.

The members of the constitutional convention were mostly farmers, who had acquired land under the act of congress of the twenty-seventh of September, 1850, granting land to

settlers in Oregon. When these settlers were married people, the wife received from the government an equal share of the land with her husband, and as there was a vast amount of this land, the title to which was in the married women of the county, a large majority of the members of the convention enacted this clause, supposing that it would protect this property from the debts and contracts of the husband, and they did not think it capable of any other construction.

And such has been the almost uniform construction of this section by the people of the state since that time, and the only reason that can be urged against such a construction, is that it modifies the marital rights of the husband in this land to his injury, and, as in this case, may prevent creditors of the husband from selling the marital rights of the husband. In the last case this provision could not be defeated, because it abridges the rights of creditors of the husband in securing their debts, for such a doctrine would defeat and render null all homestead exemption laws. So the only real objection is that this section defeats or modifies the rights of the husband in his wife's property. Courts look with disfavor on all laws which are retrospective in their action where they divest vested estates, or impair the obligation of contracts.

It was by virtue of the marriage contract that the husband became at common law, entitled to the use of his wife's land. And it was a fiction of the common law, that husband and wife were one person, and the legal rights of the wife on marriage become merged in the husband; but this fiction, and the laws and decisions which grew up under it, were becoming modified in this country before the adoption of our constitution, the more rational and enlightened maxims of the civil law, which recognizes the rights of married women to property, having then been adopted in many of the states. And where the civil law was not adopted, cautious and judicious parents evaded the rigid rules of the common law by making anti-marital settlements for the benefit of future wives. If the section of the constitution under consideration, which changes the common law rights

of the husband, is right and proper in cases of future marriages, or of property acquired in future, it is also right and proper to apply it to the lands of persons then married, unless such a construction cannot be given it. Against such a construction, it is claimed that the husband, by the common law, became on marriage invested with a freehold in the lands of the wife, which estate continued for their joint lives. This estate, however, was conditional and subject to be defeated by a divorce *a vinculo*. (Schoaler's Dom. Rel. 300.) The marriage contract out of which this estate arose, was at common law one in which the state was interested, and over which it exercised legislative control. It is both *sui generis* and *publici juris*. (Cord on R. of M. W., 1 Kent, 418, note a; *Maguire v. Maguire*, 7 Dana Ky. 183.)

In this last case the court, in speaking of the legislative control over marriage contracts, says: "Marriage being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligations of contracts." In view therefore of the nature of the contract by which the estate of the husband in his wife's lands is created, and the control which the legislature has always assumed over them, we think that without constitutional authority such contracts are subject to be altered and modified by the legislature. But this section of the constitution is an expression of the sovereign will of the people expressed in their constitution, and in the making of that constitution the convention representing the sovereign power, and was subject to the control of no higher power, except the constitution of the United States, and if they judged it right to exempt the lands of married women from the debts and contracts of these husbands, they could do so, and the only question is, What is the true meaning and scope of the section of the constitution in question? As we have before indicated, the language of the section embraces the lands of women who were married at the time Oregon became a state; and such meaning should be given to it, unless it be limited by the last clause of section 10 of article 18 (sched-

ule), of the constitution, which is: "And private rights shall not be affected by such changes."

In construing these two clauses of the constitution the obvious meaning and intent of both should be given effect if possible. They are in *pari materia,* and must be construed together. The words "private rights" may properly be confined to such rights, when applied to property, as persons may possess unconnected with, and not essentially affecting, the public interest, or growing out of a public institution of society.

The marriage relation, affecting the whole public, and being an institution of society affecting more deeply than any other the foundations of social order and public morals, has always been under the control of the legislature. The legislature can, and often does, dissolve the marriage relation between parties, and when the relation is thus destroyed the marital right to use the wife's land, which is incident to such relation, ceases longer to exist. And we think this right is not strictly a private right, but is one which is incident to a relation in which the whole community is interested. We think, therefore, that section 5, article 15, is not modified by section 10, article 18 of the constitution, and that article 5, section 15, does include all the lands, owned in their own right by married women at the time of marriage, whether married before or after Oregon became a state.

It is claimed as a further defense in this case that the plaintiff is estopped from claiming this land, as she acquiesced in giving the deed to her husband by Gardner, and that it is a fraud for her to now claim the land against the creditors of her husband, who furnished the goods on the faith that he was the owner of this land. So far as this matter is concerned, we think from the evidence and the law in this case that the plaintiff has an equity in this case, and which she could enforce against her husband, although the trust was not by deed. As the land in Washington county was her property, a court of equity will follow it into this land, unless she has voluntarily surrendered it. (*Nichlin v. Wythe,* 2 Sawyer, 535; 64 N. C. 538.) And we find

from the evidence that she did not surrender it. If she has been guilty of fraud which should estop her, then the same should be pleaded to make it allowable, which is not done, and the matter of estoppel cannot be considered in this case.

We have considered all the questions necessary for the determination of this case, and think the decree of the court below should be affirmed.

JACOB KAMER, Appellant, v. CLATSOP COUNTY, Respondent.

COUNTY COURT—LOCATION OF ROADS—ORDER DENYING NOT A BAR.—An order of the county court denying the petition for the location of a road is not conclusive. Such an order is not a bar to a subsequent proceeding to establish a road over the same route.

HOUSEHOLDERS—ROAD LAW.—Unmarried men may be householders within the meaning of section 2, title I, chapter 50, of the miscellaneous laws relating to the location of roads.

SPECIAL TERM—COUNTY COURT MAY APPOINT.—Under sections 865 and 872 of the civil code, the county court may appoint special terms, at which any business may be transacted, the same as at the regular terms fixed by the statute.

APPEAL from Clatsop County.

This is an appeal from the judgment of the Circuit court upon a writ of review taken from proceedings of the county court of Clatsop county, in relation to the laying out of a county road.

At a regular term of the county court a petition was presented for a road across the lands of the appellant. Viewers and a surveyor were appointed, who proceeded to locate the proposed road, and who, at the July term following, reported in favor of establishing the same. At such July term, the appellant having filed his petition for damages, viewers were appointed to assess the damages. These viewers reported at the September term, awarding damages in the sum of five hundred dollars. No further order was made until the April term, 1877, when the court ordered in effect that such proposed road be not established.

In the meantime, and two days before the order last referred to was made, a second petition was presented. To this petition objection was formally made that it was not signed by twelve householders, a portion of such petitioners being men without families. Upon this second petition viewers and a surveyor were appointed to locate the proposed road, and a special term of the court appointed for April 17, to hear them report. At such special term, such viewers having reported in favor of the road, and the appellant having filed his petition for damages, viewers to assess damages were appointed, and a special term of the court appointed to receive their report. At such second special term an order was made establishing the road.

Dolph, Bronaugh, Dolph & Simon, for the appellant.

Raleigh Stott, Prosecuting Attorney, for the respondent.

By the Court, MCARTHUR, J.:

Upon the facts set forth three points are presented for our consideration by appellant's counsel. First, that the court below erred in entertaining the second petition while the first one was pending, and in proceeding upon said second petition after ordering and adjudging upon the first petition that the road be not established. Second, that bachelors without families are not qualified petitioners for a road, and consequently there was not a sufficient number of qualified petitioners upon the first petition. Third, that said court had no power to call a special term, held April 17, to hear the report of the viewers, and no power to call a special term of said court of May 1, at which the road in question was ordered opened at a called term, and the proceedings of said court at said terms were irregular.

We will consider the objections in the order in which they were presented. And in answer to the question arising upon the first allegation of error, we need only remark that there is nothing in any provision of our statutes that imparts to an order denying the prayer of the petitioners for a road, the conclusiveness of a judicial decision when rendered in an action, suit or proceeding between contend-

ing parties asserting rights or seeking redress for wrongs. Roads are matters of public concern and convenience, and the necessity or convenience thereof should always be looked to by the county court before one is established. What may seem to be unnecessary and inconvenient at one time may at some subsequent time be manifestly both necessary and convenient. If we were to adopt the views of appellant's counsel, we would infringe upon the jurisdiction of the county court. We would wrest from it so much of its discretion in road matters as would seriously embarrass it in responding to the lawful desires of the people. We are of opinion that where the county court dismisses a proceeding by which it has been sought to establish a road, the order of dismissal is not a bar to a subsequent proceeding to establish a road over the same route.

Upon the second point it appears that several of the petitioners were unmarried men, who, in the language of the transcript, "kept houses and servants." We are of opinion that they were householders within the meaning of the term as used in section 2, title 1, chapter 50. It must be borne in mind that the act providing a method for establishing roads was passed eighteen years ago, when in many parts of the state the only "settlers" were single men. It is not to be presumed that it was intended to disfranchise them in so important a matter. They were evidently regarded as householders by the legislature and by the people generally, and in adopting the construction we have given the word, we follow the law as laid down by Blackstone that courts in construing the meaning of words used in a statute should always give them that construction and meaning which they had in general use among the people for whom the statute was enacted, and with the legislators who enacted the law.

Upon the third point we are of opinion that the county court had a right to hold the terms objected to by appellant. The order for the term beginning April 17, was made and entered in the journal on the fifth day of the preceding regular term, and at times so ordered any business may be

transacted as if the same were appointed by law. (Civil Code, sec. 865.)

Being invested with such power and authority, the general order made at the term beginning April 17, for a term to begin May 1, 1877, was legal.

Judgment affirmed.

ORSON DUNNING, Appellant, v. J. L. CRESSON, Respondent.

FALSE REPRESENTATIONS—WILL NOT AVOID CONTRACT, WHEN.—False representations made by one party to another to induce him to enter into a contract will not avoid the contract unless it is shown that the party complaining relied upon such representations and was thereby misled and induced to make said contract.

APPEAL from Coos County.

The facts are stated in the opinion of the court.

Strahan and Burnett, for appellant.

There was no appearance for respondent.

By the Court, PRIM, C. J.:

This is an action on a promissory note to recover thirty-four hundred dollars and interest. The note was executed by respondent, and made payable one year from date to William Utter or order, and indorsed and assigned by him to appellant.

The answer admits the execution of the note, but attempts to set up an entire failure of consideration as a defense. It is alleged that the consideration entirely failed in this: The note was given to Utter in consideration of the assignment by him of an account due him from the Isthmus Transit Railway Company, said Utter representing to respondent that said company was solvent, and that the account would be paid before the note became due, well knowing at the time that said railway company was insolvent. That said company has at all times failed and refused to pay the same, by reason of which it became valueless. It is further alleged, upon information and belief, that the plaintiff had full notice of the fraudulent

manner in which respondent was induced to execute the note. It is admitted that the note upon which this action is based was executed in consideration of an assignment of a certain account due William Utter from the railway company.

This, we apprehend, was a sufficient consideration to support the note in the absence of fraud on the part of the assignor; but the defense attempted to be set up is that there was an entire failure of consideration for the execution of the note by reason of the false and fraudulent representations by said Utter to respondent in relation to the solvency of the railway company. The answer alleges that Utter made representations which he well knew to be false, but does not allege that they were made with intent to defraud, nor that respondent was misled and induced by said representations to purchase said account and execute his note therefor. In this we think it is defective and insufficient to constitute a defense. The false statements of Utter could not have injured respondent unless he believed them, and was thereby misled and induced to purchase those accounts. Mr. Story, in commenting upon this subject, says, "The party must be misled by the misrepresentations, for if he knows it to be false when made it cannot be said to influence his conduct, and it is his own indiscretion and not any fraud or surprise of which he has any just complaint to make under such circumstances." (1 Story Eq. Jur., sec. 202.) This doctrine we think is fully sustained by the decision of this court in the case of Rolfes v. Russell, and the authorities therein cited: 5 Or. 400; 11 Wend. 314; 25 How. Pr. 398; 23 Mich. 399.

The conclusions of fact found by the court are defective in the same respect, and consequently insufficient to warrant the conclusion of law that there was an entire failure of consideration for the execution of the note in question. It follows from these views that the judgment of the court below is erroneous in this respect and must be reversed. It is therefore ordered that the judgment be reversed and the cause remanded for a new trial.

Judgment reversed.

KNAPP, BURRELL & CO., Appellants, v. SOL. KING, Respondent.

JUSTICE OF THE PEACE—JURISDICTION.—The jurisdiction of a justice of the peace once obtained over the subject-matter of an action, continues until the action abates, or is legally disposed of by the justice.

IDEM—ALIAS SUMMONS.—The rendering of a void judgment by the justice does not terminate the action so as to prevent such justice from issuing an *alias* summons, and acquiring jurisdiction of the person of the defendant.

PUBLICATION OF SUMMONS—ORDER FOR.—In construing an order for the publication of a summons to an absent defendant, the court will consider the affidavit and complaint.

INSTRUCTIONS TO THE JURY.—It is not error for the court to append to an instruction asked for by a party, and given by the court to the jury, an explanation in writing if any matter pertinent to the case.

JUDGMENT IN JUSTICE'S COURT—TIME OF ENTRY.—When a justice renders a judgment, but neglects to record the same at length in his docket at the time it is rendered, he may afterwards record the same, and such judgment will be valid.

APPEAL from Benton County.

The facts are stated in the opinion of the court.

F. A. Chenoweth, for appellants.

Kelsay & Woodcock, and J. W. Rayburn, for respondent.

By the Court, BOISE, J.:

On the sixth day of November, 1876, Knapp, Burrell & Co. recovered a judgment against Edward Price and W. C. Price, in the county court of Benton county, for the sum of one hundred and sixteen dollars and costs, the whole amounting to the sum of one hundred and sixty dollars. On the twenty-fifth of November, 1876, an execution was issued on said judgment, and delivered to the respondent, Sol. King, then sheriff of said county, for service, and the complaint alleges that said Edward and W. C. Price were then the owners of certain personal property described in the complaint. That the said property was known to said Sol. King at the time he received the execution, and that the plaintiff requested him to levy on the same, but that he neglected and refused to do so, and returned said execution on the twelfth day of December, 1876, with the indorsement

thereon that no property of the defendants was found. Plaintiff alleges that such return was false, and that by reason of his neglecting to make the levy they are damaged the sum of one hundred and sixty dollars, and alleges that the said property was of the value of three hundred dollars. The answer admits that the property named in complaint was of the value of one hundred and seventy-seven dollars and fifty cents, but denies any greater value; denies that W. C. Price had any interest whatever in said property; and denies that said return on the execution was false. The answer then sets up as a separate defense:

That on the twenty-third day of August, 1876, defendant, Sol. King, commenced an action in a justice's court for precinct number two of Benton county, against said Edward Price. That a writ of attachment was duly issued in said action, and that this same property named in complaint was duly levied on by virtue of said writ of attachment. That afterwards, on the sixth day of November, 1876, judgment was duly rendered in said action in favor of said Sol. King against said Edward Price for the sum of two hundred and six dollars and fifty cents and costs.

That on the twenty-fifth day of November, 1876, execution was issued on this judgment, and said property sold, under and by virtue of said execution. The answer sets out that service was had in said action by a publication of the summons against the defendant, he being a non-resident of the state, and alleges that Hinkle, the constable who levied the attachment, returned the same with the indorsement thereon that the defendant could not be found.

The replication denies that such action was commenced; that Hinkle was constable; that he attached the property; that he returned the summons into court indorsed that defendant, Price, could not be found. Denies that at the time the execution of plaintiff was placed in the hands of said Sol. King, said property was in the hands of said constable, by virtue of an execution issued in said action of *Sol. King v. Edward Price.*

In the argument in this case it was not seriously contended that the goods in question were not attached on the

twenty-third of August, 1876, by virtue of the writ of attachment issued in the action then commenced of *Sol. King v. Edward Price*. But appellants claim that such action terminated on the ninth day of September, for on that day the said justice entered a judgment for the plaintiff, Sol. King, and that although such judgment was rendered without jurisdiction of the person of Edward Price, the defendant therein, and therefore void, yet such determination ended the case, and that the justice could not afterwards, on the eighteenth day of September, issue an *alias* summons on the complaint filed on the twenty-third of August. That is, that the jurisdiction of the justice over the subject-matter of the action was lost; and that the attachment was dissolved on the entry of the said judgment, as the justice did not then continue the action to any future time, and therefore all rights under it were lost.

This is a question of considerable interest and importance, and has been ably argued and presented to the court by counsel, and many authorities cited. We have carefully examined these authorities, and find the opinions expressed in them based on the statutes of the several states in which they were announced, and it is held by them that proceedings before justices of the peace are almost exclusively prescribed and regulated by statute. And, in deciding this important matter, it will be necessary to examine the provisions of our own statute on this subject. On page 108 section 15, it is provided that an action shall be deemed commenced when the complaint is filed and the summons delivered to the officer with intent that it shall be actually served. But such attempt to commence the action shall be followed by the first publication of the summons or the service thereof within sixty days. This is the provision of the code, and will control actions in justices' courts unless modified by the act regulating proceedings in justices' courts. (Stat. 284, sec. 880.) But section 15 of the code is modified as to what shall be deemed a commencement of an action in a justice's court by section 23, page 465, which provides: "The complaint must be made or filed before the issuing of the summons, and such making or filing is the

commencement of the action." And from the filing of the complaint the action is pending in the justice's court, and will continue so pending until disposed of in the same manner. In the circuit court it would abate if the summons was not served or published within sixty days; and it may be that such neglect to proceed to obtain jurisdiction of the person, would also terminate an action in a justice's court so as to dissolve an attachment issued therein; but this question does not arise in this case, for the reason that the first publication was within sixty days from the twenty-eighth of August, and therefore the action would not abate on that account.

It is not contended that the action of *King v. Price* was not commenced and pending at one time, and the only question in this branch of the case is, Did it terminate on the rendition by the justice of the void judgment on the ninth of September, 1876, the day on which the first summons was made returnable?

The statute, p. 284, sec. 879, provides: "A justice's court is a court held by a justice of the peace within the precinct for which he is chosen. There are no particular terms of such court, but the same is always open for the transaction of business." So that, when the court once acquires jurisdiction of the subject-matter of an action, there is always a court to exercise such jurisdiction until it is terminated in some legal manner. After jurisdiction is acquired by filing the complaint, the court has only power to review an amended complaint, or dismiss the case on motion of complainant, except to issue process to acquire jurisdiction of defendant, or to issue mesne or auxiliary processes, such as attachments or the like. Until he acquires jurisdiction of the defendant, he can render no valid judgment against him.

If he render judgment against defendant without jurisdiction of his person, it is simply void and no judgment, and can be disregarded in any collateral proceeding when such want of jurisdiction appears on the record. And in this case the judgment rendered on the ninth of September was a mere nullity, and did not affect the standing of the case, and the case then stood in the same manner as though

the summons had been returned indorsed *non est inventus*, and the justice had entered this return in his record, and not adjourned the case to a day certain; and if an adjournment to a day certain had been made, it would have had no authority to affect the rights of the defendant, for the justice had no jurisdiction to affect him by such an order, and he had no authority to limit the rights of the plaintiff, for he had a cause pending, and having failed to get service on the defendant, he had a right to move for an *alias* summons, and it did not prejudice the rights of defendant that he did not so move on the return day of first summons. For, if he wished to get his property released from the attachment, he could come into court and move for that purpose.

It is claimed that a different rule must apply as to the limitation or abatement of actions in justices' courts from that which prevails in courts of record, and that such is the tenor of the authorities cited. The authorities cited apply to cases in which jurisdiction of the person had been obtained. But if such is the rule in other states we would be constrained to apply the same rule in this state to justices' courts that apply to courts of record, for the reason that the statute has prescribed that "the mode of proceeding and the rules of evidence are the same in a justice's court as in a like action or proceeding in a court of record, except when otherwise specially provided;" and in the matter in question is not otherwise provided. We think, therefore, that the judgment of the ninth of September did not terminate the action of *Sol. King v. Edward Price*, and that the court below did not err in so instructing the jury.

It is claimed by appellant that the judgment on which the property in question was sold is void, for the reason that there was no sufficient order made for the publication of summons, and that the justice's court never acquired jurisdiction of the person of Edward Price, the defendant in said judgment. It appears, by the bill of exceptions, that when this judgment was offered in evidence by defendant in this case, the appellant did not object to the introduction of this record, for the reason that there was no sufficient order for the publication of summons, or for any

other reason. But the same was received in evidence without objection, so far as it appears. The order is as follows:

"On the nineteenth day of September, 1876, said constable returned said summons into court with an indorsement thereon in substance that said defendant, Edward Price, could not be found in Benton county and state of Oregon." "Affidavit for publication filed this nineteenth day of September, 1876; order for publication made and filed this nineteenth day of September, 1876, whereby it was ordered by the court that service of summons in the above entitled action, be made by publication thereof in the Corvallis Gazette, a newspaper published in Benton county, state of Oregon, once a week for six consecutive weeks next before the sixth day of November, 1876, that being the day hereby set for the hearing of said action, before me at my office in Corvallis, Benton county, Oregon, at the hour of nine o'clock in the forenoon of said day last mentioned."

The affidavit on which the order was based is not exhibited, and we are not advised of its contents. It is claimed that the order must set out enough to show a case giving the court jurisdiction to make it. If an objection had been made to this record of the judgment when offered in evidence, that this order was not sufficient, as it did not appear affirmatively that the justice had authority to make the order, the parties offering it might have produced the affidavit; and for aught that appears it was before the court, and as it is not here, we must presume that it was sufficient to authorize the order for publication. The only question is, must the order itself recite the facts which give the court authority to make it. We think the rule is that in determining the validity of the order the court may look at the affidavit and the complaint, and in the absence of any proof to the contrary, the court will presume they were sufficient.

It is claimed that the judgment of Alexander was void, for the reason that some portion of the record was written up after the time when the proceedings recorded had transpired. We think that if a justice of the peace neglects to

enter a formal judgment in his record at the time it is rendered, he may afterwards make such record and it will be valid.

The fifth instruction asked by the plaintiff, to the effect that if there were found to be erasures or alterations in the justice's record then it was void, was properly refused, for the reason that such erasures or alterations might be explained by parol evidence. It is claimed that the court, after giving to the jury the instruction asked for, as follows, "If the jury find that any fraud or collusion has entered into the proceedings practiced by the said defendant, then the record would be void, and no right would enure to the party practicing such fraud," erred in adding to this instruction the words, "but fraud must be proved; it is never presumed."

The principle announced in these words is good law, and the only objection that can be urged against this clause being added to the instruction is, that it might be an intimation that no fraud had been proven. Whatever intimation there is, if any, is in the words themselves, and the effect of such an announcement to the jury would only have been to call their attention to a duty incumbent on them to inquire into the questions of fraud presented by the pleadings and evidence, and find whether or not fraud had been practiced; and as such a finding would be necessary to enable the plaintiff to avail any benefit from the instructions, we think the words affixed to the instruction were pertinent and proper. Had the instruction not been pertinent to the case then being submitted to the jury—and from all that appears in the case now before us we think that it was—the court might have properly refused this instruction for the reason that it was not pertinent. The ground of objection to the judgment of *King v. Price,* was that the justice lost jurisdiction of the case when he entered the void judgment on the ninth of September. This was a question of law for the court, as the record was before the court, and it was the duty of the court to construe this record, and as we have before considered, the erasures and additions to the record of the justice complained of did not affect the valid-

ity of the record. So there was no question of fraud to be submitted to the jury.

These considerations dispose of the questions presented in this case. As we have found no substantial error, the judgment of the circuit court will be affirmed.

P. GOLDSMITH et al., Appellants, v. THE REVENUE CUTTER, Respondent.

PROCESS CANNOT TAKE UNITED STATES PROPERTY.—The government of the United States cannot be sued in the courts, nor can its property taken from its possession under their process, without its consent expressly given by an act of congress.

WAIVER—PLEADING TO THE MERITS.—The government of the United States did not waive its exemption from the jurisdiction and process of the courts by pleading to the merits.

APPEAL from Multnomah County.

On November 13, 1876, the appellants filed a complaint against the vessel known as the Revenue Cutter, to enforce an alleged lien upon said vessel for the sum of one thousand seven hundred and seventy-eight dollars and thirty-five cents, arising out of the furnishing of labor and materials used in the original construction of said vessel at the request of the Oregon Iron Works. On November 14, 1876, the revenue cutter was arrested under warrant, by the sheriff of Multnomah county. On December 5, 1876, the United States made claim to the vessel, and filed an answer to the merits; the answer contains no plea in abatement. On December 7, 1876, the defendant was released from arrest upon stipulation by the secretary of treasury to the effect that the United States would pay any judgment that might be given against the vessel, pursuant to sections 3753 and 3754 of Rev. Stats. of the United States.

The cause was tried by his Honor Judge Shuttuck, upon stipulation of the parties and the evidence offered and allowed by the court, and the court found:

1. That the said revenue cutter, continuously since November 2, 1876, had been in charge and possession of Capt.

J. W. White and Lieut. J. Brown, officers of the United States, or of men employed by them, or one of them on behalf of, and in service of, the United States.

2. That the said revenue cutter was, at the time of the said seizure by the sheriff, under process from this court in this cause, in the actual charge and possession of a servant of the United States, acting under direction and orders of the aforesaid officers of the United States, and the said vessel was used by said officers for storage and safe keeping of divers articles of property belonging to the United States, and in no way connected with or part of the alleged contract with the Oregon Iron Works.

3. That the watchman of the Oregon Iron Works remaining at night on board of said revenue cutter between the second and fourteenth of November, 1876, was subject to the orders and control of said officers of the United States.

The conclusions of law found were as follows: That the plaintiff have a lien as material men and laborers, as alleged in the complaint, the amount of which lien should be ascertained before enforcement could be had. That by reason of the property and possession of the United States, of and in said revenue cutter, at the time of the alleged seizure by the sheriff of Multnomah county, said lien cannot be enforced in this proceeding against said revenue cutter, or against the United States. That the United States is entitled to judgment upon its plea and claim herein, and that the prayer of the plaintiff should be denied.

J. H. Woodward and David Goodsell, for appellant.

Rufus Mallory, U. S. District Attorney, and Hill, Durham & Thompson, for respondent.

By the Court, WATSON, J.:

One of the findings of fact of the court below, is that the Revenue Cutter, defendant, was and for some time prior to the commencement of this action had been continuously in the charge and possession of Captain J. W. White and Lieutenant J. Brown, officers of the United States, or of men employed by them, or one of them on behalf of and in

the service of the United States, and that it was at the time of its seizure by the sheriff, under the warrant issued in this action, in the actual charge and possession of a servant of the United States, acting under the direction and orders of said officers; and that the watchman of the Oregon Iron Works, who remained on board the vessel at night from the second to the fourteenth of November, 1876, was subject to the orders and control of those officers.

We think that these findings of fact are equivalent to finding that at the time of the commencement of this action and the seizure of the vessel the government of the United States was, by its officers and servants, in the possession of the vessel. We are further of the opinion that such possession was sufficient to exempt the property from the process of the courts of this state.

It came clearly within the principle announced in the *case of the Davis,* 10 Wall. 15. We quote from the opinion in that case the definition of a possession by the government of the United States, which will exempt property from the process of the courts. "The possession which will do this must be an actual possession, and not that mere constructive possession, which is very often implied by reason of ownership under circumstances favorable to such an implication. We are speaking now of a possession which can only be changed, under the process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the courts and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by judicial process."

We think that the findings of fact in this case clearly show that the officers of the United States were, at the time

of the seizure of the revenue cutter, in such an actual and rightful possession of the vessel that, had they chosen to resist, a collision would have resulted between them and the officers of the court.

The United States cannot be sued in the courts, nor can its property be taken from its possession by process issued by the courts without its consent expressed by a law enacted by congress. (*Briggs v. Light Boats*, 11 Allen 157.) It is contended by counsel for appellants that the exemption of the government of the United States from suit in the courts is in the nature of a personal privilege, and must be pleaded in abatement, and that the United States having pleaded to the merits cannot thereafter raise the question. We cannot assent to this doctrine.

The exemption of the government from being sued in the courts without its consent is an attribute of its sovereignty, and its consent to be sued must be shown by some act of congress expressly to that effect. In the case of *United States v. Clarke*, 8 Pet. 444, Chief Justice Marshall said: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."

We are aware that the learned judge of the United States district court for this district has, in a proceeding to enforce a lien under the state law upon the same vessel, defendant in this action, rendered a decision which might at first view seem adverse to the views which we have herein expressed. (*The Revenue Cutter*, the United States claimant, decided in U. S. Dist. Ct. for Oregon, Jan. 2, 1878.) We have carefully examined the opinion in that case, and find nothing in it adverse to the views of the law which we herein express. The court in that case found the facts in regard to the possession of the United States differently from the findings of the court below. It found that the United States at the time of the seizure was not in the rightful possession of the vessel.

We have repeatedly decided that under our statute, the findings of fact of the court below, like the special verdict

of a jury, are not reviewable here. It is not for us to express any opinion as to the correctness of the findings of fact of the court below, in regard to the possession of the vessel.

We are governed by those facts as presented by the findings. Had the United States district judge found that the United States was in the actual possession of the vessel at the time of the seizure, we are satisfied from the reasoning used by him, that he would have arrived at the same conclusion of law as we herein announce. The notice of appeal contains a number of assignments of error, but we think that all of any importance are disposed of by the views already announced.

The decision of the court below dismissing the complaint, was correct, and the judgment must be affirmed.

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*C. W. MOORE, Appellant, v. C. S. MILLER, Respondent.

PROMISSORY NOTE TRANSFERRED WITHOUT INDORSEMENT.—Minear, being indebted to the bank of Idaho, upon his promissory note, in consideration of an extension of time thereon to Minear, Miller executed his promissory note to the bank for the sum of Minear's note, with the understanding that both notes should be delivered up when either was paid. Moore, a stockholder in the bank, received both notes, with notice of all the facts, as a part of his share of the bank assets. The Miller note was regularly indorsed to him; the other was delivered without indorsement: *Held*, 1. That Miller's liability was not that of an indorser upon the Minear note, but that it grew out of an independent contract to pay a certain sum at a fixed time, upon conditions expressed in the agreement; 2. That Moore became the owner of the Minear note without indorsement, and that he had the right to maintain his action upon the Miller note.

APPEAL from Casco County.

The facts are stated in the opinion of the court.

B. Witten, N. H. Gates and W. W. Thayer, for appellant.

W. H. Effinger, for respondent.

By the Court, SHATTUCK, J.:

The liability of the respondent, Miller, in this case must

*See 25 Am. Rep. 518.

be ascertained by the writing offered in evidence, including the note sued on. These writings show that Minear made a promissory note to the First National Bank of Idaho, for four thousand dollars, bearing interest at two per cent. a month, and due August 4, 1874. About the date of the maturity of this note, an extension of the time of payment was sought, and Miller was requested or asked by letter from the cashier of the bank to indorse this note, which by letter he consented to do. The cashier then sent to Miller the note sued on in blank, inclosed in a letter wherein this proposition was made to Miller. "If you will sign and return the note (the one sued on) I will grant the time asked for and deliver up both notes when either is paid," (referring to the Minear note upon which the time asked was granted). Miller signed this note and returned it to the cashier, and stated in the letter inclosing it, in substance that he gave this note with the understanding contained in the cashier's letter quoted from above.

There was also further evidence in the case tending to show that Moore, at the time of this correspondence, was cashier of the bank and a stockholder in the institution, but since that time he had withdrawn and had received in his settlement with the bank and as part of his share of assets, the Minear note and the note sued on—both representing, in fact, one debt and entitling the holder to payment of only one of the sums of money specified in them. The note sued on was regularly and properly indorsed by the payee; but the Minear note, through some oversight, was delivered without any indorsement whatever by the payee. The Minear note was delivered to the plaintiff by the payee for a valuable consideration, along with the note sued on, and the plaintiff was the sole party interested in the money due upon these notes.

With this testimony before the court below, it was not error to instruct the jury as a general proposition that parties to promissory notes may, as between themselves, make a separate contract as to the liability assumed by which their rights are to be governed, or they may make a contract as for an indorsement upon a separate piece of paper and attach the same to the note.

But the evidence in this case makes Miller's undertaking amount to something more than is implied in this general proposition of law. The writings introduced in evidence, fairly construed, mean simply this, that Miller, in consideration of forbearance to Minear, promised to pay, not Minear's note, but a certain definite sum of money at a certain time, with a condition, however, that if Minear's note should be paid before the day fixed, then this promise should be void. The only satisfaction or fulfillment of this promise, or the only defense to this action, upon this view of the testimony, which can avail the respondent is payment of the one or the other of these two notes, and in so far as the instruction given by the court to the jury conveyed to them a view of the matter different from that just expressed, it was erroneous. The second instruction given, to which exception was taken, and the instruction asked by plaintiff and refused, both refer to the same point, and may be considered together. The instruction given was this: "If you find that Miller executed the note of date August 4, 1874, for four thousand and one hundred and eighty-six dollars and sixty-seven cents to the First National Bank of Idaho, as collateral security for the payment of the Minear note, sixty days after the maturity of the Minear note, you must also find, before the plaintiff can recover, that he is the owner and holder of both the notes, and as they are negotiable promissory notes, that they were transferred to him by indorsement; for in no other way will the transfer convey the legal title so as to permit the plaintiff to recover in this action."

The instruction asked and refused was this: "If you believe from the evidence that plaintiff is the owner and holder of the Minear note, that will be sufficient for plaintiff to maintain an action against defendant on his note without the indorsement of the Minear note."

Two propositions are asserted by these constructions: one that the plaintiff must be the owner and the holder of both notes, in order to maintain this action; the other that the ownership of the Minear note, for the purpose of the action, must be created and exist by indorsement of the

payee's name, and not otherwise. The first of these propositions need not be considered, for the decision of the second will dispose of the case.

The question then, is, can Moore become the owner of the Minear note, it being payable to the order of the payee without the indorsement of the payee? The court below held, and the counsel for the respondent here contend that he cannot, and we are cited to a provision of our statute, and to elementary works on bills and notes, besides several reports, that employ language mainly the same as that used in the instruction given. But those cases and rules have reference to purely legal titles, to negotiable paper, and legal remedies thereon, as enforced under the law merchant. It does not follow from these citations that a party who pays valuable consideration for a note or bill, payable to order, and takes a transfer of it by delivery only, without indorsement, may not be deemed in law for many purposes the owner. By such a transfer, it is true, the holder does not take the paper clothed with all the rights of an indorsee of negotiable paper, transferred in the usual manner and course of business. He nevertheless could, under the old law, sue upon it in the name of the payee, and was so far recognized as owner as that he might lawfully collect and receive for his own use the money due on it; but, different from a regular indorsee, he would doubtless be subject to the equities subsisting between the maker and the payee. Under the New York code, and it is presumed wherever that code has been adopted, such a note payable to order may be transferred by delivery without indorsement, so as to vest the property in it in the purchaser and holder, and to entitle the holder to sue upon it in his own name. (Edwards on Bills, 286; 11 Barb. 620; 12 How. Pr. 166.) And it would seem that such a holder of a note for which he has paid value, would have a good, equitable title that would sustain a suit to enforce collection, and to establish his right to the money against both the maker and the payee.

The code of this state has preserved to a considerable extent the distinction between law and equity jurisdiction and modes of proceeding; and whether or not Moore could

maintain an ordinary action at law under our code upon the Minear note on the ground of his being the real party in interest, it is not necessary to determine at this time. But, beyond question, the evidence in this case tended to show facts from which the legal inference is that Moore has title to the Minear note and the sole right to receive the money due upon it and to cancel and deliver it up; that he could collect it if not by action at law in his own name, certainly by action at law in the name of the payee, or by suit in equity in his own name against the maker and payee.

Having such a title to the Minear note and a perfect legal title to the note sued on, we think Moore can maintain this action without having the indorsement of the payee upon the Minear note.

It follows that there was error in the instructions given and in refusing the instructions asked, and the judgment will have to be reversed and a new trial ordered.

HENRY SCHELAND, Appellant, v. JOHN ERPELDING, Respondent.

CROSS-BILL—NOT ALLOWED WHEN.—When a defendant, in his answer to an action, pleads a matter which is a defense at law, he cannot also as plaintiff file a complaint in equity in the nature of a cross-bill.

ENTIRE CONTRACT.—A contract which is for the sale of several distinct things, as for the sale of a town lot and personal property, but all for one consideration, is an entire contract, and not divisible except by the consent of both parties thereto and the making of a new contract.

WAIVER—COUNTER-CLAIM NOT DEMURRED TO.—When a counter-claim is pleaded by a defendant in a suit in equity, which counter-claim is not demurred to, but is denied by the plaintiff, all objection to the irregularity of the plea is waived.

CONTRACTS—MAY BE RESCINDED.—When one party to a contract violates it, he cannot avail himself of its provisions against the other party, and such other party has a right to consider the contract rescinded.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

M. C. George and W. H. Effinger, for appellant.

C. M. Kincaid, W. W. Thayer and W. S. Newbury, for respondent.

By the Court, BOISE, J:

John Erpelding, the respondent and defendant in this suit, commenced an action in the circuit court of Multnomah county against Henry Scheland, the appellant and plaintiff. Said action was commenced on the eighteenth day of September, 1875, and was for the recovery of wages. Plaintiff in that action alleged that Scheland was indebted to him for wages as a cooper from August 15, 1873, to September 30, 1873, at fifty dollars, in gold coin, besides board and lodging, which was worth, as he says, for that time twenty-five dollars, making in all the sum of one hundred dollars. He also claims wages as a brewer from October 1, 1873, to September 17, 1875, and alleges that said wages as brewer was reasonably worth one hundred dollars per month, besides board and lodging, which said wages as brewer are claimed to be worth two thousand three hundred and fifty dollars, in gold coin, of which the plaintiff has received from defendant on account, eighteen dollars and fifty cents. The respondent prayed for a judgment for the aggregate sum of two thousand four hundred and thirty-one dollars and fifty cents.

The appellant Scheland, in his answer puts in issue this indebtedness, and in a further and separate answer alleges that after May 1, 1874, Erpelding worked in the brewery not for Scheland, but as a partner of Scheland in the business; and alleges that from that time they were equal partners in the business of brewing. If this separate answer is true, then the plaintiff in the action could not recover for the time the partnership existed. So it seems Scheland had a complete defense against Erpelding in the claim for wages, and had no need to seek the aid of a court of equity for his defense.

But notwithstanding there was a complete defense made in the answer in the action of *Erpelding v. Scheland*, Scheland, the defendant in that action, immediately on filing his answer in the action against him, also as plaintiff filed

a complaint against Erpelding in the nature of a cross-bill to said action at law, in which cross-bill he alleges that on the first day of May, 1874, he and defendant, Erpelding, did contract and agree to form a partnership, and enter into the business of carrying on brewing for the manufacture of ale, porter and beer as copartners; that in pursuance of said agreement they did form said copartnership on the first day of May, and began at once to carry on said business at a brewery in the city of Portland, which said brewery is the separate property of the plaintiff Scheland. Plaintiff in the cross-bill further alleges that the name of the said partnership was H. Scheland & Co., and alleges that the business was continued by them until the filing of the cross-bill; that no time was fixed in the agreement of partnership as to the time of its continuance; that the defendant refused to continue to carry on said business, and that defendant has misapplied the funds of the partnership. And plaintiff in said cross-bill refers to said action at law and asks that it be stayed, and that said partnership be dissolved and the business thereof settled by a decree of the court, and that all the matters between the parties before and after the first of May, 1874, be settled by a decree in this suit.

The respondent, Erpelding, answered this cross-bill, and denied specifically having made the contract as alleged in the cross-bill, and, as a defense to said cross-bill, set up another and different contract as follows: That on or about the twenty-fifth day of April, 1874, plaintiff and defendant made a verbal contract, the legal effect of which was that plaintiff agreed to sell to defendant and defendant agreed to purchase of plaintiff one undivided one half of plaintiff's brewery and the block of land upon which the same was situated and known as block 1 Caruther's Addition to the city of Portland, together with the appurtenances, and one undivided one half interest in the business of brewing and selling ale, porter and beer, and in the team with wagon and harness used about the brewery, and the good will of the business, for the sum of three thousand five hundred dollars. No definite time being agreed on for the payment of

said sum of money by defendant to plaintiff; but said partnership was to commence on the first of May, 1874; that said defendant was to have an equal voice and control in the management of the said business, and said plaintiff was to go on and complete at his own expense a part of the brewery building, since used for the bar, which was then in course of construction, and was to have said agreement reduced to writing on said first of May, 1874, the date on which said partnership was to have commenced. Said plaintiff was, by the terms of said agreement, to make, execute, and deliver to defendant on said date, a bond for a good and sufficient deed of warranty for one half of said block of land and one half of said brewery thereon. And said defendant alleges that said contract was one and entire, and that he has never paid any money thereon, and claims that the same is void by the statute of frauds.

Defendant also pleaded a counter-claim in this suit against said Scheland for compensation for services in superintending said brewery for the period of sixteen months, the time claimed by plaintiff to be covered by said partnership. Plaintiff alleges that he has always been willing, and now is, to comply with said agreement; and says further, "That upon the first of May, 1874, defendant proposed to go on with the business of the partnership, and that he, defendant, was then unable to comply with the contract for the sale of the real and personal property, but that he agreed to pay and allow plaintiff interest on said thirty-five hundred dollars from said first day of May; the purpose of defendant being, as he informed plaintiff, to pay the purchase-money so soon thereafter as he might become able, whether from the profits of the partnership or otherwise." Plaintiff denied "that the contract was entire or within the statute of frauds, and averred that each of the said several items of said contract a separate price was agreed upon," and said reply concluded with denials of defendant's counter-claim.

The case being at issue, the cause was referred, by the order of the court to J. J. Browne, esq. (by consent of the parties in open court), to take the testimony and report his

of a jury, are not reviewable here. It is not for us to express any opinion as to the correctness of the findings of fact of the court below, in regard to the possession of the vessel.

We are governed by those facts as presented by the findings. Had the United States district judge found that the United States was in the actual possession of the vessel at the time of the seizure, we are satisfied from the reasoning used by him, that he would have arrived at the same conclusion of law as we herein announce. The notice of appeal contains a number of assignments of error, but we think that all of any importance are disposed of by the views already announced.

The decision of the court below dismissing the complaint, was correct, and the judgment must be affirmed.

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*C. W. MOORE, Appellant, v. C. S. MILLER, Respondent.

PROMISSORY NOTE TRANSFERRED WITHOUT INDORSEMENT.—Minear, being indebted to the bank of Idaho, upon his promissory note, in consideration of an extension of time thereon to Minear, Miller executed his promissory note to the bank for the sum of Minear's note, with the understanding that both notes should be delivered up when either was paid. Moore, a stockholder in the bank, received both notes, with notice of all the facts, as a part of his share of the bank assets. The Miller note was regularly indorsed to him; the other was delivered without indorsement: *Held*, 1. That Miller's liability was not that of an indorser upon the Minear note, but that it grew out of an independent contract to pay a certain sum at a fixed time, upon conditions expressed in the agreement; 2. That Moore became the owner of the Minear note without indorsement, and that he had the right to maintain his action upon the Miller note.

APPEAL from Casco County.

The facts are stated in the opinion of the court.

B. Witten, N. H. Gates and W. W. Thayer, for appellant.

W. H. Effinger, for respondent.

By the Court, SHATTUCK, J.:

The liability of the respondent, Miller, in this case must

*See 25 Am. Rep. 518.

be ascertained by the writing offered in evidence, including the note sued on. These writings show that Minear made a promissory note to the First National Bank of Idaho, for four thousand dollars, bearing interest at two per cent. a month, and due August 4, 1874. About the date of the maturity of this note, an extension of the time of payment was sought, and Miller was requested or asked by letter from the cashier of the bank to indorse this note, which by letter he consented to do. The cashier then sent to Miller the note sued on in blank, inclosed in a letter wherein this proposition was made to Miller. "If you will sign and return the note (the one sued on) I will grant the time asked for and deliver up both notes when either is paid," (referring to the Minear note upon which the time asked was granted). Miller signed this note and returned it to the cashier, and stated in the letter inclosing it, in substance that he gave this note with the understanding contained in the cashier's letter quoted from above.

There was also further evidence in the case tending to show that Moore, at the time of this correspondence, was cashier of the bank and a stockholder in the institution, but since that time he had withdrawn and had received in his settlement with the bank and as part of his share of assets, the Minear note and the note sued on—both representing, in fact, one debt and entitling the holder to payment of only one of the sums of money specified in them. The note sued on was regularly and properly indorsed by the payee; but the Minear note, through some oversight, was delivered without any indorsement whatever by the payee. The Minear note was delivered to the plaintiff by the payee for a valuable consideration, along with the note sued on, and the plaintiff was the sole party interested in the money due upon these notes.

With this testimony before the court below, it was not error to instruct the jury as a general proposition that parties to promissory notes may, as between themselves, make a separate contract as to the liability assumed by which their rights are to be governed, or they may make a contract as for an indorsement upon a separate piece of paper and attach the same to the note.

But the evidence in this case makes Miller's undertaking amount to something more than is implied in this general proposition of law. The writings introduced in evidence, fairly construed, mean simply this, that Miller, in consideration of forbearance to Minear, promised to pay, not Minear's note, but a certain definite sum of money at a certain time, with a condition, however, that if Minear's note should be paid before the day fixed, then this promise should be void. The only satisfaction or fulfillment of this promise, or the only defense to this action, upon this view of the testimony, which can avail the respondent is payment of the one or the other of these two notes, and in so far as the instruction given by the court to the jury conveyed to them a view of the matter different from that just expressed, it was erroneous. The second instruction given, to which exception was taken, and the instruction asked by plaintiff and refused, both refer to the same point, and may be considered together. The instruction given was this: "If you find that Miller executed the note of date August 4, 1874, for four thousand and one hundred and eighty-six dollars and sixty-seven cents to the First National Bank of Idaho, as collateral security for the payment of the Minear note, sixty days after the maturity of the Minear note, you must also find, before the plaintiff can recover, that he is the owner and holder of both the notes, and as they are negotiable promissory notes, that they were transferred to him by indorsement; for in no other way will the transfer convey the legal title so as to permit the plaintiff to recover in this action."

The instruction asked and refused was this: "If you believe from the evidence that plaintiff is the owner and holder of the Minear note, that will be sufficient for plaintiff to maintain an action against defendant on his note without the indorsement of the Minear note."

Two propositions are asserted by these constructions: one that the plaintiff must be the owner and the holder of both notes, in order to maintain this action; the other that the ownership of the Minear note, for the purpose of the action, must be created and exist by indorsement of the

payee's name, and not otherwise. The first of these propositions need not be considered, for the decision of the second will dispose of the case.

The question, then, is, can Moore become the owner of the Minear note, it being payable to the order of the payee without the indorsement of the payee? The court below held, and the counsel for the respondent here contend that he cannot, and we are cited to a provision of our statute, and to elementary works on bills and notes, besides several reports, that employ language mainly the same as that used in the instruction given. But those cases and rules have reference to purely legal titles, to negotiable paper, and legal remedies thereon, as enforced under the law merchant. It does not follow from these citations that a party who pays valuable consideration for a note or bill, payable to order, and takes a transfer of it by delivery only, without indorsement, may not be deemed in law for many purposes the owner. By such a transfer, it is true, the holder does not take the paper clothed with all the rights of an indorsee of negotiable paper, transferred in the usual manner and course of business. He nevertheless could, under the old law, sue upon it in the name of the payee, and was so far recognized as owner as that he might lawfully collect and receive for his own use the money due on it; but, different from a regular indorsee, he would doubtless be subject to the equities subsisting between the maker and the payee. Under the New York code, and it is presumed wherever that code has been adopted, such a note payable to order may be transferred by delivery without indorsement, so as to vest the property in it in the purchaser and holder, and to entitle the holder to sue upon it in his own name. (Edwards on Bills, 286; 11 Barb. 620; 12 How. Pr. 166.) And it would seem that such a holder of a note for which he has paid value, would have a good, equitable title that would sustain a suit to enforce collection, and to establish his right to the money against both the maker and the payee.

The code of this state has preserved to a considerable extent the distinction between law and equity jurisdiction and modes of proceeding; and whether or not Moore could

maintain an ordinary action at law under our code upon the Minear note on the ground of his being the real party in interest, it is not necessary to determine at this time. But, beyond question, the evidence in this case tended to show facts from which the legal inference is that Moore has title to the Minear note and the sole right to receive the money due upon it and to cancel and deliver it up; that he could collect it if not by action at law in his own name, certainly by action at law in the name of the payee, or by suit in equity in his own name against the maker and payee.

Having such a title to the Minear note and a perfect legal title to the note sued on, we think Moore can maintain this action without having the indorsement of the payee upon the Minear note.

It follows that there was error in the instructions given and in refusing the instructions asked, and the judgment will have to be reversed and a new trial ordered.

HENRY SCHELAND, Appellant, v. JOHN ERPELDING, Respondent.

CROSS-BILL—NOT ALLOWED WHEN.—When a defendant, in his answer to an action, pleads a matter which is a defense at law, he cannot also as plaintiff file a complaint in equity in the nature of a cross-bill.

ENTIRE CONTRACT.—A contract which is for the sale of several distinct things, as for the sale of a town lot and personal property, but all for one consideration, is an entire contract, and not divisible except by the consent of both parties thereto and the making of a new contract.

WAIVER—COUNTER-CLAIM NOT DEMURRED TO.—When a counter-claim is pleaded by a defendant in a suit in equity, which counter-claim is not demurred to, but is denied by the plaintiff, all objection to the irregularity of the plea is waived.

CONTRACTS—MAY BE RESCINDED.—When one party to a contract violates it, he cannot avail himself of its provisions against the other party, and such other party has a right to consider the contract rescinded.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

M. C. George and W. H. Effinger, for appellant.

C. M. Kincaid, W. W. Thayer and W. S. Newbury, for respondent.

By the Court, BOISE, J:

John Erpelding, the respondent and defendant in this suit, commenced an action in the circuit court of Multnomah county against Henry Scheland, the appellant and plaintiff. Said action was commenced on the eighteenth day of September, 1875, and was for the recovery of wages. Plaintiff in that action alleged that Scheland was indebted to him for wages as a cooper from August 15, 1873, to September 30, 1873, at fifty dollars, in gold coin, besides board and lodging, which was worth, as he says, for that time twenty-five dollars, making in all the sum of one hundred dollars. He also claims wages as a brewer from October 1, 1873, to September 17, 1875, and alleges that said wages as brewer was reasonably worth one hundred dollars per month, besides board and lodging, which said wages as brewer are claimed to be worth two thousand three hundred and fifty dollars, in gold coin, of which the plaintiff has received from defendant on account, eighteen dollars and fifty cents. The respondent prayed for a judgment for the aggregate sum of two thousand four hundred and thirty-one dollars and fifty cents.

The appellant Scheland, in his answer puts in issue this indebtedness, and in a further and separate answer alleges that after May 1, 1874, Erpelding worked in the brewery not for Scheland, but as a partner of Scheland in the business; and alleges that from that time they were equal partners in the business of brewing. If this separate answer is true, then the plaintiff in the action could not recover for the time the partnership existed. So it seems Scheland had a complete defense against Erpelding in the claim for wages, and had no need to seek the aid of a court of equity for his defense.

But notwithstanding there was a complete defense made in the answer in the action of *Erpelding v. Scheland*, Scheland, the defendant in that action, immediately on filing his answer in the action against him, also as plaintiff filed

a complaint against Erpelding in the nature of a cross-bill to said action at law, in which cross-bill he alleges that on the first day of May, 1874, he and defendant, Erpelding, did contract and agree to form a partnership, and enter into the business of carrying on brewing for the manufacture of ale, porter and beer as copartners; that in pursuance of said agreement they did form said copartnership on the first day of May, and began at once to carry on said business at a brewery in the city of Portland, which said brewery is the separate property of the plaintiff Scheland. Plaintiff in the cross-bill further alleges that the name of the said partnership was H. Scheland & Co., and alleges that the business was continued by them until the filing of the cross-bill; that no time was fixed in the agreement of partnership as to the time of its continuance; that the defendant refused to continue to carry on said business, and that defendant has misapplied the funds of the partnership. And plaintiff in said cross-bill refers to said action at law and asks that it be stayed, and that said partnership be dissolved and the business thereof settled by a decree of the court, and that all the matters between the parties before and after the first of May, 1874, be settled by a decree in this suit.

The respondent, Erpelding, answered this cross-bill, and denied specifically having made the contract as alleged in the cross-bill, and, as a defense to said cross-bill, set up another and different contract as follows: That on or about the twenty-fifth day of April, 1874, plaintiff and defendant made a verbal contract, the legal effect of which was that plaintiff agreed to sell to defendant and defendant agreed to purchase of plaintiff one undivided one half of plaintiff's brewery and the block of land upon which the same was situated and known as block 1, Caruther's Addition to the city of Portland, together with the appurtenances, and one undivided one half interest in the business of brewing and selling ale, porter and beer, and in the team with wagon and harness used about the brewery, and the good will of the business, for the sum of three thousand five hundred dollars. No definite time being agreed on for the payment of

said sum of money by defendant to plaintiff; but said partnership was to commence on the first of May, 1874; that said defendant was to have an equal voice and control in the management of the said business, and said plaintiff was to go on and complete at his own expense a part of the brewery building, since used for the bar, which was then in course of construction, and was to have said agreement reduced to writing on said first of May, 1874, the date on which said partnership was to have commenced. Said plaintiff was, by the terms of said agreement, to make, execute, and deliver to defendant on said date, a bond for a good and sufficient deed of warranty for one half of said block of land and one half of said brewery thereon. And said defendant alleges that said contract was one and entire, and that he has never paid any money thereon, and claims that the same is void by the statute of frauds.

Defendant also pleaded a counter-claim in this suit against said Scheland for compensation for services in superintending said brewery for the period of sixteen months, the time claimed by plaintiff to be covered by said partnership. Plaintiff alleges that he has always been willing, and now is, to comply with said agreement; and says further, "That upon the first of May, 1874, defendant proposed to go on with the business of the partnership, and that he, defendant, was then unable to comply with the contract for the sale of the real and personal property, but that he agreed to pay and allow plaintiff interest on said thirty-five hundred dollars from said first day of May; the purpose of defendant being, as he informed plaintiff, to pay the purchase-money so soon thereafter as he might become able, whether from the profits of the partnership or otherwise." Plaintiff denied "that the contract was entire or within the statute of frauds, and averred that each of the said several items of said contract a separate price was agreed upon," and said reply concluded with denials of defendant's counter-claim.

The case being at issue, the cause was referred, by the order of the court to J. J. Browne, esq. (by consent of the parties in open court), to take the testimony and report his

findings of fact and conclusions of law thereon, and after the said testimony had been regularly taken, the said referee duly reported finding that defendant was entitled to have plaintiff's suit dismissed, and a judgment against plaintiff for the sum of one thousand three hundred ($1,300) dollars, gold coin, and his costs and disbursements of suit, and the said report was duly confirmed in all respects by the court below and a decree was given dismissing plaintiff's suit, and a decree or judgment for defendant against plaintiff for the sum of one thousand three hundred ($1,300) dollars, gold coin, and his costs and disbursements of suit. From which decree of said court, the appellant brings this appeal.

There are several questions presented in this case arising on the pleadings and evidence. The first, that we will notice is, could the equitable defense pleaded in this cross-bill be interposed to the action at law before mentioned? As has been before stated, a complete answer had been interposed to the action at law. The indebtedness was denied, to the whole claim for wages and as to that part of the wages claimed after the first of May, 1874, a special answer was pleaded that the parties were then partners, and that whatever work was done after that time was done for the partnership, and not for Scheland, the defendant in the action.

The question of the existence of this partnership, if traversed, could be tried by a jury in the action at law, and was therefore a good defense; and Scheland had no need to avail himself of an equitable defense, and the motion of the plaintiff in the action at law, to strike out this cross-bill, should have prevailed. Such was held to be the law in the case of *Dolph v. Barney*, 5 Or. 191. But the court overruled the motion to strike out this bill, and the same was allowed to stand as a defense to that part of Erpelding's claim which accrued after the first of May, 1874, and the action at law was allowed to proceed as to that part of plaintiff's claim accruing before that time. The plaintiff, Erpelding, obtained a judgment on that part of his claim, and the parties have acquiesced in this judgment.

If the parties had been allowed to proceed at law, and try the issue there tendered on the question of partnership, and it had been decided, as it afterwards was in this case, that there was no partnership, then Erpelding would have been able to obtain a judgment for his wages if found to be due. But as the parties have themselves abandoned that part of the action, and proceeded to make an issue, as to the partnership and also as to the claim of Erpelding for wages in this equity proceeding two questions are presented: First, could a court of equity sustain this suit, coming before it as it did in the nature of a cross-bill? As we have before said we think this cross-bill should have been stricken out on motion, but the court having refused that motion, the plaintiff had his option to insist on his motion, and assign the overruling of the same as error; or do as he did, answer the same and let this part of his case proceed in equity.

This cross-bill is a bill to dissolve and settle an alleged partnership, and would have been a proper proceeding as a suit in equity had the issue of partnership in the action at law been found for Scheland, and that part of the claim of Erpelding thereby defeated; that is to say, the matters alleged in the bill are such as belong to the jurisdiction of a court of equity, and the same being before the court by proper pleadings, and the parties having appeared and submitted to the jurisdiction, we think the court had authority to hear and determine the question as to whether there was a partnership as alleged; and if such was found, to declare and settle it, if a sufficient case was made by the pleadings and the evidence. The next question is, could the court entertain and determine the merits of the counter-claim by Erpelding, and in case it was found there was no partnership, give a decree for wages as claimed in the counter-claim?

If the plaintiff in the cross-bill desired to exclude such a claim from consideration in the case, he should have demurred to it, which he did not do, and he thereby waived any irregularity in pleading the same and every objection except the want of jurisdiction of the court over the subject-matter of the thing in controversy. And we think that

the consideration of the matter of this indebtedness for work is such a thing as may be considered by a court of equity when the parties are present and consent to the submission of the matter to the court, and we think it is too late now to raise this objection, if it were a valid objection at any time, which question it is not necessary now to decide.

The court, having this case properly before it, referred the same to J. J. Browne, esq., to take the evidence and find the conclusions of fact and law therefrom, and said referee, after taking the evidence and finding his conclusions of fact and law, reported the same to the court, and the court affirmed the report and made a decree in accordance therewith.

The findings of fact by the referee are, we think, warranted from the testimony, and we shall consider them as the facts in the case, and they are about as follows: On the twenty-fifth day of April, 1874, plaintiff and defendant entered into an oral agreement to form a copartnership to carry on the brewing business, and for the sale by plaintiff to defendant for one undivided half of the plaintiff's brewery and the block of land on which it was situated, and some personal property specified in the contract. Defendant was to pay plaintiff as a consideration for said sale and copartnership the sum of three thousand five hundred dollars; and said agreement specified that said copartnership should commence on the first day of May, 1875. No time was stated in said agreement when said three thousand five hundred dollars should be paid, or as to how long the partnership should continue. The contract was never reduced to writing, or any part of the three thousand five hundred dollars ever paid.

On the first day of May, 1874, the parties began to carry on the business of the brewery together, and so continued for a period of about sixteen months, when the parties had a quarrel, and soon after, about the fifteenth of September, 1875, the defendant left the business and brewery in the possession of plaintiff. Before the defendant left, the plaintiff claimed to be the sole owner of the brewery, and

that he could control it as he pleased, and threatened to eject the defendant without a cent. From these facts it appears that the parties entered this partnership under this parol agreement, and were partners so far as their doings with third parties were concerned, and we think that the defendant might, by a proceeding in equity, and the tender of the money, have compelled the performance of the contract on the part of the plaintiff, provided he had, by entering on the same with the plaintiff, and continuing for sixteen months, become so involved in the business that he could not retire without loss to himself. But when the plaintiff claimed the brewery as his own, and threatened to not comply with the agreement, and defendant could take the alternative of retiring from the business, and rescinding the contract, and the plaintiff could not complain, for the contract being entire, and for one consideration, could not be severed by plaintiff without the consent of the defendant; that is, the defendant could insist on the performance of the whole contract; and if the plaintiff refused to convey the property to him and threatened to turn him out, he could return and repudiate the partnership; and the plaintiff has no right to enforce against the defendant a contract which he has violated.

When the plaintiff claimed that he owned the brewery and could eject the defendant, he repudiated the partnership, and such repudiation necessarily went back to the time of its commencement, for if the defendant on the first of May was an owner in the brewery he still was on or about the fifteenth day of September, when the plaintiff claimed to own it all and threatened to assert his legal title, which he then held, and which, at law, would enable him to eject the defendant, and the defendant had the right to acquiesce, and not go into equity to compel a specific performance.

So we think that by the act of the plaintiff, the partly performed contract was rescinded, and became void as between the parties, as though it had never been entered upon, and as the plaintiff has sought the aid of a court of equity to settle this business, and it appears that he en-

abled the defendant to retire, and the cause being before the court, the court can settle the rights of the parties growing out of this business, and find for the defendant a just compensation for the time he served in the brewery of the plaintiff, which the referee has found to be one thousand three hundred and twenty dollars, which we think to be reasonable and just, and such will be the finding of this court, and the decree of the circuit court will be affirmed.

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*SAMUEL A. MILES, Respondent, v. SPENCER D. MILES et al., Appellants.

VALUABLE CONSIDERATION—CONVEYANCE OF REAL ESTATE.—Where a deed recites that the estate therein conveyed is subject to a mortgage, the acceptance of such deed by the grantee therein, and the subsequent payment by such grantee of the mortgage, in the absence of actual fraud, constitutes such a valuable consideration as will uphold the deed as against creditors, existing or subsequent, of the grantor.

APPEAL from Multnomah County.

This is a suit in equity in the nature of a creditor's bill, to set aside a conveyance made by defendant, Spencer D. Miles, to defendant Laura Tredeau, and to subject certain real property described in that conveyance to the lien of a judgment obtained by plaintiff against said Spencer D. Miles. The amended complaint alleges in substance, that on the twenty-fourth day of March, 1875, the said Spencer D. Miles was the owner in fee-simple of certain lands described in the complaint; that he, on that day, by his deed, duly executed and recorded, conveyed said lands to appellant, Laura R. Tredeau, who was then unmarried, and whose name was then Laura R. Wetherbee, and who has since intermarried with defendant, Joseph Tredeau; that said Spencer D. Miles was at, and before, the time when he executed said deed, indebted to plaintiff in the sum of eight hundred dollars, for rent of certain premises of plaintiff formerly occupied by him, and in the sum of two hundred and sixty-seven dollars and fifty cents, upon a certain promissory note formerly given by him to one Ellerton, and by said Ellerton assigned to said plain-

*See 25 Am. Rep. 522.

tiff, and that he was also indebted to other persons; that said deed was made without any consideration, and was contrived and intended by the said Spencer D. Miles to defraud plaintiff and his other creditors out of their debts. That plaintiff, on the eleventh day of February, 1876, recovered a judgment against Spencer D. Miles, defendant, in the circuit court for Multnomah county, upon the causes of action hereinbefore stated, and caused a transcript of said judgment to be filed in the county of Columbia, the county in which the land sought to be reached by this suit, is situated; that he caused an execution to be issued to enforce said judgment, and placed in the hands of the sheriff of Columbia county for service, and that the sheriff returned "*nulla bona*" on that execution; that since the rendition of the judgment, said Spencer D. Miles has never had any property out of which it could be satisfied in whole or in part.

The answer denies all the allegations of the complaint, except the alleged prior ownership of the land by S. D. Miles, and the issue and return of the execution against him, and the allegation that he had no other property. Defendant also alleges that the deed to Laura was taken, so far as she was concerned, in good faith; that there was a mortgage on the property when she received the deed, and that she has paid it off. The reply denies all new matter set up in the answer.

The complaint alleges that Girard, one of the defendants, who had taken a mortgage of the premises from Laura, took it with notice of the matters set up in the complaint. The answer denies such notice, and alleges that he took his mortgage in good faith, and without any notice of such matters. The court below found the deed from defendant S. D. Miles to defendant Laura R. Tredeau to have been made without any valid consideration, and as to defendants Laura R. and Joseph Tredeau, decreed that the land therein conveyed should be subjected to the lien of the judgment of the plaintiff, but it further found that at the time defendant Girard took his mortgage, he did so in good faith and without notice

of the invalidity of the deed to Laura, and sustained his mortgage.

Defendants, Joseph, and Laura R. Tredeau, appeal to this court.

Catlin & Killen, for appellant.

T. A. McBride, for respondent.

By the Court, WATSON, J.:

This suit comes to this court for trial anew on the pleadings and evidence forming part of the transcript. The decree of the court below sustains the mortgage in favor of defendant Girard; and as neither party appeals from that part of the decree, it need not be considered by us in this opinion. The first and most important question in this case, upon the decision of which the case mainly depends, is this: "Does the fact that the deed from Spencer D. Miles to Laura R. Tredeau, which is attached in this suit, recites and expresses that it is taken subject to a mortgage for the sum of five hundred dollars, which said Laura R. Tredeau afterwards paid, constitute a valuable consideration for the deed?" That the deed does so recite, and that she did pay that sum with interest is alleged in the answer, and not denied in the reply. This question is important, because the complaint, while it charges that defendant, Spencer D. Miles, intended by the deed in dispute to defraud plaintiff and his other creditors, neither directly nor indirectly charges that said Laura R. Tredeau was a party to that fraud, or that she had any knowledge or notice of the fraudulent intent of her grantor. The deed is attacked solely upon the ground that it is a voluntary conveyance. On the other hand, defendants allege no other consideration than the said mortgage and its payment by defendant Laura, and they attempt to prove no other consideration.

We are not prepared to argue with counsel for appellant in the proposition, that when a deed recites that the premises therein conveyed are subject to a mortgage, the grantee, by accepting the deed, binds himself personally to pay the debt secured by the mortgage. The authorities fully sustain the

proposition, that when the deed not only recites the mortgage but adds that the grantee assumes it, he is personally bound if he accepts the deed. (1 Hill. on Mort. 357; 7 Cush. 133.) This obligation the law implies without any express promise. (9 Mass. 510.) We think this is as far as the cases go in support of the theory that by accepting a deed which expresses that the estate therein conveyed is subject to a mortgage, the grantee becomes liable to the mortgagee personally for the debt secured by the mortgage.

But while we hold that the mere acceptance by the grantee of a deed which expresses that the estate which it conveys is subject to a mortgage, will not render the grantee personally liable to the mortgagee for the mortgage debt, we are of the opinion that if in such case the grantee shall pay off the mortgage, such payment will, in the absence of any further explanation, be taken as a payment of so much of the purchase-money for the premises, and it will be a valuable consideration sufficient to uphold the conveyance. In this case the deed, in addition to the usual parts, contains a clause reciting that the premises are subject to a mortgage for five hundred dollars. Such a construction should be given the instrument as will give effect to all of its parts according to the intent of the parties. It is evident that at the time of the execution of the deed in dispute, the grantor thought of the mortgage, and caused a clause, reciting that the estate was subject to it, to be inserted, in order that the grantee might have notice of its existence, and might know that she could only enjoy the estate granted upon the condition that she should pay it off. We think that by accepting the estate upon this condition, while she did not render herself personally liable to the mortgagee, she at least placed herself in a position such as that she must lose the property or pay off the mortgage. Under these circumstances she actually did pay the mortgage, amounting, with interest, to the sum of five hundred and eighty-four dollars. Spencer D. Miles thus actually received by the payment of the debt which he owed the mortgagee for the land, the sum of five hundred

and eighty-four dollars, and the defendant Laura R. Tredeau actually paid that sum for the land. We think that when Spencer D. Miles made and Laura R. Tredeau accepted the deed, to set aside which this suit was brought, it may be reasonably presumed that they intended that she should pay off the mortgage, which the deed recited was upon the land, and that they intended that such payment should be deemed a payment of that amount of the purchase-money.

It is not necessary for us in this case to decide whether or not, as between Spencer D. Miles and Laura R. Tredeau, the said Laura, by accepting the deed in dispute, became liable to indemnify him against the mortgage, expressed in the deed to be a lien on the estate. That she did in fact pay it is, under the circumstances, in the absence of any proof of actual fraud, a sufficient consideration to uphold the deed. A number of other questions of law and of fact are presented by the transcript, but as our views expressed as to the sufficiency of the consideration are decisive of the main question in the case, we deem the examination of the other questions unnecessary.

It follows that the decree of the court below must be reversed, and that this cause must be remanded, with direction that the complaint be dismissed.

JOHN R. ROY, Respondent, v. F. C. HORSLEY, Appellant.

SHERIFF—RETURN OF—PRESUMPTIONS.—The return of an officer, serving a notice of appeal, did not show in what county the service was made: *Held*, that it would be presumed that the service was made within the local jurisdiction of the officer making it, and that, the sheriff of Grant county being the officer who made the return, it would be presumed that the service was made within such county.

IDEM.—The sheriff's return upon a notice of appeal showed that service had been made upon L., the attorney of the respondent in the action, but it did not show that L. was a resident of the county within which the notice was served: *Held*, that it would be presumed that the attorney was a resident of the county in which he appeared as counsel, and in which the notice was served.

APPEAL from Grant County.

This was a motion to dismiss the appeal on the ground that the notice of appeal was not served as required by law.

The return of the officer who served the notice of appeal is as follows:

"State of Oregon, County of Grant, ss.

I hereby certify and return that I served the within notice of appeal upon the within named W. B. Laswell, on the nineteenth day of October, 1877, by delivering to him a copy thereof certified to by Geo. B. Curry, attorney for defendant.

W. P. GRAY, Sheriff.
By C. S. PIERCE, Deputy."

Sheriff's fees $75.

The record disclosed the name of W. B. Laswell as the attorney of Roy, the respondent. It was contended in behalf of the motion that the return should show, first, that the service was made within the county of Grant; and, second, that Laswell, the attorney of Roy, was a resident of said county.

L. O. Sterns and Bonham & Ramsey, for the motion.

James K. Kelly, opposing the motion.

By the Court, WATSON, J.:

We do not think the first objection well taken. This court decided in the case of *Dennison v. Story*, 1 Or. 272, that when a verification to a pleading is taken by a known and recognized officer, having authority within the district in a cause pending in such district, it is to be presumed that such verification was taken within the local jurisdiction of such officer, for otherwise we must presume that such officer has violated his official obligation by exercising his functions without his jurisdiction.

We think the same principle is applicable to the return of a sheriff. He cannot serve process except in his county. When he certifies that he did serve process, it will be presumed that such service was within his county, in the absence of proof to the contrary, rather than that he has assumed to act without his local jurisdiction; especially when,

as in this case, the venue of the return is in the proper county.

We do not think the second objection well taken. The return shows that the summons was served upon W. B. Laswell, and that it was served in the county in which the action was tried. The transcript shows that W. B. Laswell was an attorney in the action. We think it will be presumed that he was a resident in the county in which he appeared as counsel and in which the notice was served upon him. We so decided in the case of *Wolf v. Smith*, at the last term of this court, on a similar return.

The motion to dismiss will be overruled.

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*JOHN W. MOORE, Respondent, v. MARY A. E. FULLER et al., Appellants.

CERTIFICATE OF ACKNOWLEDGMENT—IMPEACHMENT OF.—The officer's certificate of the acknowledgment of the execution of a mortgage or deed cannot be impeached by parol evidence, unless there are allegations in the pleadings to warrant it.

MARRIED WOMAN—DEED BY, CANNOT BE AVOIDED, WHEN.—If a married woman, without duress or misrepresentation as to the nature of the instrument, joins her husband in a deed, and suffers the same to be delivered, she cannot avoid it on account of fraud and misrepresentation, without showing that the grantee knew of or participated in the fraud.

IDEM—DEBTS OF HUSBAND.—The sale or mortgage by a married woman of her seperate property for the payment of her husband's debts may be enforced.

CONSIDERATION—PRE-EXISTING DEBT.—A pre-existing debt or liability is a sufficient consideration to uphold a mortgage.

APPEAL from Benton County.

The facts are stated in the opinion of the court.

John Kelsay and L. Vineyard, for appellants.

F. A. Chenoweth, for respondent.

By the Court, MCARTHUR, J.:

This is a suit in equity to foreclose a mortgage. The record shows that on May 1, 1874, A. Fuller, James O. Fuller and T. M. Fuller made and delivered to one Reed

*See 25 Am. Rep. 524.

a promissory note for the sum of one thousand dollars, with interest at one per cent. per month, payable one year after date without grace.

John W. Moore, the respondent, became surety on said note. The note was not paid at maturity. Reed demanded payment, and the Fullers not being able to raise the money without stripping themselves of property necessary to carry on their business, it was agreed between Moore, the surety, and the Fullers, that if they would secure him, he would pay the note, and give them time to make the money. Accordingly, said A. Fuller and Mary A. E. Fuller, his wife, in consideration of Moore's advancing the money to pay Reed and extending the time of payment, executed to Moore a mortgage upon certain real property, which was the separate property of said Mary A. E. Fuller. Moore paid the money to Reed, and took an indorsement of the note. The note remaining unpaid, this suit was brought to foreclose the mortgage, the Fullers having in the mean time become insolvent. The testimony certified up with the transcript, clearly establishes the making and acknowledgment of the mortgage to secure Moore, that he gave the Fullers time, from the date of its execution until the commencement of this suit—nearly six months; that the land mortgaged was the separate property of Mary A. E. Fuller, and that her husband joined her in the execution thereof.

The testimony in relation to fraud in procuring the acknowledgment, even if relevant, is wholly insufficient to warrant the conclusion that any improper means were resorted to to induce Mrs. Fuller to execute and acknowledge the mortgage. But it is not relevant, for there is no allegation in the answer of fraud, in relation thereto. It will be found, that the certificate of the officer to the acknowledgment of the mortgage deed appears on its face to have been in substantial compliance with the statute, and that the evidence to impeach it was wholly parol evidence, and we decided in *Dolph v. Barney*, 5 Or. 205, that such an acknowledgment could not be impeached by parol evidence unless there were allegations in the pleadings to warrant it. Furthermore, if there was fraud therein there is nothing to show that Moore participated in

it, and the law is, that if a married woman of sufficient mental capacity, without duress or misrepresentation as to the nature of the instrument, joins her husband in the deed, and suffers the deed to be delivered, she cannot avoid it on account of fraud and misrepresentation, without showing that the grantee knew of or participated in the fraud. (*White v. Graves*, 107 Mass. 325.) The rule applies to mortgages as well as to deeds absolute.

Passing this point, we find presented several questions in relation to the right of a married woman to mortgage her separate property for a debt of her husband. It is unnecessary to examine these questions at length, for we have decided that a married woman has a right to sell or mortgage her separate property for the payment of her husband's debts. (*Allen and Lewis v. Harker et al.*, December term, 1876. Opinion by Mr. Justice BOISE.)

We come now to examine the most important question presented by this record. There was no consideration passing to the mortgagors at the time of the execution of the mortgage. The consideration was the pre-existing liability of the payors of the note heretofore mentioned to the surety, Moore. Is a pre-existing liability a sufficient consideration to support a mortgage? This question has been differently decided by different courts. Mr. Justice Story, 2 Eq. Jur. 657, 658, 9th ed., holds to the affirmative, and bases his opinion on *Mitford v. Mitford*, 9 Ves. 100; and *Bayley v. Greenleaf*, 7 Wheat. 46. In White and Tudor's Leading Cases in Equity, vol. 2, part 1, 73, it is said "similar decisions were made in *Richeson v. Richeson*, 2 Gratt. 497; and in *Dey v. Dunham*, 2 John. Ch. 182." It will be found, however, that the courts of New York have not followed the case of *Dey v. Dunham*, but have since that decision uniformly held that a pre-existing debt or liability is not sufficient consideration to uphold a mortgage. Chancellor Kent, however, 4 Com. 154, regarded a pre-existing debt or liability sufficient to support a mortgage. In support of the doctrine, he cites *Roberts v. Salisbury*, 3 Gill & John. 425, and *Gann v. Chester*, 5 Yerger, 205; and he thought the principle rested upon grounds

which would command general assent. *Jewett v. Warren*, 12 Mass. 300, and *Babcock v. Jordon*, 24 Ind. 14, are to the same effect. Indeed, the weight of authority is in favor of the affirmative of the proposition, and to that we give our assent.

Connected with this there is another point deserving of attention. The mortgage was executed May 3, 1876, and Moore paid Reed the amount of the note May 6, 1876. This fact is the basis of the further claim of appellants' counsel, that Moore's liability is not sufficient consideration to support the mortgage. In *Jewett v. Warren, supra*, it was distinctly held that a liability for another on a contract in force is sufficient consideration for a mortgage or pledge. So we decide.

Decree affirmed.

N. P. MACK, Respondent, v. THE CITY OF SALEM, Appellant.

MUNICIPAL CORPORATION—NOTICE OF DEFECTIVE SIDEWALKS.—To maintain an action against a municipal corporation for an injury to a person resulting from the bad condition of its streets, it must be alleged and proven that the corporation or its officers had notice of such condition of the streets, or a state of facts must be shown from which notice may be implied.

COMPLAINT—WAIVER.—The objection that the complaint does not state facts sufficient to constitute a cause of action, is never waived by a failure to demur or answer.

APPEAL from Marion County.

This is an action to recover damages for injuries received by the respondent in consequence of a fall upon a broken and defective sidewalk in the city of Salem. The jury found for the respondent in the sum of four hundred and seventy-five dollars, and he recovered judgment for that amount. There was no allegation in the complaint or evidence tending to prove that the city or its officers had notice of the defect complained of.

Knight & Lord, for appellant:

The complaint does not state facts sufficient to constitute a cause of action, for the reason that there is no allegation in the complaint that the appellant had notice of the defect in the said walk. No one can maintain an action against the corporation grounded solely on the defect and want of repair of the highway; but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway. (*Weightman v. Corp. of Washington,* 1 Black, 52.)

A municipal corporation is not an insurer against accidents upon its streets or sidewalks; its duty in that respect is performed if they are kept in reasonably safe condition for travelers over them. (2 Dill. Mun. Cor. sec. 789; 33 Iowa, 398.) Before a municipal corporation can be held guilty of negligence on account of defects in the sidewalks (not arising from the original construction), or for an obstruction placed thereon by a wrong-doer, either express notice of the existence of the defect or obstruction must be brought home to it, or they must be so notorious as to be observable by all. (33 Iowa, 399; 24 Wis. 549; 4 Wallace, 195; 5 Duer, 674; 36 Barb. 227.)

Cutting and Lawson, for respondent:

"An objection to the sufficiency of the cause of action or defense, as stated in the pleadings, cannot be made on a motion for a new trial, but only in arrest of judgment. A good cause of action or defense, imperfectly stated, is covered by a general verdict, and a motion in arrest of judgment will not lie." As to liability of cities in such cases, see *Rice v. Des Moines,* 40 Iowa, 638; 55 Ill. 322; 35 Ill. 64.

On the point of notice being charged, plaintiff alleges that it was sufficiently charged, if not in direct words, yet by intendment, and was proven and was found by the jury. In support of this position plaintiff submits the following quotations from Chitty's Pleadings and Oregon reports: "The court is satisfied that the verdict is correct upon the evidence,

and ought not therefore to be set aside." (1 Or. 164.) "Where the general allegations in the declaration or other pleading are such as to require proof of any particular fact, which is not expresaly stated, in order to entitle the plaintiff to a verdict, it will be intended after a verdict for him that such fact was duly proved and the defect aided." (1 Chitty's Pl. 678.)

"If the complaint does not aver, and the plaintiff fails to prove a necessary fact, the defendant must move for a nonsuit, else the verdict will aid the defects in the evidence as well as in the complaint." (Id. 680.) Contra: "The main rule on the subject of intendment is, that a verdict will aid defective statement of a title or cause, but will never assist a statement of a defective title or cause of action." (1 Chitty's Pl. 680.)

In the case at bar, it is alleged that the defendant's duty was to keep the side or crosswalk in repair. That it accepted the charter with that duty imposed. That the place where the injury was received was a sidewalk and crosswalk much traveled and used by the citizens of the city and others, so much so that said duty of said defendant was and became at the time of said inquiry a matter of general and public concern. Then is it not clear that this case is one of defective statement, and not one of a statement of a defective cause? It is not a defect that bars an action at any time, but that only abates it now. (10 Cal.—; 1 Chitty's Pl. 680; 9 Cal. 268.)

By the Court, PRIM, C. J.:

It is admitted by the pleadings in this case that it is the duty of the city of Salem, under its charter, to keep in repair, and in a safe condition for travelers, its streets and side and crosswalks.

Respondent having obtained a verdict and judgment in the court below, appellant seeks to reverse said judgment on the ground that the complaint upon which the judgment is based is fatally bad, for the reason that it does not contain a statement of facts sufficient to constitute a cause of action, in this, it contains no allegations that the corpora-

tion or its officers had any notice of the defect in the side and crosswalk alleged to have caused the injury complained of by respondent.

It does not appear from the transcript that the court below was ever directly called upon to pass on the sufficiency of the complaint. A general demurrer was interposed in the court below upon this ground, but was withdrawn by consent of parties without any action of the court upon it. Nor does it appear that a motion in arrest of judgment was ever made upon the ground; but appellant specifies this ground of error for the first time in his notice of appeal. And it is urged by counsel for respondent that the defect is waived and cured by verdict. If the complaint contained a cause of action, but defectively stated, the position would be correct and the authorities cited by respondent applicable. But this is not this case. The complaint is bad for the want of a material allegation to show the liability of the appellant for the injury complained of.

By section 70 of the code, "the objection that the complaint does not state facts sufficient to constitute a cause of action" is never waived by failing to demur or answer. (7 Barb. 581.)

To maintain an action against a municipal corporation for an injury to the person in consequence of its streets or sidewalks being defective and out of repair, it must be alleged and proved that the corporation or its officers had notice of such defect and want of repair, or at least a state of facts must be shown from which notice may be inferred or implied. Mr. Dillon in commenting on this question says: "As in such case the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability. For in such cases the corporation is responsible only for reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known or ought to have been known to it or its officers, having authority to act respecting it." (Dill. on Mun. Corp. 921.) The doc-

trine that notice to the corporation is essential to fix liability in such cases as the one under consideration, is fully sustained by the following authorities: (*Mayor v. Sheffield*, 4 Wall. 195; *Wrightman v. Corp. of Washington*, 1 Black, 53; 24 Wis. 342; 33 Iowa, 397.)

The complaint in this case containing no allegations of notice, nor such a statement of facts from which notice might be implied, we think it insufficient to sustain the judgment, and it must therefore be reversed and the cause remanded to the court below for further proceedings.

Judgment reversed.

MULTNOMAH COUNTY, Appellant, v. A. J. KNOTT and LEVI KNOTT, Respondents.

SPECIAL ACT CONSTRUED—FERRY LICENSE.—The license to keep a ferry, granted by the territorial legislature to James B. Stevens, is perpetual, and relieves the grantee from the necessity of obtaining license from the county court.

EXCLUSIVE JURISDICTION—JUSTICE OF THE PEACE.—When the statute creates an offense and affixes a penalty thereto, and provides that such penalty shall be collected by an action before a justice of the peace, the justices' courts have exclusive jurisdiction of such action.

APPEAL from Multnomah County.

The facts are stated in the opinion.

Raleigh Scott, Prosecuting Attorney, for appellant.

James K. Kelly and W. W. Thayer, for respondents.

By the Court, BOISE, J.:

This was an action commenced in the circuit court of Multnomah county, to recover of the defendants certain fines or forfeitures, alleged to have accrued against the defendants for keeping a ferry across the Willamette river, at Portland without having first obtained a license for that purpose from the county court of Multnomah county. This action is for the violation of section 53, p. 733, of the statute which is as follows: "Any person who shall maintain any ferry and receive ferriage without first obtaining a license for the same, shall pay a fine of ten dollars for each offense, to be collected

for the use of the county by suit before any justice of the peace having jurisdiction."

The defendants admit that they have kept the ferry, as charged, and taken ferriage; that they have no license from the said county court. But they set up as a defense that they have a license to keep said ferry, granted to James B. Stephens, his heirs and assigns, in January, 1852, by the legislature of the territory of Oregon, which, defendants claim, was a perpetual grant, and that the same has been duly assigned to them, and is now owned by them. It is conceded that a perpetual right to keep such ferry was granted by the legislature of the territory, and that the defendants now own such right. But plaintiff claims that the words of the act, "That James B. Stephens, his heirs and assigns be and they are hereby authorized to establish and keep a ferry across the Willamette river, at the city of Portland, in Washington county, to the county of Clackamas, on the east side of said river, opposite, within the following limits," etc., do not exempt the defendants from procuring a license from the county court. The right of ferriage is a right vested in the sovereign, and may be granted to individuals by special act, or given to certain persons by a general act of the legislature, and when so granted becomes a franchise in the person to whom it is granted, and, when unlimited as to time, is a perpetual right, and this right cannot be taken away from the grantee unless he forfeits his right, and that forfeiture must be declared by some competent tribunal.

We think this grant of a ferry right to James B. Stephens was a license to keep a ferry, and it was not necessary for him to have a license from the county court for the purpose; and, as it is conceded that that right still exists in the defendants, we think they may still keep said ferry without incurring the penalty sued for in this case.

There is another point made in this case by the respondents, which is that the circuit court has no jurisdiction to sustain a suit for a penalty of this kind. The statute provides that any person who shall receive ferriage without such license shall pay a fine of ten dollars for each offense, to be collected for the use of the county, by suit, before any justice

of the peace having jurisdiction. The statute has created the penalty, and provided the mode in which it shall be collected, and we think in this case, as this offense is wholly created by the statute and the manner of its collection specially directed, that it excludes any other mode, and that the jurisdiction to collect this fine resides exclusively in a justice's court in the first instance, for when the statute says "to be collected by a suit before a justice of the peace," it necessarily excludes any other mode of collection.

We think the judgment of the circuit court should be affirmed.

JAMES H. FRUSH, Respondent, v. THE CITY OF EAST PORTLAND, Appellant.

MUNICIPAL CORPORATION—LIABILITY OF, ON CONTRACT.—The charter of the city of East Portland empowers the corporation to open and establish streets, to appropriate private property therefor, to improve streets, etc., "with full power to determine and provide for everthing necessary and convenient to the exercise of the authority" granted. The city contracted with F. for a street improvement, and agreed "to pay the amount found due therefor by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose:" *Held*, that the right of F. to recover the amount due on this contract is not restricted to the funds arising from the tax levied upon the property adjacent to the improvement, that being the mode of raising money to pay for such improvements provided by the municipal authority; but that the city is liable therefor, and is bound to provide funds to pay for such improvements.

STIPULATED FACTS—FINDINGS NOT REQUIRED.—In a trial before the court, without the intervention of a jury, the parties having stipulated the facts, no formal findings of fact are necessary.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

W. W. Thayer, for appellant.

M. C. George, for respondent.

By the Court, MCARTHUR, J.:

The respondent entered into a contract with the city of East Portland to improve a certain section of one of its

streets, including a sidewalk and gutters, for which the city agreed "to pay the amount found due, by warrants to be drawn on the fund to be collected and be paid into the city treasury for that purpose." By stipulation filed it is admitted that the work was duly performed and accepted, and that at the time of acceptance there was a balance found due the respondent amounting to four hundred and twenty-eight dollars. For this sum the city drew its warrant, which was immediately presented, but it was not paid for the reason that there was no fund at hand wherewith to pay the same.

Whether the city is primarily liable upon this contract depends not wholly upon the terms thereof, but also upon the provisions of the charter. It will be observed that though the improvements were local, there is nothing in the contract to show that it was in the minds of the contracting parties at the time the same was entered into that a special and local tax was to be resorted to in order to raise the fund from which the warrants were to be paid. The contract provided simply that the respondent should do certain work at a stipulated price, and that upon its completion and acceptance the city would pay him the contract price through the instrumentality of warrants to be drawn upon a fund which the city agreed to provide for the purpose of liquidating the same. Section 1 of article 6 of the charter authorizes and empowers the board of trustees "to lay out, establish, vacate, widen, extend and open streets or parts of streets, and alleys or parts of alleys, in said city, and appropriate private property for that purpose, and to establish or alter the grade of any street or part thereof, and to improve the sidewalks, pavements, streets and parts of streets, within the limits of the city, by making full or partial improvements thereof; and it has full power to determine and provide for everything necessary and convenient to the exercise of the authority herein granted."

Pursuant to this provision, an ordinance was passed authorizing the improvement covered by the respondent's contract, and other improvements in the same locality, and

providing for the assessment, levy and collection of a tax upon the property abutting the street to be improved. From this tax a fund was constituted, but this fund was exhausted by the payment of warrants anterior in date to the warrants now held by the respondent. Had the contract contained a stipulation that the respondent was to be paid out of a fund arising from the tax collected from the owners of the property abutting the street to be improved, he would have no right to look to any other fund for payment of his warrants. But such was not the case, and under the terms of the contract above set out, we think the city was and is primarily liable to pay the sum he claims.

There is another point in this case deserving of attention. By agreement, the case was tried by the court without the intervention of a jury, and there are no formal findings of fact. The code, section 216, provides that upon a trial of an issue of fact, the judge, in his decision, shall state the facts found. This rule must be followed in all cases where the judge is called upon to pass upon the facts. In this case he was not called upon to do so. All the facts were agreed to by counsel for the respective parties, and are set forth in the stipulation, signed by them, and these facts were so stated and agreed upon, so that he might "pass upon the law in the case."

It was not necessary that he should have formally found the facts. He could have found no others than those agreed on. They were already set forth in the stipulation. That paper was part of the record. Under such circumstances it would be unreasonably technical to hold that the court below erred in not mechanically transcribing what already sufficiently appeared in the record of the case.

From these views, it follows that the judgment of the court below must be affirmed.

Judgment affirmed.

SAMUEL A. HOWE, Appellant, v. T. H. TAYLOR et al., Respondents.

OFFICIAL UNDERTAKING—JURISDICTION OF A COURT OF EQUITY TO ENFORCE WHERE UNDERTAKING IS LOST.—The official undertaking of a county clerk was lost and the official copy destroyed, so that a certified copy thereof could not be obtained: *Held*, that a person damaged by the official delinquency of the officer, could maintain a suit in equity against the sureties in the understaking in order to establish the same and to obtain leave to sue upon it.

IDEM.—Courts of equity have jurisdiction to establish lost instruments of writing, and this jurisdiction is not taken away by the provisions of the statute allowing secondary evidence of their contents.

IDEM.—In such suit a court of equity having obtained jurisdiction for one purpose will retain it for all purposes necessary to complete relief, and will, should the undertaking be established, decree the payment by the sureties of such sum as they shall be found to have become liable to pay on account of the official delinquency of their principal.

APPEAL from Columbia County.

This is a suit in equity by the appellant against the respondent and others, who are the sureties upon the official undertaking of one C. H. Williams, late county clerk of Columbia county, for relief on account of the official delinquency of Williams as such clerk.

The appellant, on the fifth of April, 1872, loaned one Gillihan two thousand dollars, and took as security a mortgage upon certain real estate in Columbia county. The real estate was unincumbered and of sufficient value to make the security ample. The appellant, on the second of May, 1872, delivered the mortgage to Williams, then county clerk, for record in the record of mortgages, and paid him the fees for recording it. Williams recorded it in the book of deeds instead of that of mortgages, and in so recording it omitted what is alleged to be a material part of the certificate of acknowledgment, so that the mortgage, as thus recorded, does not appear to be a paper entitled to record.

The complaint alleges that on the twenty-third of August, 1872, Gillihan and wife, for a valuable consideration, conveyed the mortgaged premises by deed to one Semple, by whom they were, on the sixteenth of the following April,

for a full and valuable consideration conveyed to one Patterson. Both Semple and Patterson were purchasers in good faith, without notice of appellant's mortgage. Their deeds were duly recorded.

In February, 1873, Gillihan was adjudged a bankrupt, since which time he has been insolvent.

It is further alleged that on or about the first day of September, 1874, the county clerk's office of said county was fraudulently entered and the original undertaking stolen, and that the book of records containing the recorded copy of the undertaking was mutilated by removing said copy therefrom by some person unknown to the plaintiff; that neither the original undertaking nor any copy thereof remains in said office; that on account of the loss of the original undertaking, and the destruction of the record thereof, he is unable to procure a certified copy thereof, in order to apply to or obtain leave of the court to commence his action thereon, and that he is without remedy at law. The complaint concludes with a prayer that the court will decree that plaintiff have and recover against defendants a decree for the sum of two thousand nine hundred and ninety-two dollars in gold coin, together with his costs and disbursements, and for general relief.

To this complaint defendants demurred for the following reasons: 1. Because said complaint, as amended, does not state facts sufficient to constitute a cause of suit; 2. Because this suit was commenced within three years after the alleged cause of suit accrued, the time limited by the code for bringing suits of this nature; 3. The court has no jurisdiction of the persons of the defendants; 4. The court has no jurisdiction of the subject of the action. The court below sustained the demurrer and dismissed the complaint, and judgment was accordingly entered in favor of defendants for their costs and disbursements, whereupon plaintiff appealed.

William Strong, for appellant:

Our statutes (Civ. Code, sec. 376) provides "that the enforcement or protection of a private right, or the preven-

tion of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter." The case made by the complaint comes within both of the two classes provided for in the section quoted above. The facts here present a case where, owing to the loss of the undertaking — which occupies the place of and is subject to the same rule as a bond— there is not a plain, adequate and complete remedy at law, and it also presents a case where courts of equity have been used to exercise concurrent jurisdiction with courts of law. (Story Eq. Jur., secs. 29, 75 to 81; Smith's Man. of Eq., p. 6, sec. 2; 5 Cranch, 322.)

The code, section 378, provides "that a suit shall only be commenced within the time limited to commence an action." The statute, section 337 of the code, provides "that an official undertaking or other security of a county officer shall be security to all persons, severally, for the official delinquences against which it is intended to provide."

It is the undertaking signed by the surety that makes him liable to a party for damages caused by official delinquency; and it is an express liability and is subject to limitation only, by the provisions of subdiv. 1, of section 6, of the code. It is a liability created by the contract of the party. The statute provides the form in which the contract may be made, but, as the agreement of the party is required to give it force, it does not seem possible to consider it a liability created by statute. The statute does not make the liability; the act of the party alone does that. This undertaking takes the place of the old common-law official bond; and no one has ever pretended that the liability of the sureties upon such a bond was a liability created by statute. But if we concede that it is a liability created by a statute, it is not for a penalty or forfeiture.

The word penalty, in the statute, is not used to express the consequence of the failure to perform the condition of a civil contract for which damages up to a certain amount may be

awarded, but it is used, rather, in the sense of a punishment inflicted by law for its violation, and as synonymous with fine; a sum certain, which is imposed upon a party for doing something which the law forbids, for failing to do something which the law enjoins, and which usually goes to the state, but may sometimes be given to the informer, in whole or in part, not because he has suffered by the wrong act, but as a reward for his aid in the punishment of the offender. That which is recovered in an action upon an undertaking of this character is for the benefit of the plaintiff and is determined by the amount of damage he has sustained through the delinquency of the officer. This undertaking, in this respect, does not differ from any other civil contract where the performance of an agreement is secured by a greater nominal penalty, and where whatever is recovered goes to the party injured as compensation for damages actually sustained, and is never taken from the party as a punishment.

The word "forfeiture" is evidently used also in a restricted sense, as a punishment for some illegal act. An unlawful distiller forfeits his implements and the spirits he has manufactured. The smuggler forfeits his goods and ships. The man who wrongfully exercises a public function, may incur a penalty for each wrongful act. The ferryman, who carries on business without a license or charges unlawful fees if licensed, may be fined or compelled to pay penalties; but these fines or penalties are a punishment for violated laws, and not compensation to the party injured, and are not at all analogous to the case now on trial. (Bouvier's Dic. cites "Penalty," "Forfeiture." Civil Code, sec. 342; Crim. Code, Stat. 384, sec. 333.)

All through our statutes, wherever "fines or forfeitures," or "penalties and forfeitures," are spoken of, it is in reference to criminal matters. It seems to me, therefore, that this case comes under the provisions of section 6, subdivision 1, and that it cannot, by anything but a very strained construction, be considered as embraced in the provisions of subdivision 2, of section 7, and that the limitation is six years. Such is the holding in the state of New York, from which this statute came. (1 Comst. 47; 35 N. Y. 112.)

If there were any doubt as to the proper construction, courts, in a case of this kind, should incline to the longest period. At common law there was no limitation to an action upon a contract. (Ang. on Lim., sec. 6.) Where a statute contravenes the common law, or is a departure from it, and is of doubtful construction, courts should incline to that which adheres most nearly to the common-law principle. (10 John. 579.) The "statute of limitations being in restraint of right, should be construed strictly;" *i. e.* so as to continue and preserve the right, rather than abridge or destroy it. (14 Johns. 480.)

Catlin & Killen, and T. A. McBride, for respondents:

There is no privity between the plaintiff and the defendants. (Code, 692, secs. 12, 13.) And the plaintiff has no rights, and can have no remedy against the defendants, except such as are given to him by sections 338, 339 of the civil code. The rights and remedy given by these sections are to maintain an action, not a suit, against the officer and his sureties, after first obtaining leave of the judge or court. The plaintiff wholly disregards and fails to pursue the remedy given by said sections, in the following respects: 1. In not making the principal in the undertaking, the county clerk, a party defendant in this litigation; 2. In not obtaining leave of the court or judge to bring an action; 3. In not bringing an action instead of a suit in equity.

The plaintiff has no remedy at common law; his only remedy is under the same statute which creates and gives him the right of action, and it is a rule of law that the same statute which gives or creates the right or power, gives the remedy, and provides the manner and means of enforcing it. It can be enforced in no other way. (*Reed v. Omnibus R. R. Co.,* 33 Cal. 212; *A. & W. T. Corp. v. Gould,* 6 Mass. 44; 3 Comstock, 9.)

If the plaintiff had a common-law right of action against defendants, then the facts alleged are not sufficient to give a court of equity jurisdiction. The only ground alleged is be-

cause the instrument is lost, but the instrument upon which suit is brought is neither negotiable nor under seal; nor is profert thereof necessary. The remedy sought is not peculiar to a court of equity—the decree prayed for is money only.

Two things must concur to give the court of equity jurisdiction: 1. When a court of law cannot grant the relief prayed for; 2. When the party has a conscientious title for relief; and if both grounds do not concur, the court of equity is bound to dismiss the case. (Story's Eq. Jur., sec. 79; Adams Eq. 166.)

The bill or complaint must lay some ground other than mere loss of paper. (1 Story's Eq. Jur., sec. 84; 3 Edwards' Ch. 618.)

The suit is for a forfeiture or penalty, and a court of equity does not assist the recovery of a forfeiture or penalty, or anything in the nature of one. (4 John. Chan. 433.) It is "an action or suit upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state." (Stat. 107, sec. 7; *Merchants' Bank of N. H. v. Bliss*, 13 Abb. Pr. 226; 21 How. Pr. 365; 35 N. Y. 412.)

By the Court, WATSON, J.:

We will consider the first and fourth causes of demurrer together, because no other reason is presented by counsel for the respondents, to sustain the objection to the complaint that the court has no jurisdiction of the subject of the suit, than those relied upon to show that the complaint does not state facts sufficient to constitute a cause of suit. It was not claimed in the argument that if the complaint states sufficient grounds to entitle the appellant to equitable relief, the circuit court did not have the jurisdiction to grant it. Being a court of general jurisdiction, and being invested by section 9 of article 7 of the constitution with all jurisdiction vested by law in some other court, in the absence of any contrary showing, its jurisdiction will be presumed.

Do the facts alleged in the complaint constitute a ground

for equitable relief? Counsel for appellant claim that they do, because the right of the appellant to have the official undertaking of the county clerk of Columbia county, C. H. Williams, stand for a security to him for his loss, caused by the official delinquency of that office, a right which was perfect before the loss of the undertaking and the abstraction of the recorded copy thereof from the records of Columbia county, has been rendered nugatory by the wrongful acts of others and without his fault.

On the other side, counsel for respondents contend that the right to maintain an action on the official undertaking of an officer is purely statutory. That the statute which gives the right gives the only remedy. That the fact of the loss of the undertaking, while it renders it impossible for plaintiff to obtain leave of the court to bring his action at law, does not give him the right to proceed in any other manner than that prescribed by the statute. Upon this theory they claim that the appellant is in the position of a person having a legal right which he can enforce neither at law nor in equity. If this view of the law were correct, the case is a hard one. If the facts alleged in the complaint are true, plaintiff, acting with ordinary prudence, relying upon the presumption that the clerk would or had correctly performed his official duty, has, through the delinquency of that officer, lost a large amount of money, and when he seeks redress upon the undertaking which the law required the officer to give as a security against such delinquencies, finds that while he has the right to the benefit of that security, he cannot enforce that right because some one has stolen the undertaking and destroyed the official copy.

It is necessary for us first to ascertain whether the appellant has any plain, speedy or adequate remedy at law. If he has any such remedy at law, the demurrer was properly sustained. No equitable interposition was necessary.

Section 339 of the civil code provides that: "Before an action can be commenced by a plaintiff other than the state or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall

be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some one on his behalf, showing the delinquency."

It may well be doubted whether any other evidence could be admitted to supply the place of the "certified copy of the undertaking" required by the section just quoted. The proceeding to obtain leave is *ex parte*, and the statute expressly states upon what evidence the court shall act.

But while we do not now express an unqualified opinion upon the question whether or not the court to which an application is made for leave to commence an action upon an official undertaking may, in case of the loss of the undertaking, receive secondary evidence of its contents, we think the right sufficiently doubtful that it cannot well be said that it furnishes a plain, speedy or adequate relief within the meaning of section 376 of the civil code. Lost instruments under seal furnished a common ground for interposition of equity at the time when it was held at common law that there could be no remedy at common law upon a lost bond, because there could be no profert of the instruments, without which the declaration would be fatally defective. (1 Story's Eq. Jur. 81.)

We think that the case at bar, in which no action can be commenced, because a certified copy of the undertaking cannot be had, presents a case for equitable interposition differing but little from the case where an action at law could not be maintained upon a bond, because the courts held that it was essential that the complaint should make profert, and the bond being lost profert could not be made. Yet that was an ancient ground of equitable relief, which having once conferred jurisdiction, the courts of equity still retain it.

In the case of *Cornell v. Keiser*, tried by this court at the December term, 1873, and not reported, this court sustained jurisdiction of a court of equity to establish a lost deed, although it was conceded that under our statute upon proof of its loss secondary evidence might be received of its contents. The decision was placed upon the ground that courts of

equity having once acquired jurisdiction to establish lost instruments, were presumed still to retain it, although the rules of common law had been so modified as to give courts of law concurrent jurisdiction, and that the rule allowing secondary evidence of the contents to be received at law might not furnish a plain, speedy and adequate remedy.

We are unable to see any reason why the jurisdiction of courts of equity to establish lost instruments, should not in a proper case extend to a lost official undertaking. It is not sought to reform the undertaking, nor in any way to supply any defects in its execution, but taking it just as the parties made it, we are called upon to relieve plaintiff from the consequences of its loss, by as far as possible establishing it just as it was made, as evidence of the contract and obligations of the parties to it. Some objection is made to the prayer for relief in the complaint. Perhaps it would have been better to pray in the first instance that the decree of the court should establish the lost undertaking, in order that it might be used for the purpose of obtaining leave of the court to sue upon it, and should enforce the undertaking as established.

The prayer of the complaint is only that plaintiff may have a decree against the defendants for the payment of the money which the complaint shows they are liable to pay to him on their undertaking and for general relief. We think that under the familiar principles of equity jurisprudence, that a court of equity which once acquires jurisdiction for one purpose will retain it for all purposes necessary to afford complete relief, the court could in the first instance decree the establishment of the official undertaking alleged in the complaint to be lost, in order that leave could be obtained to sue on it, and that having acquired jurisdiction for that purpose it could proceed to enforce the instrument so established, by decreeing that defendants should pay to plaintiff such sum as it should be found that they were liable to pay upon it. It is true that the complaint merely prays for this final relief, but it seems to us that under such a prayer it is competent for the

court to grant any relief necessary to be decreed before decreeing the final relief prayed for.

The third ground of demurrer is that the court had no jurisdiction of the persons of defendants. We can see no reason whatever for this objection. The defendants appeared in the suit by their attorneys. That was all that was necessary to give the court jurisdiction of their persons. We consider the second ground of demurrer last. It is that the suit was not commenced within three years after the cause of suit occurred. In support of this objection to the complaint it is claimed by counsel for respondents that this suit is governed by the limitation prescribed in subdivision 2 of section 7 of the civil code, which provides that "an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, except where the statute imposing it prescribes a different limitation," shall be commenced within three years.

If an action upon the undertaking would be barred by this provision, then this suit is barred, because section 378 of the code provides that "a suit shall only be commenced within the time limited to commence an action, as provided in title 2 of chapter 1 of this code." If this then is a suit to recover a penalty or forfeiture, it is barred by the statute of limitation, and the demurrer was properly sustained.

We do not think it is such a suit. Section 337 of the code provides that "the official undertaking or other security of a public officer to the state or to any county, city, town or other municipal or public corporation of like character therein shall be deemed a security to the state or to such county, city, town or other municipal or public corporation, as the case may be, and also to all persons severally for the official delinquencies against which it is intended to provide." Section 338 provides "that when a public officer by official misconduct or neglect of duty shall forfeit his official undertaking or other security, or render his securities therein liable upon such undertaking or other security, any person injured by such misconduct or neglect, who is by law entitled to the benefit of the security, may maintain an action at law there-

on in his own name, against the officer and his sureties to recover the amount to which he may by reason thereof be entitled."

It is under these sections that the rights of plaintiff to the benefit of the official undertaking described in the complaint is derived. It is deemed a security to him against the official delinquencies of the officer; that officer by his neglect of duty has rendered his securities liable to plaintiff. He or they have forfeited nothing. No forfeiture is given to plaintiff. He can recover what he has lost; no more. This suit is very different from the actions provided for by sections 342, 343 and 344 of the code, and which we take to be the actions limited by subdivision 2 of section 7 of the code, and by section 10 of the code.

The only distinction between the actions of the same general class made by subdivision 2 of section 7, and by section 10, is that when the action is given to the party aggrieved to recover a forfeiture under a statute or to the state, with such party three years is the limitation, and when it is given generally to an informer, one year is the limitation. All these actions for forfeitures are in the nature of *qui tam* actions at law, and are quite distinct from that class of actions in which the person injured by the official delinquency of an officer is allowed to resort to the official undertaking of that officer as a security for his loss.

It cannot be questioned that plaintiff could have brought his action against C. H. Williams, the county clerk, for the damage he has suffered by his negligence, without resorting to the official undertaking. In such action the measure of such damages would be just the same as if the action had been brought on the undertaking; and yet in that case it certainly will not be claimed that the action would be to recover a penalty or forfeiture, or that the limitation prescribed for such action would apply. Yet the only difference between such action against the officer personally and that upon his official undertaking, is that in the latter action plaintiff seeks to avail himself of the benefit of his official undertaking as a security for such damages as he may recover.

We are of the opinion that this suit is governed by the limitation prescribed by subdivision 2 of section 6 of the code, it being an action upon a liability created by statute, other than a penalty or forfeiture, and that six and not three years is the limitation. It follows that in sustaining the demurrer to the complaint the court below erred, and this cause must be reversed, and remanded to the court below for further proceedings.

JAMES TERWILLIGER, Respondent, v. MULTNOMAH COUNTY, Appellant.

ERROR NOT AFFECTING SUBSTANTIAL RIGHTS.—A judgment should not be reversed on account of erroneous instructions to the jury, when it appears from the verdict that no substantial right of the appellant was injured thereby.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

Raleigh Stott, Prosecuting Attorney, for appellant.

Hill, Durham & Thompson, for respondent.

By the Court, PRIM, C. J.:

The respondent appealed from an order of the county court of Multnomah county, the effect of which order was to establish and direct the opening of a road across certain lands owned by the respondent, and denying to the respondent any damage for injury to his land, or any compensation for the land appropriated for the purpose of establishing the road. The cause having been tried by the circuit court, the jury found a verdict for respondent for five hundred dollars damages, and four hundred and fifty dollars for the value of the land taken, upon which the court rendered judgment. From this judgment appellant has appealed to this court. The only error assigned in this case is that the court erred in its instructions to the jury. The court instructed the jury as follows:

1. That the jury must find a verdict for the appellant for

the amount of the value of the land taken by the proposed road, without reference as to whether the said road would be a benefit or damage to the said appellant.

2. That the jury, in estimating damages and benefits to the appellant resulting from the opening of the proposed road, should not alone take into consideration the question as to whether the land of appellant would sell for more or less than it would in small parcels or otherwise without the road. They were not to presume without proof that the appellant wanted to sell his land, or was obliged to sell his land; they should rather presume that he held it for his own use, and would appropriate it to such uses as it was suitable for, and the chief consideration for the jury is what benefits or injuries would result from the said road in respect to these uses by the appellant; as, for example, whether the said road would render his land more or less convenient to his uses; whether the road occasioned more or less fencing, would interfere with water, courses or springs, or otherwise interfere with or facilitate the enjoyment by appellant of his estate. A supposed or actual enhancement of market price of the land was not a criterion of benefits unless the owner desired to sell.

These instructions, we think, were erroneous, for the reason that the jury were required to find a verdict for respondent for the value of the land taken for the proposed road, without taking into consideration any benefits that might arise out of the opening of said road to respondent. The rule adopted by the statute is that the jury "shall assess and determine how much less valuable the premises of the claimant will be rendered by the opening of the proposed road." And in order to determine that fact, it was necessary to ascertain the value of the land before the road was opened and its value after it was finished and ready for the use of the public.

But we deem it unnecessary to further notice this point as this question has been fully settled in the case of *Putnam v. Douglas County*, decided at this term.

We are of the opinion, however, that the judgment in this case should be affirmed, notwithstanding the erroneous in-

structions of the court for the reason that it appears from the verdict found by the jury, that no substantial right of appellant was injured thereby.

The jury found that the land taken for the proposed road was of the value of four hundred and fifty dollars, and in addition thereto that the adjoining land of respondent was damaged five hundred dollars, consequently there were no benefits which could have been deducted from the value of the land, if the jury had been so instructed. No error having been committed in this case affecting a substantial right of appellant, the judgment of the court below is affirmed.

Judgment affirmed.

NORTHUP & THOMPSON, Respondents, v. THE PILOT, Appellant.

LIEN OF MATERIAL-MEN.—When one contracts to build the hull of a boat, and contracts with material-men for material to be used in constructing said hull, such material-men have no lien on the boat when finished.

BOAT—WHAT CONSTITUTES UNDER LIEN LAW.—A boat or vessel, named in section 17, chap. 13, Mis. Laws, is one that is complete and capable of being used to carry freight or passengers. The hull of a boat without the other parts necessary to its use, is not a boat within the meaning of the statute, to which a lien could attach.

APPEAL from Multnomah County.

This action was to recover for certain materials furnished by respondents to one Steffen for the construction of the hull of the The Pilot, a steam-tug. The complaint alleges that Steffen was the owner at the time the materials were furnished. The materials were furnished between May 8 and November 10, 1876.

Charles Holman, J. M. Gilman and A. B. Nutting intervened and filed an answer to the complaint in which they denied that Steffen was at any time the owner of the boat.

The material facts relating to the question of ownership, are as follows: In February, 1876, Holman and Gilman upon the one side, and Nutting upon the other, entered into an agreement, by which the former sold to the latter one third of certain material and machinery for a tug-boat,

and by which the parties agreed to complete a certain tug-boat already begun. On the same day they contracted with Steffen for the building of the hull for such boat, for six thousand dollars, to be completed July 1, 1876. About the same time they contracted with the Willamette Iron Works to build and furnish the machinery for the boat. In May, 1876, the frame-work having been put up they began preparing the hull for the machinery. The boat was launched on the sixteenth of August, and on the following day Holman, Gilman and Nutting removed it to the iron-works on the opposite side of the river, had the machinery put in, and having returned it, Steffen compelled the hull. Up to the time it was launched the boat was in Steffen's yard. During the same time Holman, Gilman and Nutting employed a night watchman to take care of it. They paid Steffen in full. The total cost of the boat was twenty-three thousand dollars.

The court below decided that Steffen was the owner of the hull during the entire period when the materials were furnished, and that the respondents had a lien upon the boat for the materials furnished amounting to two hundred and seventy-two dollars.

From this conclusion the appeal is taken.

W. W. Thayer, for appellant.

Addison C. Gibbs and Loyal B. Sternes, for respondent.

By the Court, BOISE, J.:

It is claimed that the circuit court was not warranted from the facts found in finding as a conclusion of law that John Steffen was the owner of the hull of the said tug-boat Pilot, until its completion under said contract to construct the hull of said boat. While said hull remained on the premises of said John Steffen and was entirely under his control, it was his property. But after it was launched and taken possession of (in part at least) by Holman, Gilman and Nutting, and the machinery put into it and other parts besides the hull added, which were as much a part of the boat as the hull itself, it may well be questioned whether Steffen

remained the owner of the uncompleted hull, which was in part paid for, and under the control of the parties for whom it was being constructed. When the hull became united with other parts of the boat, it was no more in the possession and ownership of the contractor to build it, than the unfinished machinery was in the possession and ownership of the iron-works, and when the different parts of a boat are brought together and fitted to each other under the direction of the parties for whom the work is being done, such parties are the owners, else they would be different owners to the various parts of the boat; that is to say, one person might be the owner of the hull, another of the propeller and another of the engine, but neither could be the owner of the boat, for it takes all the parts to make a boat or vessel, such as is mentioned in section 17, page 656 of the statute. For to come within this statute, it must be a boat or vessel used in navigating the waters of the state, and evidently must be such a boat as is complete and capable of being used in the business of carrying freight or passengers, and one which would be subject to commercial regulations.

The hull of a boat without the other parts necessary to its use is not a boat within the meaning of the statute, to which the lien created by the statute could attach. The builder of the hull was a contractor and assisted in building the boat, and would have a lien if not paid for his material and work. We think, therefore, that the court erred in finding that the plaintiffs had a lien on this boat. The judgment of the court below will be reversed and the court below directed to dismiss the plaintiff's complaint.

DOUGLAS COUNTY ROAD CO., Respondent, v. COUNTY OF DOUGLAS, Appellant.

WRIT OF REVIEW—FACTS NOT TRIED UNDER.—The superior court, on proceedings for review, has nothing to do with the evidence upon which the court below acted in its finding of facts. It will not examine such evidence, nor try anew the questions of fact; but will review the decision of the court below upon the ultimate facts appearing in the record.

EVIDENCE—CONTRACT BY COUNTY.—The question being as to whether the county court of Douglas county executed a certain contract

which the petitioners sought to have entered upon the records of the county court and enforce as a contract of the county; to prove such alleged contract, the petitioners relied upon a writing, which was made a part of the record of the proceeding, signed by the county judge and one commissioner, and attested by the county clerk in his official capacity, which paper purported to be a contract, as claimed: *Held*, that this paper could only be impeached by evidence tending to prove that it was not genuine, and that the recitals contained in it were not true.

APPEAL from Douglas County.

The facts are stated in the opinion of the court.

W. R. Willis and S. H. Hazard, Prosecuting Attorney, for appellant.

J. F. Gasley and W. W. Thayer, for respondent.

By the Court, SHATTUCK, J.:

This cause comes into this court upon appeal from the circuit court for Douglas county, and was brought into the circuit court by writ of review from the county court of that county. As the matter has been before this court at previous terms, the present aspect of the case may be more clearly presented by referring to the history of the case.

The matter involved herein first came before this court in the suit of *The Douglas County Road Co. v. Abraham et al.*, decided at the December term, 1874, and reported in 5 Or. 322. In that case an attempt was made by the plaintiff (the respondent in this appeal) to introduce in evidence the alleged contract or agreement between the plaintiff and the county court of Douglas county, which is described in this writ of review, and is the chief matter in controversy in this proceeding. The court sustained the objections of the defendants in that case to the introduction of the instrument in evidence, on the ground that it had not been entered in the journals of the county court, so as to make it available as evidence, and the plaintiff failed in the suit.

Thereupon said plaintiff (this respondent) commenced another suit in equity in the circuit court of Douglas county against the county court, the county itself and other parties, seeking, among other things by way of relief, an injunc-

tion restraining the county authorities from granting to another private corporation the privilege and right in and over the Canyon Road in said county, which it was claimed had been already granted to plaintiff in and by the contract or agreement before mentioned, and praying the circuit court to enter up in its journal, and so render it available as evidence, the contract in question.

The relief prayed for in that suit was denied by the circuit court, and this court, on appeal at the July term, 1875, affirmed the decision of the circuit court, holding that the plaintiff had no remedy in equity to have the record of the county court completed, but that the proceeding should be by mandamus, or by the writ of review. (5 Or. 374.)

The plaintiff also, on the eighth day of April, 1875, made an application in form of a motion to the county court of Douglas county, sitting to do county business, based upon a copy of the alleged contract or agreement, and the affidavits of two members of the court at the time the contract bore date but not then in office, to have said contract or agreement entered on the journal of the county court *nunc pro tunc*. The county court so sitting to do county business, being composed of different persons from those whose signatures were appended to the instrument, "after considering the same, refused to entertain the motion." This was held to be in effect a denial of the motion and a final order thereon, and the cause was removed to the circuit court by a writ of review. The circuit court dismissed the writ, thus affirming the action and order of the county court. From that judgment of the circuit court, the plaintiff appealed to this court, and brought in the appeal for hearing at the December term, 1875. This court reversed that judgment of the circuit court, and held that the plaintiff was entitled to have an entry of this contract or agreement in the journal of the county court as of the day of its date, and that the county and circuit courts erred in denying plaintiff's application (5 Or. 406.) This court ordered the cause to be remanded to the county court, with instructions to enter up in its journal the contract in question in conformity with the opinion of this court. But before the

mandate of this court had been issued, application was made by the counsel for the county for a special mandate, directing the county court to hear the matter anew, and to take the evidence of both parties for and against the motion originally made, as aforesaid, in the county court, and to proceed according to the facts found from said evidence, on the ground as it was alleged, that the recitals of the contract were untrue, and that there was a good defense to the motion.

This court accordingly made its order in the case that the circuit court of Douglas county should remand the cause to said county court to take the evidence of both parties, for and against the motion, as to the making of said agreement, and to reduce the evidence to writing and the whole of it, and the same to preserve as a part of the records of this cause, and to proceed according to the facts found from said evidence and by law provided.

Under this mandate the cause went back to the county court of Douglas county, and a large amount of testimony was taken and reduced to writing, and the motion again submitted upon the original papers and evidence so taken to that court, which, at the January term, 1877, passed upon the motion, making four findings, three of which it called findings of fact and one of law (to be more particularly noticed hereafter), and upon such findings again denied the motion, and refused to enter the agreement in its journal *nunc pro tunc*, or at all. Another writ of review was sued out, and this decision of the county court was taken to the circuit court for Douglas county, which, at the May term, 1877, reversed the decision of the county court, and ordered that court to cause to be entered upon its records, *nunc pro tunc*, said contract. From this judgment and order of the circuit court this appeal is taken, and the cause and record, thus made in the circuit and county courts, is now here for our examination and decision.

It will be observed that the motion now to be passed upon is the same motion that was made in the county court on the eighth day of April, 1875, and it is the same subject upon which this court rendered decision and recorded its

opinion at the December term, 1875. It was not, however, presented to us in 1875 in precisely the same manner as it now is. Then it came up here on the transcript of the mover's papers alone. The motion and contract along with the affidavits of Fitzhugh, former county judge, and Jackson, former commissioner, and the orders of the county and circuit court thereon. At this time it is here again upon the same papers as then: and, in addition, a large amount of testimony taken under the special mandate before mentioned, along with the findings of the county court. If these additional papers now in the record make a case substantially different from the case when it was before this court in 1875, the decisions adopted in that trial ought to be modified or changed accordingly. But if the record which this court shall consider discloses substantially the same facts as on the former occasion, then the decision ought to be the same.

Before examining the record, however, it is necessary to dispose of the question argued at length by counsel; that is, whether or not upon this proceeding the court of review will examine the evidence, and try mere questions of fact. We held, when this case was before the court on a previous occasion (5 Or. 407), that the court of review have nothing to do with the evidence upon which the court below found the facts, but must have and would act upon the ultimate facts as found or appearing in the return to the writ. We adhere to that ruling, and repeat the decision that upon a writ of review under our statute, the superior court will not examine the evidence which was before the inferior court, nor try a new or mere question of fact, but will review the decision of the court below only upon the ultimate facts appearing in the record. It follows, then, that this court will not now re-examine or consider the mass of testimony which has been sent up and was read as a part of the record of this case, although the same was taken in writing, and preserved in the record by the special mandate of this court. As before stated, that mandate was made on the special motion of the counsel representing the county, and the order to preserve the testimony was made,

not with the intent to commit the court to a mode of proceeding, but to the end that the subject might remain open for further discussion, and that the parties on both sides might avail themselves of the evidence, if the court should modify its decision, and conclude to go back of the ultimate facts in cases of review.

Now, laying aside the evidence taken in the county court, the ultimate facts laid before the court of review are these: First, the contract or agreement itself set out in full with its recitals and signatures. This paper, among other things, recites that "this agreement is made and concluded the tenth day of April, in the year of our Lord, 1874, between the county court of Douglas county, and sitting as a board for the transaction of county business, and composed of Hon. Joseph S. Fitzhugh, county judge, and John Jackson and Levi Kent, commissioners, the party of the first part, and the Douglas County Road Company * * the party of the second part." The instrument then sets forth the obligations and stipulations of the respective parties at length and in detail. It is signed at the foot with the names of J. S. Fitzhugh and John Jackson, commissioners of Douglas county, and by A. A. Fink, president, and J. F. Gazley, secretary of the Douglas County Road Company. It is also attested by L. L. Williams, county clerk, and marked filed April 10, 1874. It is admitted that a paper of this description was, on said tenth day of April, 1874, filed with the papers and records of the county court and has remained there ever since, concerning this agreement, its signatures, its recitals and its being in the files of the court. The only facts found by the county court were these. 1. "That no order was ever made by said county court of Douglas county, that said alleged agreement should be entered in the journal of records of the court; 2. That the clerk of said court was never ordered, directed or requested by said court, or any of its members, to enter said alleged agreement in the journal or any of the records of the said court; 3. That there never was a contract or agreement made by the said county court of Douglas county with the Douglas County Road Company, nor an order of any kind

respecting the same or in relation thereto." And as conclusions of law from said facts, "That said alleged contract or agreement should not be entered in its journal or other records *nunc pro tunc*, and that said motion to enter the same should be denied and dismissed."

When the matter was taken by writ of review to the circuit court the evidence was before the court, and whether examined or not by that court, the findings upon the review were: That the agreement set out in the petition was duly entered into by the county court of Douglas county with the said Douglas County Road Company, on the tenth day of April, 1874, and that said agreement should have been entered on the records of said county court at that date, and thereupon the circuit court reversed the decision of the county court, and ordered the county court to enter up the agreement *nunc pro tunc*. This judgment and order of the circuit court is what is now appealed from, and the appellants assign against seven allegations of error. All the assignments of error, however, may be reduced to these: That the circuit court erred in finding contrary to the decision of the county court; it had no jurisdiction to reverse the findings and judgment of the county court, or to order the county court in the peculiar circumstances of this case to enter in its records the agreement *nunc pro tunc*.

The appellants, in making these assignments of error, assume for the decisions of the county court, in county business, the high attribute of finality maintained by but few courts in the land, and an exemption from the supervisory control of the circuit court, which is clearly given both by the constitution and by the statute. But, as before intimated, the decision of the circuit court, in order to be maintained, must be warranted by the ultimate facts as they are presented by this record after eliminating from it what is mere evidence.

When our decision in this case was announced in 1875, we were of the opinion that the contract or agreement itself, if genuine, contained enough to show that it was an act of the court in term time, and was such a proceeding as was entitled to entry in the journal of the court. (5 Or. 406.)

We now, as then, have the agreement before us, and, in addition thereto, these negative findings of the county court. The point is, whether these findings rebut the presumption arising from the face of the contract itself, taken in connection with the fact of its being and remaining among the authenticated files of the county court. Let us now inquire what is affirmed, presumptively, by the contract, and what is negatived by these findings. The recital of the contract is that it was made and concluded by the county court—composed of a county judge and two county commissioners, whose names are given, sitting as a board to do county business. Then there are the signatures of two of the persons named, as members of the court, and an attestation by the name and official title of the county clerk. Now, if these signatures are genuine, and this recital is true, they furnish conclusive evidence of facts—they indeed constitute in themselves facts from which it must be held that there were at the time these things purport to have transpired, solemn proceedings of the court; and that the court, not members of it in their private capacity, was then and there engaged in the transaction of county business, and did then and there make and conclude a proceeding pertaining to such business which section 876 of the code provides should have been entered in the books of that court. Now, these findings of the county court do not refer to these specific facts declared by the very face of the contract, at all. They do not impeach the genuineness of the signatures. They do not negative the averment that the court was sitting in the transaction of county business at the time. They do not deny or explain the circumstances of instruments being filed and remaining among the official papers of the court.

The finding necessary to impeach this contract as the act of the county court, must be one showing that the county judge and commissioner and county clerk did not sign it; that the paper is not genuine, or that those officers signed it out of court, and when acting as private persons, or that there was some mistake of fact connected with it. If the signatures are genuine and the recitals true, the instrument is what the plaintiff claims it to be, an act or agreement of

the county court. The general negative averments that there was no order made to enter it in the journal, that there never was any contract made by the county court, are not a specific response to the presumptions raised by the agreement or instrument itself, and it must be deemed a contract, an act of the court, notwithstanding these findings of the county court.

These findings of the county court seem to result from the theory of the counsel for the respondent, that a specific order of the court to enter this contract in the journal, or a specific order by the court to the court to make it, is necessary in order to give it any validity. The argument of counsel has been very nearly this: This instrument is not a contract of the county court, because it was not entered in the journal; it must not be entered in the journal, because it is not a contract. This reasoning in a circle may be excused in an interested counsel, but it cannot enlarge one's ideas of the candor of a court.

So far as any specific order concerning the instrument or the subject-matter of it being necessary in order to entitle it to entry, we think it was not necessary other than appears on the face of the instrument itself, as already explained. It is true that the contract is not in form an order or judgment, but it shows that the court acted—did something, concluded some matter to the advantage or injury of somebody. Such being its substance and effect, it must be deemed a proceeding sufficient to entitle it to entry in the books and journals of the court. (Freem. on Judg., sec. 51; Code, sec. 876.) We are of the opinion, therefore, that the decision and judgment of the circuit court was warranted by the presumptions arising from the face of the paper in question, and that the county court, in refusing to enter it in its journal, committed error and omitted a plain duty.

The judgment of the circuit court must be affirmed, and its mandate to the county court must be carried into effect.

Note—Mr. Chief Justice Prim having tried the cause at circuit, and Mr. Justice Watson having, while at the bar, been counsel therein, took no part in the hearing or decision.

D. P. THOMPSON, Respondent, v. A. WOLF, Appellant.

PLEADINGS—COMPLAINT IN EJECTMENT.—In an action of ejectment the plaintiff must set forth the nature of the estate which he has and the premises claimed, and when he omits to do so his action will be regarded as one brought under the forcible entry and detainer act.

JURISDICTION—CIRCUIT COURT—ACTIONS OF FORCIBLE ENTRY AND DETAINER.—In actions of forcible entry and detainer the justices' courts have jurisdiction to the exclusion of the circuit courts.

APPEAL from Washington County.

The facts are stated in the opinion of the court.

W. W. Page, Geo. W. Yocum and T. B. Handley, for appellant:

At common law there was no remedy given for the forcible entry upon, or unlawful detention of real property; such remedy is purely the creature of statute, and in derogation of the common law; and no principle is better settled, or more wholesome, than that where extraordinary powers are conferred, or summary proceedings are authorized, all the steps and proceedings required must be strictly pursued to give jurisdiction, or the whole proceedings will be void. (Sedg. on Stats. and Const. Law, 347; 12 Cal. 500; *Moore v. Goslin,* 5 Cal. 266; 8 Cal. 499; 9 Id. 572.) The circuit court is invested with judicial powers which must "be defined, limited and regulated by law." (Const. art. 7, sec. 1.)

And when judicial power is not given exclusively to some other court by law consistent with the constitution, then it belongs to the circuit court, and it shall have appellate jurisdiction, and supervisory control over county courts, and all other inferior courts. (Const. art. 7, sec. 9.) By the provision of section 2, chapter 23, general laws, justices of the peace are invested with jurisdiction in actions for a forcible entry upon, or an unlawful detainer of real property, and by the numerous provisions of the statute the mode and manner of the exercise of such power, summary in its nature and complete of itself, is pointed out, and the

right of appeal is given to circuit courts, which "defines, limits and regulates" the power of the circuit courts in such class of cases. *"Expressio unius est exclusio alterius."*

The constitution of Iowa is similar to our own, concerning the organization of courts, and its laws concerning actions of this nature are so likewise. (Const. Iowa, art. 5, secs. 1, 6; *Dick v. Hatch*, 10 Iowa, 380; 1 Id. 492.)

Catlin & Killen, for respondent:

Section 9, article 7, of the constitution, provides that "all judicial power, authority and jurisdiction not vested by this constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts." It is claimed that these actions are withdrawn from the jurisdiction of the circuit court by section 468 of the civil code, which is as follows: "The county court has jurisdiction, but not exclusive, of actions at law, * * * where the claim or subject of the controversy does not exceed the value of five hundred dollars, and exclusive jurisdiction of actions for forcible entry and detainer, without reference to the value of the property."

From the reading of this section it is evident that the civil action for forcible entry and detainer could not have been intended by the legislature, as the words of the first part of it are careful not to confer exclusive jurisdiction in civil matters, even when the amount or value should be less than five hundred dollars. It cannot be claimed that by actions at law, is meant merely actions for the recovery of money, as the words, "where the claim or subject of the controversy does not exceed the value of five hundred dollars," clearly cover all actions at law. If the latter clause was intended to include civil actions for forcible entry and detainer, the prior portion of the section is rendered utterly meaningless, and the clauses are repugnant, and cannot both stand; but by construing the latter clause to refer to the common law criminal action, the section is rendered harmonious and intelligible, and it is correct, in construing statutes, to give the words the force and effect they had at common law. (1 Russ. on Crimes, 310; 1 Black. 358.)

But, if by the latter clause, our civil action for forcible entry and detainer (which was given in 1866, four years after the enactment of section 468), was intended the jurisdiction could not be exclusive, or conferred upon the county court, when the subject-matter is of greater value than five hundred dollars. The only jurisdiction which the county court has in civil matters is conferred by section 12, art. 7, of the constitution, which is as follows: "The county court shall have * * * such civil jurisdiction not exceeding the amount of value of five hundred dollars, * * * as may be prescribed by law.

All jurisdiction is presumed to be in the circuit court. It does not appear by this transcript that the value of this farm, or even the possession of it for one year, is less than five hundred dollars, or out of the jurisdiction of the circuit court, even if the county court has exclusive jurisdiction where the value is less than five hundred dollars.

There was ejectment against the tenant before the forcible entry and detainer act. (Civ. Code, secs. 313, 325.)

Tenants at will are not entitled to notice to quit. (2 Caine's cases, 314.) The action against the tenant is not prejudiced by the forcible entry and detainer act of 1866. (Mis. Laws, chap. 23.)

By the Court, McARTHUR, J.:

This action was begun in the circuit court for Washington county. From the complaint it appears that the respondent's grantor on May 20, 1874, "Leased and let" to the appellant "as tenant at will or by sufferance" a certain parcel of land in Washington county. Thereafter the land was conveyed to respondent, and on February 16, 1877, he served appellant with notice to quit. The prayer is for judgment against appellant "for possession and restitution of the possession" of the premises. It is unnecessary to allude to the pleadings subsequent to the complaint, or to any other paper filed in the cause except the motion of appellant to dismiss for want of jurisdiction, which was argued, submitted and denied before the trial.

Two questions arise upon this record. The first is, what

is the character of the action? It cannot be regarded as an action of ejectment. In that action it is necessary that the plaintiff set forth the nature of his estate in the propery, whether it be in fee, for life or for a term of years (Civil Code, sec. 315), thereby enabling the courts to settle the question of title which is the great end of the action of ejectment with us. The complaint herein is entirely silent as to the nature of the respondent's estate, the recovery of the mere possession of the premises being all that is sought. Therefore we are of opinion that this must be regarded as an action brought under the forcible entry and detainer act. (Mis. Laws, chap. 23.)

Counsel contended that the complaint is sufficient both in ejectment and in forcible entry and detainer. This is incorrect. To be sufficient in ejectment it would have to tender an issue as to title, and would thereby be insufficient in forcible entry and detainer, because the statute expressly forbids inquiry into questions of title in such actions. (Mis. Laws, chap. 23, sec. 16.) It is sufficient in forcible entry and detainer, and consequently is insufficient in ejectment; for in that action, as has already been said, an issue must be tendered as to title. (Civ. Code, sec. 315.)

The second question is: Has the circuit court jurisdiction in the first instance of actions of forcible entry and detainer? By the act of October 11, 1862 (Civil Code, sec. 868), the county courts were invested with exclusive jurisdiction of actions of forcible entry and detainer, without reference to the value of the property. The act of October 21, 1864 (compilation of 1864, p. 743), simply sets forth the method of proceeding in such actions, and provided for notice to quit in certain enumerated cases. It named no court in which the action should be begun. The last act on this subject is that of October 21, 1866 (Mis. Laws, chap. 23). It expressly repealed the act of 1864. The remedy provided by the last act is summary and *quasi* criminal. Section 2 provides that "the person entitled to the premises may maintain an action to recover possession thereof, before any justice of the peace of the county in which such real property is situated." By section 8, the

verdict must be guilty or not guilty. By section 10, an appeal is allowed and must be taken to the circuit court. (Justices' Code, sections 68 and 109.) By section 16 it is expressly provided that "the merits of the title shall not be inquired into." Taking the whole act together, we can reach no other conclusion than that it was the intention of the legislature to give the justices' courts jurisdiction to the exclusion of the circuit courts.

What effect the act of October 21, 1868, had upon section 868 of the civil code, by which section exclusive jurisdiction is given to the county courts in actions of forcible entry and detainer, we do not feel called upon to decide in this case. If that section was repealed by implication, then the circuit court did not have jurisdiction in the first instance, and the same conclusion must be reached if the act of 1866 is simply regarded as conferring jurisdiction on justices' courts, without taking away the jurisdiction of the county courts, thereby increasing the number of tribunals in which actions of forcible entry and detainer can be instituted.

Judgment reversed.

LABAN SAUNDERS and E. SAUNDERS, Appellants, v. H. N. PIKE, Respondent.

JUSTICE OF THE PEACE—WHEN MAY ENTER JUDGMENT.—Under the code a justice of the peace may, after a case is submitted to him for decision, take the same under advisement and render a valid judgment without adjourning the case to a day certain.

IDEM—ERROR IN DATE OF ENTRY A MERE IRREGULARITY.—A judgment rendered in a case submitted on the sixth of the month and taken under advisement and a decision made on the eleventh, but entered up in the record as of the sixth, the day on which it was submitted is not for that reason void.

EQUITY—BILL TO SET ASIDE JUDGMENT—WHAT IT MUST SHOW.—Where a party by bill in equity seeks to have a judgment annulled, he must, to be entitled to relief, set out in his bill, the matters determined by such judgment, in so clear and intelligible a manner that the court can on setting aside the judgment proceed to determine the rights of the parties.

APPEAL from Benton County.

The facts are stated in the opinion of the court.

F. A. Chenoweth, for appellant.

Kelsay & Yantis, for respondent.

By the Court, BOISE, J.:

This is a suit in equity by which it is sought to set aside and vacate a judgment rendered in a justice's court for nine dollars and costs and to enjoin an execution issued on the same.

The case in which this judgment is sought to be annulled was rendered as follows: H. N. Pike commenced an action before justice C. W. Starr against Laban and E. Saunders, the plaintiffs in this suit, for the sum of one hundred and eighty dollars. Saunders answered, denying Pike's claim and alleging a counter-claim of one hundred and ninety-two dollars against Pike, on which issue was joined.

This case came on for trial before said justice on the sixth day of April, 1876, and the parties appeared and submitted their allegations and proofs to said justice and submitted the case to him for decision. Justice Starr did not decide the case on the day it was submitted, but took the same under advisement without setting any day when he would decide it and give judgment, and it is alleged that he decided the case some five or six days after the said sixth, but entered judgment in his record as being given on the said sixth of April, for nine dollars and costs. After the judgment was so entered the plaintiff, Saunders, attempted to appeal, and as they allege, filed with the justice an undertaking and tried to get service of notice on Pike, but, as is alleged, they were prevented from perfecting this appeal by Pike keeping himself concealed, so that no notice of appeal could be served on him, and that the plaintiffs were thereby deprived of their appeal.

They also allege generally, that the judgment of the justice's court was unjust and that said justice ought to have given a judgment for the plaintiffs, but do not state for how much.

The prayer of the complaint in this suit asks that the

justice's judgment be set aside and vacated, and that the execution be forever enjoined, but does not ask the court to go on and settle the matters in controversy that were in issue in the action in the justice's court.

From these facts it is claimed by the plaintiffs: 1. That the judgment rendered by the justice for nine dollars and costs is null, because on the case being submitted to him he took the same under advisement, and did not adjourn the action to a day certain when the parties could be present and hear his decision, and a number of authorities are cited to sustain this position. Such might be the rule had not our statute provided the mode of proceeding in such cases. Section 262, page 159, of the code, provides that when the court is in doubt what judgment should be given it may order the question reserved for further consideration, and thereupon the entry of judgment shall be delayed until judgment is given. This provision applies to justices of the peace, as it is not otherwise specially provided in the act regulating proceedings in justices' courts; for the mode of proceeding in justices' court are the same as in like cases in courts of record. Under this statute he had the power to reserve his decision, and would not lose jurisdiction of the case by so doing.

2. It is urged that this judgment is void, because it is entered as being rendered on the sixth of April, when in fact it was rendered on the eleventh of April, for the reason that it shortened the time of appeal to the plaintiff. If this fact appeared on the record it might be an irregularity, but would not render the judgment void, for the reason that the court had jurisdiction of the subject-matter and of the parties to the action, and it is no more than an irregularity when made to appear by a bill in equity. The judgment for all that appears in this case is regular on its face, and valid, and when the bill only shows that there is a latent irregularity, the court will not, for that reason, in the absence of fraud, set the judgment aside. (Freem. on Judg. sec. 487; Willard's Eq. 163.)

3. It is claimed that it was a fraud in the justice to so enter the judgment. The entry of a judgment on the wrong

day is not a fraud, unless willfully done with intent to injure the party, and it does injure him unless it be a constructive fraud depriving him of a right, and this would be a question of fact to be alleged and proved.

In this case the facts as shown by the evidence do not disclose any intent on the part of the justice to defraud the plaintiffs. The only injury which could result to them from this irregular entry as to time, was to shorten their time for appealing five days, and it is not alleged or proved that this deprived them of their appeal. It appears that they had ample time to take the appeal, and did not move in that behalf until about the first of May, 1876, some twenty days after the time said judgment was actually rendered. So from all that appears they were not injured by the judgment being entered on the sixth of April.

4. It is claimed that the defendant, Pike, was guilty of concealing himself and preventing a service on him, and that he thereby was guilty of a fraud, which deprived plaintiffs of their appeal.

There is a conflict in the testimony as to whether Pike did conceal himself. The plaintiff, Laban Saunders, testifies that he searched for him; that he saw him once at or near the house of the justice of the peace, Starr; and that he made off and would not stop to be served; and that he could not find him afterwards; and that he was seeking him to serve the notice of appeal on him himself.

Justice Starr states that plaintiff met Pike near his house, and had an opportunity to serve the notice on him but did not do it, and we think that such an opportunity was given him. But had he served the notice on Pike it would not have been effectual to perfect the appeal, for the code provides that notices can be served "by any person other than the party himself," so that had the plaintiff been successful in his search, he would not have made legal service on the defendant.

But it seems to us that there is another reason why the court cannot grant the relief asked for in this case. The bill prays the annulling of this judgment and stay of execution, but does not set out the matters in controversy in the

justice's court in a manner and form that would enable the court, after annulling this judgment, to proceed and adjust the rights of the parties in the action in which the judgment was rendered. A court of equity will not annul a judgment and open up matters that were settled by it, and leave the parties with their rights unadjusted; for the court sets aside the judgment, if at all, for the purpose of searching after and settling the rights of the parties which were wrongfully adjusted by the judgment.

LADD & BUSH, Respondents, v. THOMAS SMITH, Appellant.

LANDLORD AND TENANT—SURRENDER OF LEASE.—The surrender of a lease by the tenant and its acceptance by the landlord extinguishes any liability to pay rent accruing subsequent to such acceptance.

IDEM.—A surrender may be by consent of the parties expressly given or by operation of law.

IDEM.—A surrender will not be implied by law from the mere act of delivering the keys of the premises by the tenant to the landlord.

IDEM—WHEN A RELEASING BY LANDLORD WILL OPERATE AS ACCEPTANCE OF A SURRENDER.—If the tenant abandons the premises and delivers the keys to the landlord, and the landlord accepts them, and thereafter leases the premises to another person, and puts such person in possession, from such acts a surrender will be implied by operation of law.

APPEAL from Marion County.

This is an action by the respondents to recover an alleged balance due them for rent upon an unexpired lease.

The appellant defends by alleging a surrender of the lease, and an acceptance by the respondents.

The cause was tried without the intervention of a jury by the judge, who rendered the following finding of fact: 1. That the defendant leased of the plaintiffs the Chemeketa Hotel for four years from the first day of September, 1874, at the rent of four hundred dollars per month; 2. That on the fourth day of November, 1876, the defendant abandoned said premises and gave the keys to the plaintiffs, and paid the rent up to that time; 3. That at the time of said abandonment and the delivery of the keys, plaintiffs in-

formed the defendant that they would not accept of him a surrender of said lease or discharge him from its obligations, but that they received the keys and would protect the property from waste and would hold the defendant to the lease; 4. That after said fourth of November, the plaintiffs took possession of said premises to preserve the same, and that on the twenty-second day of November, 1876, plaintiffs leased said premises and one adjoining apartment to one S. F. Matthews, for the rent of three hundred dollars per month, and that since that date plaintiffs have received from said Matthews three hundred dollars per month rent for said property so rented to him; 5. That said additional apartments so rented to said Mathews with said hotel is worth twenty-five dollars per month; 6. That during the month of December, 1876, and January, February and March, 1877, the plaintiffs received as rent for said hotel, without said additional apartment, the sum of eleven hundred dollars.

As conclusions of law, the court found in effect that the respondents did not accept the surrender made by appellant, and that the latter was liable for the amount specified in the lease, less the amount received by respondents under their lease to Mathews, and judgment was rendered accordingly.

James K. Kelly and Jno. M. Gearin, for appellant:

The lease to Mathews was a surrender in law of the former lease of Ladd & Bush to Thomas Smith. It was an acceptance of the proposition made by the latter to the former, on the fourth of November, 1876, and released the defendant from his obligation to pay rent from that time. (*Matthews, admr. v. Tobener*, 39 Mo. 115; *Smith v. Niver*, 2 Barb. 180; *Randall v. Rich*, 11 Mass. 493; *Whitehead v. Clifford*, 5 *Taunt.* 518; 1 Eng. C. L. 173; *Walls v. Atcheson*, 3 Bing. 462; 13 Eng. C. L. 52; *McKinney v. Reader*, 7 Watts 123; Taylor's L. & T., sec. 507, 509, 515; 117 Mass. 351; 31 Wis. 638; 48 Maine, 573.)

The plaintiffs having re-let the demised premises, on the twenty-second of November, and having received rent to

the fourth of the same month, they cannot recover for portion of the same month in this action. (*Grimme v. L* 8 B. & C. 324.)

Knight & Lord and Mallory & Shaw, for respondents

There could be no surrender of the lease without the sent of plaintiffs, and this consent of plaintiffs was not for, on the fourth day of November, 1876, at the time fendant abandoned the premises and delivered the key plaintiffs, he, defendant, was informed by plaintiffs they would not accept of him a surrender of the lease or charge him from its obligations, but that they would hold to the lease. The delivery of the keys under these cir stances was not a surrender. (*Bloomer v. Merrill,* 1 D p. 485; 2 Story on Contr., sec. 947, 951; *Townsend v. bers,* 3 E. D. Smith's 560; 2 Smith's Lead. Cas. 758 Wend. 400; 25 Penn. 481; Taylor on Land. and Ten. 647; 30 N. Y. 454.)

By the Court, WATSON, J.:

The numerous assignments of error in the notice of ap present but one question. Do the facts admitted by pleadings or found by the court amount to a surrender o lease set up in the complaint? If they do, the finding law and the judgment are erroneous and the judgment o to be reversed. If they do not, the defendant remained ble on his covenant to pay rent on the lease, and the con ions and judgment of the court below are correct, and judgment ought to be affirmed.

"If a tenant for life or for years yields up his estat him who has the immediate estate in reversion or rem der, it is called by the law a surrender, the effect of w is to extinguish all claim for rent not due at the time. estate for years in such case is drowned by mutual a ment 'between them.'" (1 Wash. on Real Prop., 1 ed., 3 Surrender may be by express agreement of the parties o operation of law. It is not claimed in this case that t was any express agreement of the parties for the surre of the lease. The surrender, if any, was by operatio law.

Professor Washburn, in his work on Real Property, uses the following language: "The reader will find a summary of the law in the following language of Parke B., in *Lyon v. Reed*: 'We must consider what is meant by a surrender by operation of law. This term is applied to cases when the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. In such case it will be observed there can be no intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention.'" We think that to this summary may be added the proposition that where the owner of the particular estate has abandoned the premises, and the owner of the reversion has entered into possession of the same, and leased them by a valid lease to a third person, and placed such person in the possession of the premises, these facts amount to a surrender by operation of law. (1 Wash. on Real Prop., 1st ed., 360; *Mathews, administrator, v. Tobener*, 39 Mo. 115.)

Whether the delivery of the keys of the premises by the defendant to the plaintiffs, and their acceptance by them and their resumption of the possession of the premises was a surrender of the lease, depends upon the intention of the parties. The acts of the defendant are so inconsistent with any other intention than that of surrendering his lease, that if the surrender was accepted by the plaintiffs, defendant would be estopped to deny it. Those of the plaintiffs, so far as the receipt of the keys and their taking the possession of the premises are concerned, are consistent with their intention not to accept the surrender, but to hold defendant upon his covenant to pay rent on his lease. They allege in the reply that they expressed this intention to him at the time, and the court below found this allegation true. Under the circumstances, they had the right to accept the keys and take possession of the premises, in order to protect them from waste. The law does not infer an acceptance of the surrender from such acts. (*Bloom v. Merrill*, 1 Daily,

485; *Van Rensselaer's Heirs v. Penniman,* 6 Wend. 671.) Still we do not think that it was necessary that the surrender and acceptance should be at the same time. Plaintiffs had the right, at any time before the defendant withdrew the keys, or resumed possession of the premises, to accept the surrender. When they made a valid lease of the premises to another tenant, and delivered to him the possession of them, they did an act inconsistent with the continuance of defendant's term, and which estopped them to deny that they accepted the surrender. There were then mutual estoppels.

Defendant was estopped by his unequivocal acts to deny that he had surrendered the premises and his estate therein; and plaintiffs were estopped by their commission of an act inconsistent with the continuance of a term to deny that they had accepted its surrender.

We think that according to the weight of the authorities cited here was a surrender by the operation of law. (*Matthews ad. v. Tobener,* 39 Mo. 115; *Smith v. Nion,* 2 Barb. 180; *Randall v. Rich,* 11 Mass. 493; *Walls v. Atcheson,* 13 Eng. C. L. 52; *Gunie v. Legge,* 15 C. L. Eng. 229.)

We think the acts of the parties alleged in the pleadings, and found by the court, are so inconsistent with the continuance of the lease, that no evidence of the intention of the parties could well remove the presumption of a surrender. It certainly cannot be claimed that after the lease was made to Mathews, defendant could have resumed the possession of the demised premises, or that if plaintiffs had received from Mathews a larger amount for the rent of the premises than defendant was to pay, that he would have been entitled to the excess.

It was suggested in the argument that the presumption of the acceptance of the surrender of the least might be avoided upon the theory that in making the lease to Mathews, plaintiffs acted as the agents and for the benefit of defendant. This theory is not supported by the allegations in the proceedings, or by the findings of the court. The reply, it is true, alleges that at the time of the surrender of the keys, plaintiff told defendant, among other things, that 'if they re-let the

premises, the defendants would be charged the difference between such sum as they might receive for the same, and that defendant had agreed to pay." It does not allege that defendant ever assented to this proposition, or that when they did lease the premises, they leased them as the agents of defendant or for his benefit.

The court below evidently regarded the allegation in the reply just quoted, as immaterial, for it did not find upon it. We are of the opinion that if it had been found for plaintiffs, it would not have entitled them to recover.

From these views it follows that the judgment of the court below should be reversed and a new trial ordered.

CHARLES BARTEL, Administrator of the Estate of RICHARD NICHOLLS, Deceased, Respondent, v. ADAM LOPE, Appellant.

EVIDENCE—BILL OF SALE, WHEN PAROL EVIDENCE ADMISSIBLE TO PROVE IT A CHATTEL MORTGAGE.—Where in an action by an administrator of a deceased person to recover specific personal property belonging to the estate, a bill of sale of such property from the deceased to defendant is offered in evidence by defendant, such bill of sale may be shown by parol evidence to be a mortgage.

TENDER—OFFER IN WRITING, EFFECT OF WHEN NOT ACCEPTED.—An offer in writing to pay a debt when not accepted is a sufficient tender of money under the code, and such tender will discharge a lien for such defendant, on personal property, created by a chattel mortgage.

EVIDENCE—DECLARATIONS OF OWNERSHIP BY ONE IN POSSESSION—GENERAL REPUTATION.—The declarations of ownership of personal propty made by one in the actual possession of such property, are competent evidence to support the title of the person making them after his decease. Evidence of general reputation of ownership is competent evidence under the code.

APPEAL from Multnomah County.

This action is brought by Bartel, as the administrator of Nicholls, to recover certain personal property which belonged to Nicholls in his life-time. The defendant Lope alleged ownership in himself, and on the trial in the court below introduced an absolute bill of sale of the property by Nicholls to himself for an expressed considertion of

two hundred and seventy dollars. On such trial the
tiff, to establish the ownership of Nicholls, was allo
prove that "it was generally believed" that Nichol
the owner. He was also allowed to prove the decla
of Nicholls, to the effect that he was the owner, mad
the execution of the bill of sale; and that he, the pl
had offered in writing to pay the defendant two hundr
seventy dollars, the amount expressed in the bill of sa
interest, and that such offer was not accepted.

The introduction of all this testimony on the p
plaintiff was objected to by the defendant, and the
of the court thereon are the errors assigned in the
The jury found for the plaintiff, and under the dire
the court returned, among others, the following speci
ings:

Q. What was the intention of said Nicholls and sa
at the time, and in the execution of said instrument
ing or bill of sale; was it intended to be an absolut
sale or a mortgage? A. It was a bill of sale to se
payment of the above-mentioned sum of money, an
quently considered as a mortgage.

Q. Was there any agreement between Nicholls a
concerning a resale of the property in controversy
olls. If so, when was it made, before or after the e
of the bill of sale, and what were the terms of su
ment? A. There was, after. The terms were that
Nicholls could redeem the property within sixty day
payment of the money back to Adam Lope, accordi
agreement between them, viz.: two hundred and sev
lars, with interest.

Q. Has the estate of Nicholls any creditors, an
property of said estate, exclusive of the property
versy, sufficient to pay said creditors? A. There
itors; not sufficient outside of the property in cont
pay the debts.

The defendant moved for judgment, notwithsta
verdict, upon the special findings, which motion w
and judgment rendered for plaintiff.

The defendant appeals.

Dolph, Bronaugh, and Dolph & Simon, for appellant:

With pleadings framed as in this case, evidence could not be legitimately allowed tending to convert this absolute bill of sale into a mortgage. The submitting of that question to the jury by the court was error, and judgment should have been entered for defendant, upon the special findings, notwithstanding the general verdict. (Code, 248, sec. 682; *Anthony v. Atkinson,* 2 Sweeny, 228; *Webb v. Rice,* 6 Heill, 219; *Erwin v. Saunders,* 1 Cow. 249; *Norton v. Woodruff,* 2 Com. 153; *Miller v. Baker,* 20 Pick. 285; *Hazel v. Lindel,* 10 Mo. 308.) The rule in New York and California, allowing it, is based upon the provision of the code in those states abolishing the distinction between suits and actions. (2 Kernan, 266; 9 Barb. 658; 36 Cal. 45; *Leese v. Clark,* 20 Id. 387.)

The special findings show the parol agreement to have been for a resale, and the facts found do not constitute the bill of sale a mortgage; and the agreement so found was void, because entered into after the sale, and without consideration. (*Sturtevant v. Sturtevant,* 20 N. Y. 40; *Barrett v. Carter,* 3 Lans. 68; *Fullerton v. McCurdy,* 55 N. Y. 637; 4 Daily, 77; *Mason v. Moody,* 26 Miss. 184; *Harbaugh v. Cicott,* 33 Mich. 241; *Johnson v. Clark,* 5 Ark. 336, 343.)

Even if the bill of sale were intended between the parties to it as a mortgage at the time of its execution, Bartel had no authority as administrator to offer to redeem without an order of the county court allowing it, and without such order, he had no more right to claim to redeem out of his own individual funds than any other third person, being a stranger to the contract, would have had. (Code 331, secs. 1129, 1130; *Boone v. Ranes,* 7 T. B. Mon. 384; *Champion v. Joslyn,* 44 N. Y. 658.)

After condition broken, a mortgagee of personal property becomes the owner thereof, except that an equity of redemption remains to the mortgagor which he may assert if he sues within a reasonable time. But he cannot after condition broken tender the money, and, if unaccepted, maintain an action for the possession of the property.

(*Blodgett v. Blodgett*, 48 Vt. 32; *Brown v. Bement*, 8 John. 96; *Porter v. Palmley*, 13 Ab. Pr. N. S. 104; *Patchin v. Pierce*, 12 Wend. 61; *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Id. 414.)

Conceding for the sake of argument that this bill of sale was in fact a mortgage, still, there having been no time of payment expressed in it, it is payable immediately, and no demand of payment was necessary, but the title of the mortgage became absolute at law on the execution of the mortgage without a demand; and the mortgagor, if suffered to remain in possession, was thereafter a mere naked bailee of the property, having no right but that of redemption in a court of equity. (*Howland v. Willett*, 3 Sandf. 607.) And parol testimony is inadmissible to show a different time of payment. (*Thompson v. Ketchan*, 8 John 190.) We submit, therefore, that appellant is entitled to judgment on the special findings.

If the court should differ with us as to our right to judgment in appellant's favor on the special verdict, then we claim that for the reasons, and upon the principles of law, already stated, and for the further error of the court below in allowing proof of reputation, and of the declarations of Nicholls, after he parted with the title, as to the ownership of the property, a new trial should be granted. (*Sprague v. Kneeland*, 12 Wend. 161; *Norton v. Woodruff*, 2 Comstock 155; *Visher v. Webster*, 13 Cal. 58; *Cohn v. Mulford*, 15 Id. 52; *Jones v. Morse*, 36 Id. 205; *Poorman v. Miller*, 44 Id. 269; *Campbell v. Coon*, 51 Ind. 76.)

W. W. Thayer and David Goodsell, for respondent:

The respondent, by virtue of his general ownership of the property, was entitled to tender the amount in order to preserve his rights, and that of the creditors, in the property; it was a right incident to his trust. The fact that respondent had not obtained an order from the probate court allowing him to redeem, was not drawn in question. No objection was made upon that point, and for all that appeared in the court below, respondent may have obtained an order to that effect. Appellant had nothing to do with the question.

He was offered the money, and it was none of his business whether any order allowing the respondent to redeem had been made or not. The effect of the tender was to relieve the property from the incumbrance. The debt was the principal and the mortgage but an incident. (9 Wend. 80.) While a tender, not kept good, would not discharge the debt, yet it would discharge the lien. (8 John. 96; 2 Cain. 213; 3 Parsons on Cont. 274; 21 N. Y. 343; *Amot v. Post*, 6 Hill, 65.) It is not necessary to bring money into court. (21 N. Y. 347; 6 Cow. 728; 56 Barb. 97.) Plaintiff had the right to show that the bill of sale was a mortgage. He had a right to show anything under the pleadings that would tend to establish that he was the owner of the property in the character alleged, and that the appellant was not. (*Allison v. Mathews*, 3 John., 235.)

Under our law a chattel mortgage simply credits a lien upon the property mortgaged. (*Chapman v. State*, 5 Or. 432.) A bill of sale, though absolute upon its face, may at law be shown to be only a mortgage. (8 Wend. 375; 1 Am. R. 135; *Chaplain v. Butler*, 18 John. 173.)

The rule, however, that a party cannot, by parol evidence, vary or change the terms of a written instrument, does not apply to this case; that rule is only applicable in suits between the parties to the instrument and their privies. (55 N. Y. 284.) The parties represented by the respondent in this case, the creditors of Nicholls, were strangers to that instrument.

The plaintiff had the right to give evidence of Nicholls's declarations concerning his ownership of the property while in his possession. (47 Mo. 365.) They were a part of the *res gestae*. Allowing Nicholls to retain the possession of the property and represent it as his own, was not only an *indicia* of fraud, but tended to establish that the bill of sale was only intended as a lien or pledge of the property. The appellant's counsel excepted to the question asked the respondent when on the stand, as to common reputation of ownership of the property. It was not answered, and we might claim that if it were error, no injury was suffered by appel-

lant; but the question was asked in view of the case
son v. Maddock, 5 Or. 480.

By the Court, BOISE, J.:

From the foregoing statement of this case, sever
tions are presented for the consideration of this court

1. Was it competent for the plaintiff to prove
paper purporting to be a bill of sale from Nicholls
was intended to be a mortgage?

The plaintiff had offered evidence tending to sh
Nicholls at the time of his death was the owner of t
erty in question. To rebut this and show that Lope
owner, Lope offered this bill of sale. This would be
to show that Nicholls had sold the property to Lop
the question is, could this bill be impeached? It cou
the party who signed it, Nicholls, by showing that n
ery had ever been made under it, and that it had be
doned, and as to whether or not Nicholls could have
to be a mortgage we are not called on to decide, for
son that his administrator being in this case the
of his creditors (it being found by the jury that
tate owed five or six hundred dollars), occup
same position towards this property as these credit
could show that this sale was fraudulent as to c
This bill of sale was only evidence of the sale, and
clusive; for in the sale of personal property a bill
does not operate to pass the title without a deliver
Code, 264), and any evidence which tends to show
sale was a fraud or on a condition, is as competent
as in equity. Sales of personal property are liabl
inquired into in any court. It is objected that to sh
to be a mortgage would contradict the writing and
the contract; but it is a well settled rule that a deed
on its face can be shown to be a mortgage; this
was held by this case in *Smith v. Simpson*
not reported). That was a case in equity, and in the
deeds to land a resort to equity is necessary, for t
itself is conclusive evidence of the legal title, but n
to personal property, and courts of law have freque

ercised this jurisdiction. (55 N. Y. 234, 8 Wend. 375; 1 Am. R. 135; *Chaplin v. Butler,* 18 John. 173.)

2. It is insisted there was no tender. But we think the offer in writing proved by plaintiff not being accepted by defendant was a sufficient tender, under section 842 of the code, and that, though such tender did not discharge the debt, it did extinguish the lien. (8 John. 96; 2 Cain, 213; 3 Parsons on Contr. 274.) And we think he might make this tender without any order from the county court, for it made no difference with the defendant whether such order had been made, or whether this money tendered him was the property of the estate or of the plaintiff.

3. It is claimed as error that the court allowed evidence of the common reputation as to the ownership of this property to go to the jury to prove that Nicholls was the owner. This question was decided in the case of *Wilson v. Maddock,* 5 Or. 48, when it was held that such evidence was competent under subdivision 12 of section 766 of the civil code, and we refer to that case as decisive of this question in this case.

4. It is claimed as error that the court allowed the plaintiff to prove declarations of Nicholls concerning his ownership of the property made while in possession of the property. We think that it is always competent to prove that a person is in possession of property and that he claims it. If a man says, this is my horse, when he is in possession of the property, such declaration may be proved to show that he claims it, as well as exercising control over the property may be shown to prove the same thing; the act and the language go together to explain one another. (*Weinrich et al. v. Porte,* 47 Mo. 293.)

The foregoing are the only important questions presented; and we think there was no error, and the judgment of the circuit court will be affirmed.

*C. F. PUTNAM, Appellant, v. DOUGLAS COU
Respondent.

MEASURE OF DAMAGES—ESTABLISHING ROAD.—The measure of d for land taken for public use in opening a public highway t such land, is the loss in value which the land will sustain opening of the proposed road.

IDEM—MANNER OF ESTIMATING LOSS IN VALUE.—In determini question, the jury should estimate the value of the land occu the road, the necessary expense of building extra fences, s inconvenience it may be to the remainder of the premises, special advantages the opening of the road will confer up premises.

IDEM.—The advantages which the proposed road will confer on th ises of the claimant may be considered, not only as a compe for the increased fencing and injury to the remainder of t not occupied by the road, but as a compensation of all d caused by the opening of the road, and, if they equal or exce damages, the jury should find against the claimant.

CONSTITUTIONALITY OF STATUTE AFFIRMED.—Section 7, page 723, laneous Laws, as to the measure of damages for private p taken for a public highway, is not unconstitutional. (*Per Sh J., dissenting,*)

JUST COMPENSATION DOES NOT CONSIST OF ESTIMATED BENE "Just Compensation," in the meaning of the constitution actual value in money of the property taken, without any de for estimated benefits or advantages accruing to the owne the public use of his property. A part of the diminution i of the premises is the cash value of the portion taken, a should be made good to the owner in cash.

APPEAL from Douglas County.

The facts are stated in the opinion of the court.

W. R. Willis, for appellant.

S. H. Hazard, Prosecuting Attorney, for respondent.

By the Court, PRIM, C. J.:

The appellant claimed three thousand dollars as da for the opening of a county road through his premises.

The viewers appointed by the county court to asse damages claimed by appellant reported that in their ment the premises were of no less value with the roa out through them than they were without it; and henc appellant was not entitled to any damage.

* See 25 Am. Rep. 527.

Whereupon the county court, having adopted the report of the viewers, ordered the road to be opened. From this order the appellant appealed to the circuit court, where the issue, as to how much less valuable the premises of appellant would be rendered by the opening of said road, was tried by a jury, and a verdict rendered in favor of the respondent. Whereupon appellant took his appeal to this court. The error complained of by appellant is that the court erred in refusing certain instructions, asked by appellant, and in giving certain other instructions excepted to by him.

Appellant asked the court to instruct the jury that "the measure of damages in this case is the value of the land taken, together with the necessary expenses of building fences, and the inconvenience it may be to the remainder of the premises." The court instead gave the following instruction, to which appellant excepted. The question to be found by the jury is, how much less valuable the premises of appellant will be rendered by the opening of the proposed road. In determining this question, the jury will estimate "the value of the land occupied by the road, the necessary expense of building fences, and the inconvenience it may be to the remainder of the premises."

Appellant asked the court to instruct the jury that "the benefits to the land resulting from the location of the road, may be an offset against any consequential damages to the premises, but not against the value of the land." This instruction the court refused, but gave, instead, the following: "The jury will also take into consideration all special advantages the opening of the road will give to the premises of appellant, which appear, if any; as, for instance, the giving of an outlet to market to said premises, and the enhancement in value of the land taken." Upon the consideration of all the evidence, if you find that the premises of appellant will be rendered less valuable by the opening of the road in dispute, you will find how much less valuable they will be rendered thereby, and find a verdict in his favor for that amount. If, however, upon the consideration of all the evidence, you find that the premises of appellant will

not be rendered less valuable by the opening of the road in question, you will give a verdict in favor of respondent.

The court further instructed as follows: "The advantages which the proposed road will confer on the premises of the appellant may be considered by you, not only as a compensation for the increased fencing and injury to the remainder of the land not occupied by the road, but as a compensation of all damages caused by the opening of said road; and if they exceed or equal such damages, you will find for the respondent." The question presented upon this appeal by these exceptions is, What shall be the measure of damages or rule of compensation for land taken for public use in opening a public highway through the land of a private individual?

The legislature of this state has not only provided how land may be taken for such purposes, but what shall be the rule of compensation when so taken. And there is no complaint in this case that the statutory mode has not been pursued. The legislature has provided that if any person through whose lands a county road may be laid out shall feel that he or she would be injured by the opening of the same, and shall make complaint thereof in writing to the county court, three disinterested householders shall be appointed "to assess and determine how much less valuable such premises of the complainant would be rendered by the opening of said road." (Mis. Laws, sec. 7, p. 723.) Hence it will be seen that the rule of compensation adopted by the court in the instructions complained of, is in accordance with the rule contained in this legislative provision.

But it is claimed by appellant that this provision of the statute is in violation of that provision of our constitution which provides that "private property shall not be taken for public use without just compensation." It is claimed by appellant that under this provision the owner of land taken for public use is entitled to have actual value thereof in money without deduction for estimated profits or advantages accruing to the owner from the public use of his property. There are quite a number of decisions to that effect, but we think it will be found generally that they were

made under constitutional provisions and statutes differing in some respects from ours.

The measure of damages which appears to be established by most of the cases, for building a road through a man's land, is the difference between the value of the land before the road was built, and its value after the road is finished. And this is the rule adopted by our statute. This rule appears to have been sanctioned by the judicial decisions of Indiana, Pennsylvania, New York and Massachusetts. (*McJustin v. The State,* 5 Blatchf. 383; *Hornstein v. M. & G. W. R. R. Co.,* 51 Penn. 87.)

The provisions contained in our constitution and statute in relation to the taking of private property for public use appear to have been taken from the Indiana constitution and statute; and, having adopted them after they had been judicially construed by the courts of that state, it must be presumed that we adopted along with them the construction of those courts. (Sedg. Con. sec. 497; Smith's Con., sec. 634.) The ordinance of congress for the government of the territory of the United States northwest of the river Ohio, passed in 1787, contains a clause requiring "compensations" for private property taken for public use. Upon the division of the territory, the legislature thereof enacted that the persons chosen to assess damages for land taken for a public highway "should take into consideration how much less valuable such land would be rendered" by reason of the opening of the contemplated road.

This same provision existed when the constitution of Indiana was adopted, and was incorporated into their statute after its adoption. In *McGuthrie v. The State,* 5 Blatchf. 383, McGuthrie claimed damages against the state for land and materials taken from him for the purpose of constructing a railroad under the internal improvement act, passed in 1836, which provides that in the assessment of damages the benefits resulting to the complainant from the construction of the public work causing the injury complained of shall be taken into consideration. That act was attacked on the ground that it was unconstitutional, but was upheld by the court in that case. The court reviewed very thoroughly the

constitutional provision and all the statutes enacted upon that subject up to the time when the decision was made. The court, in commenting upon the meaning of "just compensation," said: The "meaning is, not that property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer in consequence of the exercise of the right of eminent domain over his property, shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains.

In ascertaining the extent of the injury, undoubtedly an estimation of the value of the property taken at the time of taking is a necessary step, but if the benefits really and substantially resulting to the complainant are equal in pecuniary value to the value of that of which the public has deprived him, we conceive they constitute a just and constitutional compensation for the deprivations to which he has been subjected, and such, in our opinion, is the nature of the benefits contemplated by the statute in question—the enhancement of the property by the construction of a public improvement. This doctrine is fully sustained by a series of decisions in the state of Pennsylvania, as will be seen by examination of the case of *Hornstein v. A. & G. W. R. R. Co.*, 51 Penn. 87. (Angel on High., sec. 116; 2 Mass. 492; 4 Com. 419.) This statutory provision of ours establishing the measure of damages for private property taken for public use was in full force at and long prior to the adoption of our constitution. And having thus been acted upon and upheld for a long series of years, we are of the opinion the courts should be slow to decide it unconstitutional under such circumstances.

It follows from the views herein expressed that the judgment of the court below should be affirmed.

Judgment affirmed.

Mr. Justice SHATTUCK, dissenting:

I am unable to concur in the foregoing opinion. I think that the terms just compensation employed by our state constitution means the actual value in money of the prop-

erty taken without any deduction for estimated benefits or advantages accruing to the owner from the public use of his property. (Sedg. on Meas. of Dam. 602.) I am unable to allow that supposed benefits—benefits estimated beforehand, perhaps only guessed at—always uncertain in value, and frequently at last found to be merely imaginary, can be a just compensation for tangible acres which have a known market value, and oftentimes are yielding to the owner at the time of appropriation by the public a large and certain annual income.

I do not think it necessary to declare the statute in question unconstitutional, in order to hold that the owner may have pay in money for his land which he is forced to surrender to the public use. The statute, if allowed to have the construction for which I contend, simply carries into effect the constitutional provision according to its spirit. The constitution declares that just compensation shall be awarded for property taken for the public use, but it has nowhere defined what shall be deemed just compensation, nor has it prescribed any mode of ascertaining it.

This was left for the statute. And the statute has provided that the viewers or the jury shall assess and determine how much less valuable the premises of the complainant would be rendered by the opening of the road," etc. Now, I am unable to see why it must be held that in ascertaining "how much less valuable" the premises would be, the portion actually taken away from the owner by the public can be paid for in estimated benefits alone.

On the contrary, it seems to me to be a fair construction of the provision to hold that in all cases a part of the diminution of value in the premises shall be the cash value of the portion taken, and that this must be made good to the owner in cash. For the taking of a parcel of land and perpetually excluding the owner from the use of it, is a clear damage to the extent of the value of it. Its loss to the owner is tangible, and can be valued to a certainty. The compensation for this should also be tangible—should be some equivalent value, in fact, not something resting in speculation and uncertainty. I think that a money com-

pensation—a certain thing for a certain thing—money for land alone can satisfy the requirement of the constitution.

But when the results of the appropriation of the private property to the public use are considered in determining the diminution of value of the premises, another feature is presented; the matter is then within the sphere of speculation alone, and the estimated or speculative disadvantages may be met and offset by speculative or estimated benefits; and if the estimated disadvantages exceed the estimated benefits, this excess is to be added to the value of the land taken, and that sum, so made up, is to determine "how much less valuable the premises are" made by the opening of the road.

I am, therefore, of the opinion that the instructions asked by appellant ought to have been given, and that those given contained error, and that the judgment of the court below ought to be reversed.

A. J. KNOTT and LEVI KNOTT, Appellants, v. JOSEPH KNOTT, Respondent.

FINDINGS BY THE COURT IN A SUIT — WHEN CONCLUSIVE UPON THE PARTIES IN THE SUIT IN FAVOR OF THOSE NOT PARTIES.—In a suit for a dissolution of a partnership and a final accounting, the court found that the indebtedness of the partnership consisted of a claim in favor of one F., amounting to two thousand eight hundred and forty-eight dollars. The decree of the court providing for a distribution of the property of the partnership, ordered that, "after the payment of the said indebtedness of said partnership," the money in the hands of the receiver should be applied in payment of costs of suit, and the residue distributed between the partners: *Held*, that such finding and decree were conclusive upon the partners in a proceeding to enforce the payment of the two thousand eight hundred and forty-eight dollars, in discharge of F.'s claims.

APPEAL from Multnomah County.

In a suit between A. J. Knott, plaintiff, and Joseph and Levi Knott, defendants, to dissolve a partnership, and for an accounting, the court found the indebtedness of the partnership to consist of a claim for two thousand eight

hundred and forty-eight dollars in favor of one Foster, and it ordered a distribution of the assets in a prescribed manner, "after payment of said indebtedness." The respondent, Joseph Knott, moved for an order in the court below directing the payment of the two thousand eight hundred and forty-eight dollars upon Foster's claim, which motion was opposed by the other parties to the suit. The court allowed the motion, and from its order thereon this appeal is taken.

Hill, Durham & Thompson, E. W. Bingham, and H. T. Bingham, for appellants.

Foster was no party to the suit in which this final order was made, and the only object of a finding that the assets of the firm was subject to a claim of his, was that the said assets might not be distributed among the partners without the firm debts being first ascertained and paid. It was not contemplated by this court that Foster's claim should be recognized and allowed, without these appellants being given an opportunity to dispute it. It would be establishing a very dangerous precedent. The fraud and connivance of an unscrupulous partner, with a third person, might, by this process, deplete the assets of a dissolving firm, and the other partners be powerless to resist and without remedy against the defrauding partner, and this court was without jurisdiction or authority to render such a decree. No person can bind another by any adjudication, who was not himself exposed to the peril of being bound in a like manner had judgment resulted the other way. (Freeman on Judg. 125; 2 Paine, 536; *Clark v. Clark,* 2 N. J. L. 112.) A decree that money should be paid to the owners of the judgment, without stating who the owners were, is objectionable. (*De Wolf v. Long,* 1 Ill. (2 Gilm.) 679; *Carr v. Bobb,* 7 Dana, 417; *Roberts v. Elliott,* 3 T. B. Mon. 395. *Muldrow v. Muldrow,* 2 Dana, 386; *Riley v. Wiley,* 3 Dana, 75; *Taylor v. Watkins,* 4 B. Mon. 561; *Hallett v. Hallett,* 2 Paige, 15; *Pratt v. Oliun,* 3 McL. 27; *Campbell v. Consalus,* 25 N. Y. 615; *People v. Johnson,* 37 Barb. 502; *Mathews v.*

*C. F. PUTNAM, Appellant, v. DOUGLAS COUNTY, Respondent.

MEASURE OF DAMAGES—ESTABLISHING ROAD.—The measure of damages for land taken for public use in opening a public highway through such land, is the loss in value which the land will sustain by the opening of the proposed road.

IDEM—MANNER OF ESTIMATING LOSS IN VALUE.—In determining this question, the jury should estimate the value of the land occupied by the road, the necessary expense of building extra fences, and the inconvenience it may be to the remainder of the premises, and all special advantages the opening of the road will confer upon the premises.

IDEM.—The advantages which the proposed road will confer on the premises of the claimant may be considered, not only as a compensation for the increased fencing and injury to the remainder of the land not occupied by the road, but as a compensation of all damages caused by the opening of the road, and, if they equal or exceed such damages, the jury should find against the claimant.

CONSTITUTIONALITY OF STATUTE AFFIRMED.—Section 7, page 723, Miscellaneous Laws, as to the measure of damages for private property taken for a public highway, is not unconstitutional. (*Per Shattuck, J., dissenting,*)

JUST COMPENSATION DOES NOT CONSIST OF ESTIMATED BENEFITS.—"Just Compensation," in the meaning of the constitution is the actual value in money of the property taken, without any deduction for estimated benefits or advantages accruing to the owner from the public use of his property. A part of the diminution in value of the premises is the cash value of the portion taken, and that should be made good to the owner in cash.

APPEAL from Douglas County.

The facts are stated in the opinion of the court.

W. R. Willis, for appellant.

S. H. Hazard, Prosecuting Attorney, for respondent.

By the Court, PRIM, C. J.:

The appellant claimed three thousand dollars as damages for the opening of a county road through his premises.

The viewers appointed by the county court to assess the damages claimed by appellant reported that in their judgment the premises were of no less value with the road laid out through them than they were without it; and hence that appellant was not entitled to any damage.

* See 25 Am. Rep. 527.

Dolph, Bronaugh, Dolph & Simon, and W. W. Thayer for respondent:

It is an elementary proposition, time and again reiterated in the text books and decided cases, that upon decreeing a dissolution of copartnership, there can be no distribution of the property of the firm amongst the partners until after payment of the debts of the concern; for it is only as to the surplus hereafter that any right of distribution exists. (*Story* on Part., sec. 347 and note, sec. 350; Colyer on Part., secs. 226, 320; Parsons on Part., p. 512, note *h; Geortner v. Trustees of Canajoharie,* 2 Barb. 628; *Trufant v. Merrill,* 17 How. Pr. 531; *Griggs v. Clark,* 23 Cal. 428.)

It may be, however, that the court will decline to inquire into these circumstances, or to look beyond the transcript presented on this appeal. If such should be the opinion of the court in this particular, then we submit that, as this transcript consists simply of a copy of the former decree of this court, and of said order entered in the court below for its enforcement, the doctrine must prevail that everything will be presumed to have been done and shown which was necessary to sustain the judgment of those courts in entering said decree and order, until the contrary appears, and that therefore said order will be affirmed. (*People v. Best,* 39 Cal. 690; *Carman v. Pultz,* 21 N. Y. 547; *Fulton v. Earhart,* 4 Or. 61.)

By the Court, MCARTHUR, J.:

This cause was heard and determined by this court at the last term. The decree then entered shows, among other things, that it was found and adjudged "that the indebtedness of said partnership consists of a claim of W. H. Foster for services, amounting to twenty-eight hundred and forty-eight dollars and seventy-five cents," and it was decreed that all the property of the partnership be sold; that the proceeds of such sale be paid over to the clerk of the court from which the appeal was taken, and "thereafter distributed according to the directions of this decree; that respondent Joseph Knott and respondent Levi Knott each receive one fourth, and that appellant, A. J. Knott, receive

one half of the proceeds of the sale of the partnership property and money in the hands of the receiver after the payment of the said indebtedness of said partnership."

After the mandate of this court had been sent to the court below, that court, in carrying out the decree on motion, ordered the clerk to pay over to Foster the amount of his claim as found by this court, and from that order this appeal is taken. The decree of this court at the last term must be regarded as final and conclusive upon all matters contained therein, including the liability of the late firm to Foster. If the present appeal is sustained and the order of the court below reversed, the effect will be to impeach or set aside the former decree, as to that matter which, in our opinion, would conflict with section 377 of the code of civil procedure.

In ordering the payment of the first ascertained liability to Foster before distributing the partnership property and assets, the court below followed the decree of this court, and did not err. It is laid up among the fundamentals of the law that there can be no distribution of the property of a dissolved partnership among the partners until the debts are paid. Furthermore, we are of opinion that in a suit for dissolution of copartnership the court should ascertain the amount of the indebtedness of the partnership as well as the value of the partnership property, and the respective interest of each partner therein.

We found that this debt was due to Foster. Of course such finding was not conclusive as to him, for he was not a party to the suit, but it was conclusive as to the Knotts. By accepting the amount found by the court, Foster has absolutely extinguished the only liability of the late firm, and he can never be heard to say aught against the correctness of finding of the court in relation thereto, and his receipt would be a perfect defense to the Knotts should he institute an action against them.

Decree affirmed.

SAMUEL RICH, Appellant, v. P. P. PALMER, Respondent.

TAX SALE — WHO MAY REDEEM LAND SOLD.—To entitle a party to redeem land sold for taxes it is not necessary that he should own the whole of the premises sold.

IDEM.—PART OWNER MUST REDEEM THE WHOLE.—A person owning a part of a tract of land sold for taxes must redeem the whole tract.

PLEADING—REDEMPTIONER'S BILL TO SET ASIDE SHERIFF'S DEED—WHAT SUFFICIENT ALLEGATION OF OWNERSHIP.—Where a party owning an equitable interest in land has properly applied to the sheriff to redeem land sold for taxes and paid the delinquent taxes and legal charges and percentage, and received from the sheriff a certificate of redemption, and the sheriff has afterwards given the purchaser a deed under the sale for taxes; in a bill to set aside such deed it is sufficient for the party moving to set it aside to allege generally that he is the equitable owner of a large portion of the premises sold and redeemed, without particularly describing his interest or the particular part of which he is owner.

APPEAL from Douglas County.

The facts are stated in the opinion of the court.

John Kelsay and L. F. Mosher, for appellant.

W. R. Willis, for respondent.

By the Court, BOISE, J.:

The respondent on the eighteenth day of July, 1874, purchased the land described in complaint at a sale of the same for taxes. Afterwards, the appellant, claiming an interest in a portion of the land, attempted to redeem the same from this sale. He gave the notice and paid the delinquent taxes, and took all the steps necessary to redeem and receive a certificate from the sheriff of Douglas county to the effect that he had redeemed the land. Afterwards, the said sheriff, on the eighteenth day of July, 1876, executed in due form to the purchaser, Palmer, a deed to the premises under the tax sale aforesaid. The plaintiff now brings this suit to remove a cloud from his title by having this deed canceled by a decree of the court of equity.

The main question raised in the case is as to whether or not the plaintiff had such an interest in the land as to entitle him to redeem. The allegation in his complaint, de-

scribing his interest in the land, is as follows: "Samuel Rich complains of P. P. Palmer in a suit in equity, and alleges that on and before the first day of June, 1873, the plaintiff was the equitable owner of a large portion of the donation land claim of William Sloan, in township No. 22, south of range 10, west of the Willamette meridian, in Douglas county, Oregon;" this being the land sold, as aforesaid, and redeemed.

It is claimed by the defendant in his demurrer to complaint: 1. That the complaint does not sufficiently set forth the interest of the plaintiff, or the extent or nature thereof, in and to the premises described in the complaint; 2. That it does not sufficiently describe the portion or part of said premises to which plaintiff claims an interest.

We think the first objection is not well taken, for he does not set out the nature of his interest; he says he is he "equitable owner," which is the highest equitable interest, and is only subject to the objection that it is the statement of a conclusion, and not of the facts on which the conclusion is based. Such a statement might be required if the court was called on to settle the title of parties, or in ordinary cases in equity. But in cases of this kind, a liberal construction is given to the law for the redemption of land sold for taxes (18 Iowa, 350; Blackwell on Tax Titles 423; 10 Peters, 23; also 23 Cal. 56, 594), and as this allegation that he was the equitable owner, is as broad in equity as owner in fee is at law, which is held sufficient in an action of ejectment, we think it sufficient to show that plaintiff was entitled to redeem.

The second objection that the complaint does not sufficiently describe the portion or part of said premises to which plaintiff claims an interest, we think is not well taken, for the reason that the whole premises having been sold, it was necessary to redeem the whole in order to redeem the part owned by the plaintiff, from the incumbrance created by the sale; and when the purchaser was paid back his purchase money and the percentage allowed him by law, his right to the whole premises became extinguished, and the plaintiff became restored to the interest which he had before

the sale and his estate was not enlarged by the redemption, unless it might be to give him a claim for contribution against the owner of that part of the premises not owned by the plaintiff. We think, therefore, that the demurrer in this case should be overruled and the decree of the circuit court reversed.

THE STATE OF OREGON, Respondent, v. ISAAC BERGMAN and A. W. BERRY, Appellants.

JURISDICTION—A SINGLE ACT MAY CONSTITUTE MORE THAN ONE OFFENSE.—A person may by the same act commit more than one crime. A city ordinance which provides for punishing an act which is already a crime under the general laws of the state, does not deprive the circuit court of its jurisdiction to indict and try persons who are guilty under the ordinance for a violation of the state law.

INDICTMENT—BUT ONE OFFENSE CHARGED, WHEN.—An indictment which charges that defendants committed an act which grossly injures the persons and property of others, and grossly disturbs the public health, and openly outrages public decency, does not charge more than one crime.

NUISANCE—INDICTMENT FOR, WHEN SUFFICIENT.—In such an indictment it is not essential to charge that the act committed was injurious to public morals.

APPEAL from Clatsop County.

Appellants were indicted for violating the provisions of section 674 of the criminal code. This section is recited in the opinion of the court. The indictment charges them in effect with keeping a slaughter-house in the city of Astoria, and there butchering cattle, etc. It charges that the act complained of "grossly injures the person and property of another," and "grossly disturbs the public health," and "openly outrages the public decency."

To this indictment defendants demurred for the reasons substantially as follows: 1. That the circuit court for Clatsop county had no jurisdiction of the offense charged in the indictment; the exclusive jurisdiction of said offense being vested in the police court of the city of Astoria; 2. That the indictment does not state facts sufficient to constitute a crime; 3. That the indictment charges more than one crime.

The court below overruled the demurrer, and defendants, having been convicted of the offense charged in the indictment, and fined fifty dollars each, appeal to this court.

G. W. Yocum, for appellant.

Raleigh Stott, Prosecuting Attorney, for respondent.

By the Court, WATSON, J.:

The first objection made by the demurrer is, that the exclusive jurisdiction of the offense charged in the indictment is vested in the police court of the city of Astoria. Subdivision 6 of section 38 of "An act entitled an act to incorporate the city of Astoria in Clatsop county, Oregon," confers upon the council of the city the right "to prevent and remove nuisances." Subdivision 19 of the same section empowers the council "to provide for the establishment of market-houses and places, and to regulate the location and management of market-houses, places, and slaughter-houses." Section 128 of the same act confers upon the police judge of the city the jurisdiction to try all nuisances defined by the city ordinances.

It is claimed by appellants that the city council did on the sixth day of December, 1876, pass an ordinance known as Ordinance 149 which provides for preventing and restraining nuisances, within the city limits, and which also provides for the location and management of slaughter-houses. It is further claimed that the acts charged in the indictment constitute no more than the crime of nuisance, and are made punishable by the ordinance before mentioned.

The indictment is for the violation of section 674 of the criminal code. That section provides as follows:

"Section 674. If any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this code, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than six months,

or by fine not less than fifty dollars nor more than two hundred dollars."

We do not think that the jurisdiction of the circuit court to indict and try persons for offenses under the section of the criminal code just quoted, is taken away by the provisions of the act of incorporation of the city of Astoria, or by the ordinances passed in accordance therewith. It is true that the acts therein described constitute a nuisance, and that they violate a police regulation of the city which it had the authority to make and enforce, but they are also a violation of the criminal code of the state.

A person may by the same act commit more than one crime; he may thereby violate more than one statute or ordinance. The city council had the right, as a police regulation, to pass ordinances in order to prevent nuisances, and the city police court had the exclusive jurisdiction to try persons for violating such ordinances; but such ordinances do not abrogate the criminal code of the state within the city in any respect. When any person is guilty of the acts charged in the indictment, he may be tried and punished in the police court of the city of Astoria for a violation of the city ordinances, and such trial and punishment will not be a bar to a prosecution for the violation of the criminal code of the state.

We think this question is settled by the decision of this court in the *State of Oregon v. Sly*, 4 Or. 277. The second objection made by the demurrer is that the indictment does not state facts sufficient to constitute a crime. In support of this objection it is claimed, by counsel for appellant, that the indictment should have alleged that the acts therein charged were injurious to public morals.

We do not think the objection well taken. The statute defines the crime thus: "If any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to public morals," etc.

We think the crime is complete; either if the act "grossly injures the person or property of another," or "grossly dis-

turbs the public peace or health," or "openly outrages public decency, and is injurious to public morals." T several necessary ingredients of the crime are mentione the act disjunctively, and it is enough if the act has e quality. Had the indictment merely charged that th openly outraged public decency, it might have been nece to have added the clause "that it is injurious to public als," these clauses being stated conjunctively in the statu

The third and last objection made by the demurrer is the indictment charges more than one crime. In the ca the *State of Oregon v. Carr*, decided at the last term of court, we held that "where the statute makes it a crime this or that, mentioning several things disjunctively, th dictment may, as a general rule, embrace the whole in a gle count, but it must use the conjunctive 'and' where i curs in the statute, else it will be defective for uncertai We think this decision disposes of the objection to the in ment that it charges more than one crime.

It follows that the court below did not err in overr the demurrer to the indictment, and that the judgment sh be affirmed.

THOMAS ALLEN, Appellant, v. TALBOT NORT Respondent.

JUDGMENT BY CONFESSION—CONTINGENT LIABILITY.—A judgment by fession on a contingent liability, can be enforced by executio

IDEM—WHEN ATTACKED COLLATERALLY, WHAT RULES APPLY.—A ment by confession is to be tried by the same rules as to its ity, when attacked collaterally, as other judgments, and ther be no inquiry into the consideration of the bond on which the ment was founded.

APPEAL from Benton County.

This is an action of ejectment brought by the appel who claims the land as the heir of one Jacob Allen, ceased. The respondent alleges title in himself and de his title from a sheriff's deed and sale under an execu on a judgment by confession against said Jacob Allen

in favor of Thomas M. Reed, and the questions to be decided in this case concern the validity of this judgment and sale. The judgment, after naming the case, is as follows:

"I do hereby confess judgment in this cause in favor of Thomas M. Reed, plaintiff, for the sum of two thousand eight hundred dollars, and authorize judgment to be entered against me therefor. This confession of judgment is made for the purpose of securing the said Thomas M. Reed against any liability which may accrue to him in consequence of his having signed a bond as security for me, bearing date the seventh day of November, A. D. 1854, for the sum of three thousand six hundred dollars; said bond was given by me as guardian of the infant heirs of George W. Stewart, deceased, to-wit Mary Jane Stewart, Amanda Stewart and George W. Stewart."

"State of Oregon, County of Benton, ss.

"Jacob Allen, being duly sworn, deposes and says he has heard the foregoing statement for the confession of a judgment read, and knows the contents thereof, and that the same is true of his knowledge.

his
JACOB X ALLEN.
mark

"Subscribed and sworn to before me this nineteenth day of January, 1861. A. J. THAYER, Notary Public."

The following was indorsed on said statement:

"Thomas Reed v. Jacob Allen. Confession of judgment; the said Jacob Allen having confessed judgment in favor of Thomas M. Reed for the sum of two thousand and eight hundred dollars. It is therefore adjudged that the said Reed have and recover of said Allen the sum of two thousand eight hundred dollars and five dollars costs, this nineteenth day of January, 1861. E. L. PERHAM, Clerk."

Execution was issued on this judgment on the thirtieth day of August, and the land in question sold under the same. The sale was confirmed in due form, and a sheriff's deed executed to Reed, the purchaser. Reed afterwards conveyed the same land to the defendant.

J. W. Rayburn and Hill, Durham & Thompson, for lant:

The probate court, at the time of the appointment guardian, was a court of limited jurisdiction, hence ju tion must affirmatively appear. (*Farley v. Parker,* 46.) There is nothing in the record which shows th probate court ever had jurisdiction of said infants. Laws, 1855, 391, secs. 1, 2, 3.) The amount of the should have been fixed by the probate court, or the thereof. (Gen. Laws, 1855, 392, sec. 5.)

A judgment is absolutely void when it appears on th of the record, that the court did not have jurisdiction person or subject-matter of the suit. (4 Or. 309; 3 407.) The probate court had the exclusive jurisdictio the first instance, of all matters pertaining to guardian at the time this confession of judgment was made. Laws, 339, secs. 6, 10.)

The surety on a guardian's bond undertakes, generall all legal liabilities of his principal and none other. (3 77; 25 Cal. 214.) The liability of a surety on a guar bond is fixed by a decree against the principal, and other way. (3 Hill, 77; 1 John. Ch. 607; 19 John. 30 Cal. 214.)

A party by confessing a judgment, cannot confer ju tion on a court of the subject-matter, where otherw would not have it. (Freem. on Judg., sec. 547; 23 402.) The judgment offered in evidence is a mere sec (6 N. Y. 147.)

John Kelsay and M. S. Woodcock, for respondent:

The probate court had jurisdiction to appoint said dian. (Laws of 1854, 361, secs. 1, 2, 3.) By the rec appointment, it appears that application was duly mad bond ordered to be given, whereupon said bond was given and thereafter approved by the court, which, in fixes the amount of the bond as provided by the law th isting. (See bond and order of appointment in bill ceptions and Terr. Code, 62, sec. 5.)

We do not think that the appointment of guardian

void. But if it was void, as claimed by plaintiff, the bond is nevertheless good. After Jacob Allen had gone forward under said appointment and given the bond, and thereunder taken charge of the wards' property, his appointment for want of jurisdiction of the court cannot thereafter be called in question. (20 U. S. Dig. 466, sec. 24; *Hines v. Mullins*, 25 Geo. 696; 20 U. S. Dig. 470, secs. 129-132; *Alston v. Alston*, 34 Ala. 15; 24 U. S. Dig. 311, sec. 43; *Sebastian v. Bryan*, 24 Ark. 447; 8 U. S. Dig. 208, sec. 4; *Speight v. Knight*, 11 Ala. 461.

It is a well settled principle of law that a party claiming, under a judgment debtor, can not set up against the judgment that the debt for which it was confessed was illegal or void. (*Parker v. Rochester*, 4 John. Ch. 329.) A confession of judgment to secure against a contingent liability was authorized by law at the time said judgment was obtained. (Terr. Code, 1854, p. 98, secs. 49 and 50; 8 Wait's Prac. 688.)

The statement and affidavit subscribed by defendant being filed with the clerk, the statute then authorized the clerk to enter judgment thereon; thereafter the effect of the judgment and the proceedings thereon are the same as other judgments. And the said act of entry by the clerk is the judicial action of the court. (Terr. Code, 1854, p. 99, sec. 51; *Lanning v. Carpenter*, 23 Barb. 404; 20 N. Y. 462; 4 Mo. 402.) A defective statement for a confession of judgment is good as between the parties, and between them the judgment confessed is legal and valid.

And a levy and sale of property, under such judgment, is good as against the defendant and all other persons, except judgment creditors existing and having a lien upon the property. (*Miller v. Earle*, 24 N. Y. 112; *Mitchell v. Van Buren*, 27 N. Y. 303; 1 Saw. 246; Freem. on Judg., sec. 557.) This judgment being valid on its face, cannot be attacked collaterally. (*Mitchell v. Van Buren*, 27 N. Y. 303; *Hunt v. Loucks*, 38 Cal. 382; *In re Price Fuller*, 1 Saw. 246; *Jackson v. Robins*, 16 John. 574; *Lee v. Fig*, 37 Cal. 336.) Executions may be issued on judgments by confession for a contingent liability, as in other cases. (Terr. Code, 1854,

p. 99, sec. 52; Civ. Code, sec. 271; *Hopkins v. Nelson,* 24 N. Y. 520.)

If an execution directs the levy of more money than the judgment calls for, it is not, for that reason, void, but only voidable as to the excess, and cannot be attacked collaterally, even by the parties to them. (*Hunt v. Loucks,* 38 Cal. 381, 382; *Hibbard v. Smith,* 50 Cal. 511.) If an execution issue upon a confession of judgment for a contingent liability before liability accrues, or for too much money, the defendant has his remedy, to set aside or to amend at the time, or to recover the excess of the levy from the plaintiff in the execution—and failing to do so he is estopped after the sale. (*Hunt v. Loucks,* 38 Cal. 382; *Miller v. Earle,* 24 N. Y. 111; *Hopkins v. Nelson,* 24 N. Y. 520; *Jackson v. Bartlett,* 8 John. 364; *Voorhees v. Bank of U. S.,* 12 Curtis U. S. S. Ct. R. 197.) It is the policy of the law to uphold judicial sales. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit or proceeding. (Code 1864, p. 218, sub. 4, sec. 293; *Clark v. Lockwood,* 21 Cal. 225; *Mathews v. Eddy,* 4 Or. 234.) The sheriff's deed is in due form and the judgment, execution and sale being regular and valid, the defendant's title to the land in question is therefore good— for defendant's title rests only on the judgment, execution, sale and deed. (*Clark v. Lockwood,* 21 Cal. 224; *Cloud v. El Dorado County,* 12 Id. 133; *Blood v. Light,* 38 Id. 652.)

By the Court, BOISE, J.:

On the trial in the court below, the defendant not only produced in evidence this judgment and the proceedings of the sale under it, but the bond mentioned in the judgment and the proceedings in the probate court, which required the execution of the bond. All these proceedings, and the judgment and proceedings under it, were objected to by the plaintiff.

The first question presented which we will consider is whether the judgment is valid on its face, it being given for a contingent liability on a guardian's bond. It is claimed

by the appellant, that as the circuit court cannot, in the first instance, declare that a liability has accrued on a guardian's bond (that person being in the probate court), a judgment by confession in the circuit court cannot be given in such a case, and that the statute authorizing judgments by confession does not extend to contingent liabilities of this nature.

This question depends entirely on the construction of the statute, which provides that this confession of judgment may be given "to secure any person against contingent liability on behalf of the defendant in such judgment." This statute is general, and does, we think, embrace this kind of a contingent liability. The liability spoken of and provided for by the statute may be one which is not ascertained or fixed by any court, and the sum confessed therefor is asserted by the parties to the judgment, and the judgment became a lien on the land.

The second question is can such a judgment be enforced by execution. This must depend on the statute. Section 240 of the code, defines a judgment to be "the final determination of the rights of the parties." When it is for money, as in this case, it is adjudged that plaintiff have and recover of defendant a certain sum; where the judgment is by confession, the parties fix the sum due or to become due, or the contingent liability, and fix it in the judgment, and if there is no provision in the judgment for the stay of execution, the plaintiff can have execution as provided in section 271 of the code, unless the judgment be payable by installments, which is provided for in section 247. And we think judgments by confessions are subject to the same rule as to the issuance of execution as other judgments, except as otherwise provided. If other proceedings are to be had before the liability attaches, then the judgment is not a final determination of the rights of the parties, and it not a final judgment. We think the judgment by confession, when rendered under the provisions of the statute is a final judgment, and is liable to be enforced as other judgments. In the argument it was not insisted that the proceedings, after the issuing of the execution, were so irregular as to

make the sale void. The only question which now rem
to be considered is whether we can go behind this judgm
and inquire into the validity of the bond on which the j
ment is founded.

It is claimed that this being a judgment by confessio
der a particular statute has not the same presumptions
favor as one rendered by the same court in an action
ing in the court in the regular course of business. S
as this matter is concerned, under our code, all proce
are to a great extent regulated by statute, and we think
uncertainty would result from attempting to establish
ent rules in determining the effect of different clases of
ments rendered in the same court, and we think a jud
by confession must be determined by the record of the
ment and the judgment sale, and that no inquiry can
into the consideration of the instrument on which
founded; for the parties, by agreeing to the judgmen
waived all right to impeach the consideration of the
ment on which it was founded. And it was held by th
at the last term, in the case of *Strong v. Barnhart*, wh
on a motion to revive a dormant judgment, that the
fense to such judgment was that it had been paid
fied, or that there was no such judgment.

The judgment of the circuit court will be affirmed

B. W. MORRIS, Appellant, v. B. S. PERKI
Respondent.

JURY—ABSENCE OF TESTIMONY.—It is error to submit a quest
to the jury in the absence of any evidence tending t
such fact.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

Gatlin & Killen, and W. H. Effinger, for appel

W. W. Page, W. W. Thayer and G. W. Yocu
spondent.

By the Court, PRIM, C. J.:

This was an action in which appellant sought to obtain a judgment upon two promissory notes made by respondent as surety, and H. Boyd as principal, for the sum of four thousand dollars.

Respondent for answer to the complaint of appellant, alleges that on the second day of February, 1876, said Boyd requested respondent to become his surety on the notes in question, representing to respondent that he wished to raise said sum of money by loan to use in his business as a broker, and that respondent, for the purpose of aiding said Boyd to raise said sum of money, signed the notes in question in blank as to date and name of payee, as accomdation maker. Said notes were then delivered by respondent to said Boyd, who agreed to fill up the blanks as of the proper date, and insert the name of the person or payee of whom he should borrow the money. And respondent alleges that said Boyd wrongfully and fraudulently filed up the blank as to the date and inserted the names of B. W. Morris as payee, and erased from said note the words after maturity and inserted in lieu thereof the words "from date." That said alterations were made after said notes were signed by respondent and before they were delivered to said appellant. That no consideration passed from said appellant to said Boyd. That said appellant had due notice of all such matters and things. And that all of said alterations and changes were made without the consent or knowledge of respondent.

The evidence given at the trial tended to show that the notes were made and signed within the months of January and February, 1876. That Boyd was principal and Perkins surety. That at the time the notes were signed no payer was inserted and the dates were left blank. That these blanks were filled up by Boyd before delivery to appellant. That there was no actual delivery to appellant until about the middle of March, 1876, prior to which time Boyd had become a bankrupt, but that prior to said bankruptcy, in the early part of February of said year, Boyd had placed said notes in a pigeon-hole of his safe, wherein he kept the

papers of said appellant apart from his own, said pigeonhole being reserved by said Boyd as a safe deposit for the papers of said Morris. That at the time the said notes were made, the said Boyd represented to said Perkins (and thereby procured his signature), that he desired to raise money upon the same, and that he intended to negotiate the same, and that thereupon said Perkins left the notes so signed in blank in the possession of said Boyd. That said Boyd had for some years prior to the making of said notes, been the agent of appellant, Morris, for the loan of money; that he had had in his possession four thousand dollars which he had so loaned. That several times he, Boyd, had changed the form of the instrument and had kept the interest paid up to said appellant, who was himself ignorant of the particular form of investment. That on these three notes the interest was paid, on the first one to the tenth day of January, 1876, and on the second one to the fifteenth day of November, 1875. That said Boyd had told appellant sometime in the month of January, 1876, that he would either pay him the four thousand dollars in money, or would give him the indorsement of respondent for the same. That appellant was under the impression that the sums of two thousand dollars each were invested upon mortgage security, and that he so thought until the actual delivery to him of said notes. That they were sent to appellant, at his residence, inclosed in an envelope, by a messenger deputed by Boyd for that purpose. That appellant had received no other consideration or satisfaction whatever for the said sum of four thousand dollars so left by him with Boyd for investment. That said Boyd, in delivering said notes to appellant, designed and proposed to pay off and discharge thereby his said indebtedness to appellant, and that no part of said notes had been paid, except the interest as aforesaid. This was the evidence, and the whole thereof appertaining to the question of agency of said Boyd, either as to Morris or Perkins, to the making of the said notes and to the delivery thereof.

The court then charged the jury as follows: "Upon the misappropriation of the notes it will be necessary to con-

sider the relation which Boyd sustained in this transaction to Morris. It is claimed that Boyd in these matters with Perkins was Morris's agent. Whether he was or not, I submit as a question of fact for you to find. In this case, if Boyd was agent for the appellant in procuring the signature of respondent to these notes, the appellant is chargeable with the knowledge which Boyd had of all the matters here alleged and proven as matters of defense, whether he actually knew of them or not."

It will be seen that the court submitted to the jury the question of fact as to whether Boyd was the agent of appellant in procuring the signature of respondent to the notes in question. This the appellant claims was error on the ground that there was no evidence submitted at the trial tending to show that fact. We have examined the evidence recited in the bill of exceptions very carefully with a view to ascertain whether there was any such evidence submitted to the jury on said trial, and we find it contains no such evidence, consequently we think it was error in the court to submit that question to the jury.

We cannot presume that there was other evidence before the jury on that question, for the reason that it is stated that the bill of exceptions contains the whole of the evidence appertaining to the question of the agency of Boyd, either as to Morris or Perkins in the making of said notes. Having come to the conclusion that the court below erred in submitting this question of fact to the jury in the absence of any evidence on that question, the judgment must be reversed and remanded to the court below for a new trial.

Judgment reversed.

JAMES B. STEPHENS, Respondent, v. SCHOOL DISTRICT NO. 21, MULTNOMAH CO., Appellants.

ASSESSMENTS—INDEBTEDNESS MAY BE DEDUCTED FROM ASSESSMENTS FOR SCHOOL PURPOSES.—Taxable property, within the meaning of the statute which authorizes the levy of taxes by school districts, is that property which persons within the district own, exclusive of indebtedness. The clerks of school districts, in making assessments, must follow the general law governing assessors.

APPEAL from Multnomah County.

The facts are stated in the opinion.

Claude Thayer, for appellants.

H. T. and E. W. Bingham, for respondent.

By the Court, MCARTHUR, J.:

The appellants are the officers of School District No. 21, in Multnomah county. At the annual meeting of the qualified voters of said district, in April, 1876, there was levied a school tax of two mills on the dollar upon the taxable property therein. Respondent was the owner of certain real property in said district, of the value of forty-six thousand four hundred and fifty dollars, and was indebted within that district in the sum of two thousand dollars, and outside thereof, but within the state, about fifty-four thousand dollars. He applied to the directors to have all said indebtedness deducted from his assessment, which request was denied. These facts, in an agreed statement, were presented to the court below, where it was decided that said indebtedness should be deducted. From that decision this appeal is taken. The question for decision, therefore, is: Can indebtedness within the state be deducted from the valuation of the personal and real property of the resident of a school district, by the clerk of the district who is making an assessment of the property in his district, upon which a tax has been levied in the manner prescribed by law? By legislative enactment, it is made the duty of the clerk of a school district, whenever a tax is levied by the district, to make an assessment of all the taxable property therein, and deliver the assessment roll to the directors (Miss. Laws, chap. 4, sec. 54, subd. 3), whose duty it in turn becomes to examine and correct the same, and to issue warrants upon which the taxes are to be collected. (Id. sec. 87, subds. 2, 8.) It is because the act of October 29, 1872, relating to common schools, in which the sections and subdivisions cited above are found, does not in direct terms provide for the deduction of indebtedness, that appellant's

counsel argue that such deduction cannot be legally allowed. It is true there is in the act no provision, directly declaring that indebtedness may be deducted, nor is there any provision setting forth in detail the manner in which the assessment is to be made.

All that there is on this latter subject is contained in section 54, above referred to, which simply contains an enumeration of the duties of the clerk. That officer is authorized "to make an assessment of all the taxable property" in his district. What is taxable property? In answering this question, it is obvious that we should consider all the laws of a general character upon the subject of assessments and collection of taxes, for the rule of construction is that all statutes *in pari materia* must be so construed as that proper effect may be given to the provisions of each enactment. Applying this rule, we must construe the sections and subdivisions cited in connection with the general laws, in relation to the assessment of property and collection of taxes for state and county purposes. For such purpose the amount of taxable property is that which a person owns in excess of his indebtedness, for it is the "duty of the assessor to deduct the amount of indebtedness within this state, of any person assessed, from the amount of his or her taxable property." (Miss. chap. 57, sec. 16.) There being no other or different methods provided for making assessments in school districts, the clerks thereof must follow the provisions of the general laws governing assessors, and deduct indebtedness within the state, so that the taxes may be collected from what the general laws have in effect declared to be taxable property—the amount which one owns over and above his indebtedness within the state.

From these views it follows that the question presented must be answered in the affirmative, and the judgment of the court below affirmed.

J. W. MARSH, Respondent, v. J. C. TRULLINGER, Appellant.

EVIDENCE—ACTION FOR DAMAGES.—In an action for damages for flowing plaintiff by back water, caused by defendant's dam, it is competent for the plaintiff to show the condition of the land flowed, and what it would cost to clear it and put in cultivation.

IDEM.—Plaintiff may prove that his land has been so injured as to impair its future value.

DAMAGES—OVERFLOWING LAND.—Plaintiff may recover damages for injury occasioned by the back water percolating through the soil and rendering his land swampy.

NUISANCE—ABATEMENT OF IN ACTION FOR DAMAGES.—When in an action for a nuisance the plaintiff recovers damages, he may have a warrant to have the nuisance abated.

APPEAL from Washington County.

The facts are stated in the opinion of the court.

T. H. Tongue, Dolph, Bronaugh, Dolph & Simon, for appellants.

The case stated in the complaint is that defendant's dam has obstructed the waters of the creek in their natural flow, and caused them to flow back and overflow plaintiff's land.

The court authorized the jury to take into consideration damages, claimed to have resulted from water percolating from the creek underground into the lakes and upon the low lands of plaintiff, between which and the creek there were high ridges of land.

The two cases are entirely different, and a man summoned to answer to the one ought not to be called upon at the trial to meet and refute the other. Whether the water in those lakes and upon those low lands originated or were increased in quantity by percolation from the creek, might be largely matter of opinion; or the question might depend upon the testimony of witnesses familiar with appearances at those localities, both prior and subsequent to the time of the erection of the dam; whilst the question as to what lands were overflowed by back water from the dam was one patent to every observer. Defendant was bound to be prepared with testimony to meet the latter proposition, but to

allow plaintiff to make his case, in whole or in part, upon the former, was to take defendant by surprise, by calling upon him to meet an issue not tendered in the pleadings. (*Edge v. Pemberton,* 12 M. & W. 186; *Martin v. Gilham,* 7 Adolph & Ellis, 540; *Merle v. Hascall,* 10 Mo. 407; *Long v. Doxey,* 50 Ind. 385; *Pixley v. Clark,* 32 Barb. 268.)

On the trial plaintiff was allowed to introduce testimony against the objections of defendant, to prove the yearly value per acre of the land in question, if cleared and drained; the expense of clearing the uncleared part, and the cost of draining, if the creek had been left in its natural state.

Plaintiff's right to recover should be restricted to the actual loss sustained by him in being deprived of the use of the land in its present condition as wild, timbered or unimproved land. To allow witnesses to estimate the cost of draining the land and of clearing it up so as to make it fit for cultivation, and then to estimate its probable value per annum thereafter for cultivation, is a violation of the rule against allowing speculative damages. (*McGuire v. Grant,* 1 Dutcher, N. J. 356; *Ivey v. McQueen,* 17 Ala. 408; *Jones v. Gooday,* 8 M. & W. 146; *Walrath v. Redfield,* 11 Barb. 368; *Richardson v. Northrup,* 66 Id. 85; *Clark v. N. & M Co.,* 6 Nev. 203.)

It is established by the authorities that a person whose lands are injuriously affected by backwater from a millpond has no right to ask to abate any portion of the height of the dam, except so much only as is necessary to relieve the land from injury. In an action of this character, if the plaintiff designs asking for relief in the nature of abatement, he should take the verdict of the jury as to the proportion of the height of the dam necessary to be removed in order to his relief. This might readily have been done by special verdict, without which, as we submit, there is nothing upon which to base such judgment as was granted by the court below on plaintiff's motion. We think it self-evident that upon a general verdict for damages only, such as was found in this case, plaintiff would have no right to ask the court to tear out the entire dam, and ruin property worth perhaps thousands of dollars, to relieve half

acres of swamp land from overflow, unless this were absolutely essential for the purpose. And if the whole dam may not be destroyed needlessly, neither may any part of it; and what part is necessary to be removed is a question directly involved in the case, and one upon which the defendant is as much entitled to have the jury pass as he is to have them decide upon the *quantum* of damages, before any judgment is rendered against him. (Angell on Watercourses, secs. 389, 390; *Gates v. Blincoe,* 2 Dana, 158; *Moffett v. Brewer,* 1 Greene, 348; *Heath v. Williams,* 25 Maine, 209; *Great Falls Co. v. Worster,* 15 N. H. 439; *Wright v. Moore,* 38 Ala. N. S. 593.)

While the overflowing of the land of another by the erection of a mill-dam without license, has been treated as the creation of a private nuisance, remediable by action to abate it, or by suit to enjoin it, yet such erections being somewhat in the nature of a public benefit, have in many instances received from legislatures and courts such favor and privileges as are scarcely consistent with their classification as nuisances. In some of the states laws have been passed authorizing the condemnation of the lands to be flowed. (7 J. J. Marsh, 248; 1 A. K. Marsh, 589, 5 U. S. D. 899; Mills, secs. 57, 60, 67, 74.)

In 16 Wis. 692, it was held that after long enjoyment of the privilege by the mill owner, though without legal right, equity will interfere in his behalf to prevent the destruction of his water power without which his mill is valueless. While we have no similar statute in Oregon, and such equitable feature of the case cannot be considered by this court on this appeal, yet the fact that such consideration is elsewhere extended to property of this kind tends to justify our position that respondent should be jealously limited to his strict legal rights, and a technical adherence to the rules of evidence and law should be demanded of him, in his effort to destroy the value of appellant's mill by cutting off his water power, in order that opportunity may be afforded respondent to drain half a dozen acres of natural marsh.

T. B. Handley and Catlin & Killen, for respondent.

The court instructed the jury that if they found that ome part of the plaintiff's land mentioned in the com- laint, was overflowed or saturated by the water thrown ack by the dam, and plaintiff in good faith sought to im- rove the same, and was prevented by the said water, then he plaintiff is entitled to recover the net value of the use f the land, or what it would have been worth per year had he improvements been made, which the state of the water revented; but that he was not entitled to recover for the use f the land as if it were improved, unless he attempted to im- rove it, and was prevented by the wrongful acts of the de- endant.

The only triable issue in this cause was the measure of lamages, and on this question the rulings of the court on dmission of testimony, and the charge to the jury furnished he correct rule. Testimony was properly admitted as to the alue of the use of the lands, both in an improved and unim- roved condition, and also what was necessary to improve uch lands in order to furnish proper data for the jury to es- imate the damages sustained by plaintiff. Plaintiff having roved his title to the lands alleged to be injuriously affected by said dam, and the defendants having failed to prove any ver se right to flow said lands, the plaintiff is entitled to ominal damages in any event. (3 Kent. 440; Sedg. on dam. of Dam. 47.) The order directing the abatement of efendant's dam, was according to the statutory provision in uch cases. (Civ. Code, sec. 330.)

By the Court, BOISE, J.:

This action was brought to recover damages for a nuisance nd to have the same abated. The plaintiff alleges that he s the owner of land in Washington county, through which creek, called Dairy Creek, flows; that defendant owns nd on creek below him, and has built and maintains a am on said creek, which causes the waters of the creek to ow back and overflow his land.

The defendant admits that he maintains the dam to use ater to run his mills, and does not deny but that the waters

are thereby made to flow back and overflow the land of the plaintiff, but denies the damage; and by a separate answer claims a right to flow said land by pre-emption, which separate answer is denied by the plaintiff. On the trial of the case by the court and a jury, the plaintiff offered testimony tending to show the value of the overflowed land for cultivation, how much it would cost to ditch the same so as to drain it, and generally what it would cost to prepare this land for cultivation, and what the use of it would be worth per acre per year; when so prepared for cultivation. This testimony objected to by the defendant as incompetent, but the court overruled this objection and admitted the evidence. This evidence was offered to show how much the plaintiff had lost by being deprived of the use of his land.

It is claimed that such damages are too remote and speculative, and can afford no proper criterion from which to estimate the damages which the plaintiff had suffered. We think this evidence was properly admitted. Suppose this land had been prairie, which only needed to be fenced and plowed to be made ready for grain and the plaintiff was about to utilize it in that way, and was prevented by this act of the defendant, in causing the water to flow over it. There can be no question but plaintiff could show what the land would have been worth to him, and to estimate this value properly, the jury could take into consideration the condition of the land. There is no way to show the value of the use of land, except to show its condition, and the expense of putting it in a condition to be used, if any such expense is necessary, and whatever expense is necessary would abstract from its value and lessen the damages, and be beneficial for the defendant. And evidence tending to show impediments to the easy utilization of the land might be offered by the defendant to mitigate the damages.

We think also that it was competent for plaintiff to show to the jury that the flowage had so injured the land that it would impair is future fertility. It is also claimed that it was error to allow plaintiff as to costs of draining this land, because there was no allegation in the complaint that

plaintiff was injured by the water percolating through the soil and making it wet and swampy.

The complaint says that the dam of the defendant causes the water to flow back and overflow, and this is not denied, so it is admitted that this water did flow back and overflow the plaintiff's land, but it is denied that said flowage was any damage. To ascertain the damages it was proper for the condition of this land to be given to the jury, whether it was naturally dry or swampy. If it had been dry, the plaintiff could have used it without draining it; if swampy, he how the jury that he could have drained it and made t available had it not been for the flowage. It might be hat little expense would have been sufficient to put it in ondition for cultivation, and the land been very valuable ad the flowage not interfered. And when the jury were advised by the testimony as to the expense of draining and leaning this land they could form an intelligent judgment of he amount of damage the plaintiff had sustained in being deived of its use.

It was insisted by the defendant in the circuit court that he plaintiff could not recover under the pleadings in this ase for any damages caused by the back flow of the water, nless it was high enough to overflow the banks of the creek; hat is, if the back water caused the water to percolate hrough the soil and render it wet and swampy, such injury ould not be considered by the jury, and defendant excepted o an instruction of the court, submitting this matter to the jury.

The complaint alleges that the damages were caused by he dam of defendant, causing the water of the creek to flow ack and over the land of the plaintiff, and this allegation is ot denied by the owner and therefore must be taken as conessed; and this allegation is broad enough to include any amages which is caused to the land by the flowing back of ater. And we think the instruction to the jury, directing hem to estimate the injury, if any, in considering the damges, was correct. There is error alleged in the proceeding f the court on the motion of the plaintiff to have the dam bated.

The jury found that this dam was a nuisance to the plaintiff, and had allowed him damages. When in a case of this kind the jury so find, and the plaintiff recovers damages for the nuisance, the statute, section 330, p. 179, provides that in addition to the execution to enforce the judgment for damages, the plaintiff may, on motion, have an order allowing a warrant to issue to the sheriff to abate the nuisance. And in this case there being no issue to the jury as to what particular part of the dam caused the nuisance, the verdict simply establishes the fact that the dam was a nuisance to the plaintiff. If the defendant desired to show as a fact that the plaintiff's land would be restored to its normal condition by the removal of a part of the dam, he should have pleaded that fact in his answer, and if denied by the plaintiff, the jury could have determined that fact by their verdict. But the issue was whether the dam was a nuisance and that fact being established by the verdict, the statute has given the plaintiff a right to a warrant to have it abated.

There being no error found in this case, the judgment of the court will be affirmed.

J. E. HURFORD, Respondent, v. JAMES J. HARNED and CARRIE E. HARNED, Appellants.

PAROL EVIDENCE.—Parol evidence is admissible for the purpose of showing that a deed absolute on its face was in fact intended as a mortgage.

PRESUMPTIONS, IN FAVOR OF FAIR DEALING.—When any transaction is equally susceptible of two explanations, one of which is that it is fraudulent, and the other is consistent with good faith and fair dealing, that explanation will be preferred which is consistent with good faith and fair dealing.

APPEAL from Multnomah County.

This suit was brought to set aside a deed, absolute on its face, and have it declared a mortgage. Respondent, Hurford, and one Francis, were in business as partners in a music store in Seattle, W. T. Hurford's health was poor and the business was not very prosperous, but the concern was not insolvent. The partnership was closed, and a debt of Gray & Co., of San Francisco, amounting to one thou-

sand two hundred and sixty-four dollars, was presented for collection. Appellant Harned was a merchant in Portland, a member of the firm of A. F. Smith & Co., and his wife was Hurford's niece. Hurford went to Harned for temporary assistance in paying off the one thousand two hundred and sixty-four dollars until the money could be made on the stock of goods at Seattle, and offered Harned security on the property in question. Harned got a deed and had it made to his wife as security for his assistance. Harned made advances and assisted Hurford, but in five weeks the one thousand two hundred and sixty-four dollars and all debts were paid off, in full, from sales from the stock of goods.

The court below decreed the relief prayed for.

J. C. Moreland and J. F. Caples, for appellants.

Gibbs & Stearns and W. W. Thayer, for respondent.

By the Court, WATSON, J.:

Before looking into the evidence in this case, it is necessary that we notice a question of law, which affects the right of plaintiff to maintain this suit, under any view we may take of the evidence.

It is contended by counsel for the appellant that under the statute of frauds of this state it cannot be shown by parol evidence that a deed absolute on its face was in fact intended as a mortgage. Were this a new question in this court, it would merit a very careful consideration. But it is not a new question. This court had occasion to decide it in the case of *Smith v. Lampson,* decided at the December term, 1875, of this court. That case was thoroughly presented by able counsel, and the court, after a patient and thorough examination of the question, decided that such evidence is admissible for that purpose. The question being thus authoritatively settled by this court, we are not disposed to re-open it. The transcript presents no other question of law which is disputed. The only important questions are questions of fact, to be decided by us upon the evi[illegible]

The complaint is based on the [illegible] de-

scribed in the pleadings from plaintiff to defendants, although on its face an absolute conveyance, was intended in fact as a mortgage to secure the defendant, J. J. Harned, from loss by reason of certain advances which he was about to make for plaintiff, in order to relieve him from business difficulties in which he had become involved by a partnership in a music store at Seattle, W. T. That the deed was made to defendant, Carrie E. Harned, in trust, to hold the legal title to the real property therein described until her husband should be repaid for his advances, when she was to reconvey the premises to the plaintiff. That after the execution of the deed the advances were all repaid by a sale of the partnership assets at Seattle, but that defendant, Carrie, refuses to reconvey the premises.

The defendants, in their answer, while they admit that they received the deed for a merely nominal consideration, deny that it was in any way intended or received as a mortgage to secure the repayment of the advances made by J. J. Harned for plaintiff, but claim that he was fully secured for these advances by plaintiff's putting the partnership effects in the store at Seattle, in the hands of C. F. Shepherd, who was a partner with defendant, J. J. Harned, authorizing him to sell the same and pay off all such advances. They admit that all of said advances were repaid in a short time from sales made by Shepherd. They then allege that the deed made by plaintiff to Carrie E. was intended as a gift of the property thereby conveyed from plaintiff to Carrie E., who was his niece and to whom he was greatly attached. There is a direct conflict in the evidence; plaintiff and his wife both swearing that the deed was made and accepted in trust to secure the advances made by J. J. Harned, and defendant, Carrie E., swears just as positively that it was not made or received in trust for any purpose, but was a gift to her.

After a careful examination of the evidence, we think that the defendant Carrie is not sustained in her theory that the property was a gift to her. She swears to it, it is true; but both plaintiff and his wife contradict her, and she is contradicted by her own admissions made to Mrs. Sparrow, to Rev.

Wm. Roberts, and which she swears she made to Gov. Abernethy, all to the effect that the property was not hers, and that she held it in trust. We think also that the evidence proves conclusively that she received the property in trust, and with an understanding that she would some time reconvey it to plaintiff.

The question then presents itself, was this trust merely to hold the property until defendant J. J. Harned should be repaid his advances, being in effect a mortgage, or was it a fraud or intended as a fraud upon the creditors of plaintiff. If it was such mortgage defendants ought to be decreed to reconvey it. On the other hand, if it was intended to delay or defraud plaintiff's creditors, it is not in the power of courts of equity, consistent with their established rules, to relieve him.

The property must, as far as the parties are concerned, be left where their fraud placed it. It may be a hard case that this old man, who in a groundless panic, perhaps overcome by the timidity and irresolution of age, should have made a conveyance to those of his own blood whom he trusted, in order to delay his creditors, when he had left unassigned property amply sufficient to pay every dollar he owed, and that his confederates in this fraud, far more blamable than he, should betray him, and with coldblooded selfishness, strip him of his home, for which they did not pay a dollar, because he was weak and foolish, and trusted them, but *ita est lex*. We cannot change the law, because to enforce it will work a hardship.

We will proceed to examine the evidence on this point. In the outset it may be premised that a court of equity will never presume fraud when the transaction under their investigation is equally susceptible of two explanations, one of which is consistent with a fraudulent intent, and the other with good faith and fair dealing. In such case that construction of the acts of the parties which is consistent with good faith and fair dealing will be preferred.

In this case plaintiff and his wife both swear that [redacted] was intended as a mortgage. It appears from the [redacted] of defendant, Carrie E., that she received an

property in trust, and that she was to reconvey it. Between the presumption that this was a fraudulent trust, and that it was a mortgage, as sworn to by plaintiff and his wife, we adopt the more charitable view of the evidence, and that also, which is the more in accordance with natural justice, that Carrie E. did receive the conveyance in trust, but that such trust was only to hold the property until her husband should be reimbursed his advances made for plaintiff.

We may add that in weighing the evidence of Mr. Killin, in regard to admissions of plaintiff, we have taken into account the age of the plaintiff, his excitement at the time, and that while his statement that his intentions were to compel his creditors to go to Seattle to make their money, and to prevent them from making their money out of the Portland property, is some evidence tending to show a fraudulent intention in making the conveyance, we have not overlooked the fact that Killin merely gives his impressions of what was said, and does not pretend that he gives the words of plaintiff. It is also a fact to be taken in connection with this evidence, that at that time plaintiff had made an arrangement to have the debts paid by a sale of the partnership property at Seattle, and that he had made with defendant, J. J. Harned, an arrangement by which his partner, Shepherd, took charge of that property and applied it for that purpose. This may well have been the meaning of plaintiff in the conversation with Killin. Killin, angry as he swears he was, and not knowing of this arrangement, may have attributed all that was said to the deed in controversy.

It follows that the decree of the court below must be affirmed.

STATE OF OREGON, Appellant, v. OLIVER WITHAM, Respondent.

INDICTMENT FOR PERJURY—WHAT IT MUST SET FORTH.—In all indictments for perjury or subornation of perjury, it is necessary to set forth the substance of the controversy or matter in respect to which the crime was committed.

APPEAL from Benton County.

The respondent was indicted for the crime of perjury, mmitted before a grand jury. The indictment set forth, ith particulars of time and place, the fact of the examin- ion of the respondent as a witness before a grand jury duly panèled, etc., and it sets forth the substance of the alleged lse testimony, and alleges that "the said matters so testi- ed" were "material, and the said testimony" was willfully id corruptly false. The substance of the matter or contro- rsy pending before the grand jury, and concerning which e alleged false testimony was given, was not contained in e indictment.

The court below sustained a demurrer to the indictment, id thereupon the state appealed.

S. H. Hazard, District Attorney, for appellant.

Strahan & Burnett, for respondent.

By the Court, MCARTHUR, J.:

The indictment herein is fatally defective, because it fails show that the testimony, alleged to be false, was material some controversy or matter which was being investigated the grand jury, and which that body had jurisdiction to quire into. In all indictments for perjury or subornation perjury, it is necessary to set forth the substance of the atroversy or matter in respect to which the crime was com- itted. (Crim. Code, sec. 87.)

Judgment affirmed.

FREDERICK H. RAMSEY, Respondent, v. JAMES LOOMIS et al., Appellants.

MPLAINT—SUFFICIENCY OF, IN A SUIT TO REFORM A DEED.—In a com- plaint to reform a deed for an alleged mistake in the description of the land, the complaint is sufficient, if it set out the defective description and the true description and allege the mistake.

IDENCE—DEED SOUGHT TO BE REFORMED MAY BE USED FOR WHAT PUR- POSE.—A deed which is defective is not so far void that in a suit to reform it, it cannot be used as evidence to prove unequivocal declarations of the grantor contained in it.

NATION ACT—SEGREGATION UNDER.—Land claimed under the "dona- tion act" is segregated when the notification is filed.

IDEM—SALE OF LANDS CLAIMED MAY BE MADE BEFORE PATENT ISSUES. —Land claimed under the "donation act," in which the settler has resided for four years, and cultivated it during that time, can be sold by such settler before the patent is issued.

MISTAKE—DEED MAY BE CORRECTED, HOW FAR.—In a suit to reform a deed, lands which were not included in the deed, but omitted by mistake, may be inserted in the deed as reformed.

APPEAL from Multnomah County.

This is a suit brought by the respondent to reform two deeds, one made April 14, 1855, by one James Loomis (now deceased) to Perry Baker, the other made March 7, 1856, by Perry Baker to Thomas Carter. It was brought against the grantees in the two deeds and the heirs at law of James Loomis, deceased.

In October, 1854, Loomis filed his notification upon a section of land. The land was surveyed by an officer of the land-office on the thirteenth of December, 1858, and the survey was approved by the surveyor-general on the twenty-seventh of July, 1860. Loomis having died in the meantime, final proof of residence and cultivation was made by his heirs at law, and on the eighth of March, 1866, a patent was issued to them and to the widow, Sarah Loomis, giving to her the west half of the claim, and to the heirs the east half.

The deed from Loomis to Perry Baker, describes the land intended to be conveyed by it as follows: Commencing at the north-east corner of James Loomis's claim; thence northwest, on said claim line, one hundred and sixty rods; thence southwest one hundred rods; thence north sixty degrees, east one hundred and sixty rods; thence north, on said claim line, to the place of beginning, so as to include one hundred acres.

It is further described as a part of the donation land claimed of Loomis. The conveyance from Baker to Carter contains the same description. Allegations of these facts are made. It is also alleged that it was the intention of the grantors and grantees in both these deeds that a tract should be conveyed, described as follows: Commencing at the north-east corner of the donation land claim of James Loomis and

ife, and running thence south sixty degrees, west on the ne of said claim, one hundred and sixty rods; thence south enty-two degrees and thirty minutes, east one hundred ds; thence, in a line parallel with said first line one hun-ed and sixty rods, to the easterly line of said donation land aim; and thence, on the said claim line, to the place of be-nning. The respondent also alleges that he is the owner in e-simple, by mesne conveyances from Carter, of the prem-es as intended to be conveyed, and that he is in possession a part of them.

The case having been referred, the referee found in favor the plaintiff, and a decree was thereupon rendered in the urt below granting the relief prayed for.

J. J. Browne for appellants:

The complaint does not state facts sufficient to constitute a use of suit. (*Lewis v. Lewis*, 5 Or. 169; *Everts v. Stiger*, Or. 141; *Wemple v. Stewart*, 22 Barb. 154; *Simpson v. Viggin*, W. & M. 413; *Clarke v. Davenport*, Bosw. 95.)

The title to public land being in the government, can only ass from the same by patent duly issued, or by an act of con-ress in words of present grant; and in the latter case, when cannot be ascertained from the law what land has been ranted and to whom granted, but in order to ascertain these cts it is necessary to look to the subsequent acts of the gov-rnment, such as segregating the land by survey, identifying ne purchaser by proof, ascertaining the facts of residence, tizenship, etc., concluded finally by issuing a patent, then ne patent passes the legal title from the government to the rantee. (*Gardner v. Miller*, 47 Cal. 571; *Railway Co. v. Prescott*, 16 Wal. 603; *Railway Co. v. McShane*, 22 Id. 444; *hant v. Reynolds*, 49 Cal. 217; *Gibson v. Chouteau*, 13 Wal. 99; *Johnson v. Towsley*, Id. 72; *Keith v. Cheeny*, 1 Or. 85; *Jackson v. Lawton*, 10 Johns. 24; *Bean v. Armitage*, 47 Mo. 138.)

The right of a settler upon public lands under the donation aw was a possessory right merely—no title passed to him un-l his claim had been segregated by survey and the cost of ne survey paid, and until he had otherwise fully complied

with the law. (Donation Law, secs. 4-7; *Railway Co. v. Prescott*, 16 Wall. 654; *Railway Co. v. McShane*, 22 Id.; *Terry v. Megerle*, 24 Cal. 609.)

A patent is conclusive evidence in all courts, and all forms of judicial proceedings of the regularity of all previous steps, and no fact behind it can be investigated except in a direct proceeding, to set aside the patent for fraud or mistake, or to declare the patentee a trustee for the benefit of some one to whom the patent should have been issued. (*Johnson v. Towsley*, 13 Wal. 72; *Stenger v. Young*, 3 Pet. 338; *Jackson v. Marsh*, 6 Cow. 282; *Jackson v. Hart*, 12 John. 77; *Boardman v. Read*, 6 Pet. 342; *Cook v. Staats*, 18 Barb. 407; *Lessier v. Price*, 12 How. 74; Donation Law, secs. 4-7.)

Neither the land now in the possession of the respondent, nor any other was, by the donation law, granted to James Loomis, sen., but said land was granted by the patent in evidence in this suit, to the heirs (the widow and children) of James Loomis, deceased, and they thereby became the legal owners by purchase, as the direct donees of the United States. (*Hartley v. Brown*, 46 Cal. 202; *Wiggins v. Lusk*, 12 Ill. 135; *Phelps v. Kellogg*, 15 Id. 135; *Field v. Squiers*, 1 Deady, 382; *Lamb v. Starr*, Id. 451; *Delay v. Chapman*, 3 Or. 459; *Davenport v. Lamb*, 13 Wal. 431; *U. S. v. Dickson*, 15 Pet. 165; *McDonald v. Smally*, 6 Id. 261; *Hartley v. Brown*, 51 Cal. 465.)

The deeds from Loomis to Baker, from Baker to Carter, from Carter to Fuller, and from Carter to Walker, are all void upon their face for uncertainty. The land intended to be conveyed cannot be ascertained from the descriptions. (*Loomis v. Ramsey*, Or. Dec., 1875; 2 Parson's Con. 557; 2 Phil. Ev. 278; 4 Phil. Ev. 525; *Deery v. Cray*, 10 Wal. 269; *Banks v. Moreno*, 39 Cal. 233; 1 Greenleaf Ev. 297; 3 Bou. Inst. 400.)

A contract void for uncertainty cannot be reformed. "A court of equity will make a valid contract operate according to the intent of the parties, but will not give vitality to that which is void upon its face." (*Everts v. Stiger*, Or. Dec., 1876; Id. 147; 3 Parson's Con. 353.)

Courts of equity have always refused their aid to stale

demands where the party has slept upon his rights, where he knew of the mistake when it was committed, or had full possession of the means of detecting it, which is the same thing, and neglects to bring his suit till after the statutory period, the suit will be barred. (Ang. Lim. 187.)

Where a written contract is entered into between two parties, having no relation of especial trust or confidence, and a knowledge of the terms of the contract, are equally open to both parties, the liability thereby created cannot be avoided, though the terms differ from the contract agreed upon orally. (*Hawkins v. Hawkins,* 50 Cal. 558; *Board of Com. v. Younger,* 29 Cal. 176; Story's Eq. J., sec. 113; 2 Kent Com. 484.)

To justify the reformation of a contract on the ground of mistake, the evidence should be such as to strike all minds alike as being free from suspicion and entirely satisfactory. (*Shay v. Petters,* 35 Ill. 361; *Newas v. Dunlap,* 33 N. Y. 676; Fry Specific Per. 312, sec. 505; *Lewis v. Lewis,* 4 Or. 177; *Everts v. Staier,* 5 Or. 169.)

The court will not interfere where the instrument itself is such as the parties intended it to be. If the parties voluntarily chose to express themselves in the language of the deed, they must be bound by it. (Story's Eq. J., sec. 113; Willard's Eq. J., sec. 69.)

The declarations of a party as to the title to real property, are a dangerous species of evidence, and should not be received as evidence of title. (*Davenport v. Lamb,* 13 Wal. 431; *Burr v. Shearman,* 6 John. 19; Greenleaf Ev. 200.)

In order to reform a written contract, to change its language so as to make it read materially different from what is expressed upon its face, three things must be established beyond a reasonable doubt, and by unquestionable proof: 1. That there was a mistake; 2. That the mistake was mutual—that the contract as written does not express the intention of either party; 3. That it was the intention of both parties to use other and different language than that expressed in the writing, and that they had agreed as to what that language should be. In other words, it is necessary to show not what one party intended, but the meeting of both, and that

their minds met and agreed. The actual agreement must be established. (Story's Eq. J., 146; *Heleman v. Wright,* 9 Ind. 126; *Shay v. Pelles et al.,* 35 Ill. 361; *Ruffner v. McConnell,* 17 Id. 212; *Linn v. Barker,* 7 Ind. 69; *McClellan v. Sanford,* 26 Wis. 595.)

But suppose the respondent, at the time he purchased, believed that Loomis, before his death, or that his heirs, after that time, had sold the land now in possession of the respondent, and that there was a regular chain of conveyance from them to his immediate grantors, yet would he be entitled to equitable relief? Was it not his duty, at the time he purchased, to ascertain in whom the title was vested?

"Equity gives relief only to the vigilant, and not to the negligent * * to those * * who make inquiry, and not to those who * * have chosen to omit all inquiry which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss or may suffer the inconvenience." (Story's Eq. J. 146.)

This is a suit brought, as already stated, to reform two deeds, one from Loomis to Baker, and the other from Baker to Barter. The latter has never been served with process, is not in court, and consequently is not a party to the suit. He is a necessary party to a complete determination of the questions involved in the suit. He is an indispensable party to the rendition of any decree.

Each person having an interest in the subject-matter of the suit, or who is a necessary party to a complete determination of the question involved, should be made a party either as plaintiff or defendant. (Civ. Code sec. 360; Mitford & Tyler, P. & P. 16.)

Catlin & Killen, for respondent:

The testimony fully establishes the location of the north line and north-west corner of the tract intended to be conveyed. In these deeds two descriptions are given, one by claim lands and one by courses. Where more than one de-

scription is given, and there is a discrepancy, that description will be adhered to which there is the least likelihood that a mistake could be committed. Actual occupation, ancient reputation, the admissions of the party in possession against his interest, marked trees, the lines of adjoining surveys, and monuments erected at or soon after the date of the grant of adjoining surveys; these are all admissible for this purpose, though it conflicts with the courses and distances called for in the deed. (Wash. on Real Prop. 674; 2 Hill R. P. 345; 8 How. U. S. 274.) The location of the stake on claim line, at the north-east corner of the one hundred acre tract, after the grant, became as effectual and conclusive upon the parties as if they had been in existence when the deed had been executed. (2 Hill. R. P. 366; *Jackson v. Vedder*, 2 Cai. 210; *Jackson v. Wood*, 13 John. 345; *Baldwin v. Brown*, 16 N. Y. 359.)

This court, in *Goodman v. Myrick*, 5 Or. 65, held that, in ascertaining the boundary of a donation claim, marked lines and corners are the best evidence; and when they are established, courses and distances must yield to them. (*Lewis v. Lewis*, 4 Or. 177; *Matthews v. Eddy*, Id. 225; *Newsom v. Greenwood*, Id. 219; *Raymond v. Coffey*, 5 Or. 182.)

By the Court, BOISE, J.:

The first point presented in this case, is whether the allegations in the complaint are sufficient to show a cause of suit. The complaint sets out the description of the land as contained in the defective deed, and then says that it was the intention of the grantors to convey a parcel of land, not as described in the deed, but having a description which is given, and alleges that the description in the deed does not describe the land intended to be conveyed; that the parties supposed the deed did convey the land bounded by the alleged true description. All that is necessary in the complaint is, that it shall plainly show to the court the alleged mistake which it is asked to correct, and if the false description and the true description are both set out in the complaint, the [redacted] formed of all the facts which are necessary to grant the relief prayed for. (1 Abb. [redacted]

Pl. 430.) It was claimed by the attorney for appellant that the original contract of sale should be set out; this is true, but it is set out. The statement in a complaint, that a party sold lot two, but by mistake, made a deed to lot one, states the whole contract so far as the description of the thing sold is concerned; by this statement the court is informed that the deed is made for lot one, and that it ought to be for lot two, and the court is asked to insert in the deed the word two instead of one. More words could not make the matter any plainer, and this is all that is required in practice. If the mistake is denied, then an issue is made, which must be determined by the evidence. Some question was made as to the amount of evidence necessary to reform a deed, when the answer denied the alleged mistake. This question was settled in the case of *Gillespie v. Moon,* 2 Johns. Chan. 585, where it was held that a mistake could be established by oral testimony, and such has been the practice of this court in several cases heretofore considered. (*Lewis v. Lewis,* 4 Or. 177; *Matthews v. Eddy,* 4 Id. 225; *Newson v. Greenwood,* Id. 119; *Raymond v. Coffee,* 5 Or. 132.) In the case of *Newsom v. Greenwood,* in speaking of the character and amount of the evidence necessary to show a mistake in a deed, the court say, "the evidence must be clear and satisfactory, so as to establish the mistake to the entire satisfaction of the court."

In this class of cases where the deed sought to be reformed shows imperfection on its face, as it does in this case, this fact is evidence to show that it does not express the intention of the parties. The deeds in this case in the description of the land are indefinite. The first course is north-west one hundred and sixty rods; the next south-west one hundred rods; thence north sixty, east one hundred and sixty rods; thence north to the place of beginning, not giving the length of the last line. These courses cannot be literally correct and describe and bound one hundred acres of land, so it is evident the parties to the deed containing this description were in error in that description of the one hundred acres. This needs no parol proof, for it is to be presumed the parties in-

tended to describe and convey some definite piece of land by this deed of the area of one hundred acres. Now the plaintiff comes and in his complaint shows to the court what land it was the intention of the grantors in these deeds to convey, and the grantees to receive, and this is denied. Plaintiff claims that the land intended to be conveyed, was one hundred acres in the north-east corner of the donation land claim of James Loomis, extending one hundred and sixty rods on the north line, and one hundred rods on the east line of said claim, and being in the form of a parallelogram one hundred and sixty rods long, and one hundred rods wide. Now let us examine the evidence and see if plaintiff has proved his allegation by evidence which should fully satisfy the court.

1. Let us examine this deed which is sought to be reformed. The description in it is a parcel of land in Multnomah county, commencing at the north-east corner of James Loomis's claim; thence north-west on said claim line one hundred and sixty rods; thence south-west one hundred rods; thence north sixty, east one hundred and sixty rods; thence north on said claim line to the place of beginning, so as to include one hundred acres, and being a part of the claim held by Mr. Loomis as a donation.

It was admitted that the courses given in this case cannot agree with the claim lines, therefore claim lines which are monuments must govern, and the courses must be rejected. Thus rejecting the courses, the description is "beginning at the north-east corner." That is a fixed point, but the course having been found incorrect is rejected, and we must inquire in what direction the first course was intended to run. It was to be on the claim line, and from the north-east corner. Now let us go to the last line, which is described in these words, "thence north to the place of beginning." It must then approach the north-east corner from the south, and it comes from the end of the third line, which was one hundred and sixty rods long, and the land intended to be conveyed was one hundred acres. The length of the three first lines [illegible] given, being respectively one hundred and sixty, [illegible] and one hundred and sixty rods, and the four [illegible]

area of one hundred acres, the fourth line must be one hundred rods long, and the long lines must be parallel to each other, as also the short lines, and the tract of land a parallelogram. And as the fourth or last line comes to the north-east corner (the place of beginning) from the south, and on a line of said land claim, this land would necessarily be in the north-east corner of this land claim, extending one hundred and sixty rods on the northern line and one hundred on the eastern line of the claim, if the land claim was bounded by lines running to the cardinal points. But the evidence shows that the northern line of the claim runs north sixty-three degrees east, and the eastern line runs north about twenty-three degrees west, so that both these lines approach the north-east corner bearing north. So we will look further into the testimony to see in which direction the first-named line, of one hundred and sixty rods, runs—that is, did it run westerly along the northern line of the claim, or along the eastern line bearing south by east?

It appears from a deed in evidence, executed by Christopher Loomis over to the heirs of James Loomis, that he recognized this land as being in the north-east corner of this land claim, and extending one hundred rods on the eastern and one hundred and sixty rods on the northern claim line, also the same in deed of George W. Fuller and wife, who were also heirs of said Loomis. William Gatton, who owned a land claim adjoining Loomis on the north, swears that he knew the lines of the Loomis claim, that he knew them as early as 1853, that there was a blazed line around the claim and stakes at the corners, and that in 1858 a survey or surveyed the north line of this claim and set a stake on the division line between James Loomis and wife's where that line terminates on the north line of the claim, also that said surveyor ran a part of the division line between James Loomis and wife's, and that a stake was set on this line one hundred rods from said north line. And said witness further states that James Loomis told him that he had set a stake on this division line one hundred rods from the north line of his claim, and that it was the corner of the land he, Loomis, had sold to Perry Baker, or where that piece came to. Witness

also states that Loomis told him he did not set a stake at the south-east corner of this one hundred acre tract because it came in the lake.

There is no evidence that directly contradicts these statements or tends directly to prove that the one hundred acre tract was in any other location. And the deed shows that it was the intention of James Loomis to convey one hundred acres of land, so the only matter to be determined is its location. A deed in which the description of the land is so uncertain as that the location of the land cannot be determined from the deed, is not on that account so void that it cannot be used in a proceeding to correct it, as evidence of unequivocal declarations of the grantor contained in it. In this case the deed is evidence that the piece intended to be conveyed was one hundred acres, and that it was in the said claim of Loomis, and had its north-east corner at the north-east corner of the claim, and taking all the evidence in this case, we think it is sufficient to show that the land intended to be conveyed is as claimed in the complaint, and so far as the mistake alleged in the complaint is concerned it is established by the evidence.

It was claimed in the argument that a court of equity would not correct a deed so as to make it cover land which was not mentioned in it, and consequently no relief could be granted in this case. It is a common practice of courts of equity to correct mortgages so as to cover lands which were intended to be pledged for debts, but by mistake were omitted from the mortgage, or when the mortgage described other land than that intended, to so correct it as to describe the land intended to be mortgaged. There can be no sound reason urged why a man shall have a parcel of land, which he has by mistake included in a deed, stricken out because he has not been paid for it, and not have a parcel of land inserted in a deed, which by mistake was left out, for which he has paid the full consideration, and there is no such distinction in reason or by authority [illegible] claimed that no relief can be had in this cas[illegible] survey of this claim was not made [illegible] the land determined until af[illegible] and that the

land went to the heirs of James Loomis by the United States patent, which, in this case, was issued to the widow and heirs; that is, that there was no segregation of the land before the final survey; we think such is not the rule. The settler is required to describe this land in his notification, and when such notification is filed, the land is segregated, and such was held to be the law in the case of *Fitzpatrick v. Du Bois et al.*, 2 Saw. 434, tried before the United States circuit court of Oregon, and from the time of filing the notification the settler has in the land an estate of inheritance which can be defeated only by this failure to comply with the act of congress. It is also claimed that the patent being issued to the heirs of James Loomis, that they take this land free from any incumbrance on it, created by James Loomis, whose estate in the land ended with his wife. This point has been decided adversely to this proposition by this court in the case of *Dolph v. Barney*, 5 Or. 191, when it was held that a settler on the public land, under the donation law of Oregon, holding under the fourth section of this act after four years' residence and cultivation had an estate in fee in the land which he could sell before he obtained a patent thereto, and that his heirs on receiving the patent after his death were bound by his deed, and took the patent subject to such sale, and that decision is decisive of this point in this case.

Having considered all the points necessary to a decision of this case, it is ordered that the decree of the circuit court be affirmed.

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*THOMAS MILARKEY, Respondent, v. F. A. FOSTER, Appellant.

DAMAGES—OBSTRUCTING HIGHWAY.—To maintain an action for an obstruction of a public highway, it must be shown that the party has suffered special and peculiar damages not suffered by the public generally.

IDEM—COMPLAINT.—A complaint which shows that the plaintiff had occasion to travel over a public highway with teams and loaded wagons, in order to deliver freight in different localities, and did actually attempt to do so, but was prevented and delayed for a period of five days by means of an unlawful obstruction placed in the road, was held, on general demurrer, to be sufficient.

*See 25 Am. Rep. 531 and note.

EVIDENCE—ORAL EVIDENCE ADMISSIBLE TO PROVE A TOWN.—Oral evidence is admissible to prove the number of dwelling-houses, work shops, stores and inhabitants, in a place alleged to be a town, in order to determine whether such a place is in fact a town within the meaning of section 32, chap. 7, Mis. Laws, of the corporation law, prohibiting toll-gates within the limits of a town.

APPEAL from Union County.

This was an action for damages for the obstruction of a highway. The following is the complaint: "That on or about May 26, 1876, he, the plaintiff, arrived at the town of Orodell, in Union county, Oregon, with an eight mule team and two freight wagons, which were his property, and which were loaded with over ten thousand pounds of goods, wares and merchandise, which he had contracted to deliver at sundry points in Union and Baker counties; that he was then on his way to deliver said" freight; and that, in order to get to said points, this plaintiff was necessarily compelled to pass over and through the main highway leading through said town and located therein. "That at said time and place said defendant forcibly, wrongfully and unlawfully obstructed the said main highway passing through said town, by erecting a toll-gate thereon, and keeping the same standing therein, and forbidding and preventing this plaintiff from passing through the same with his said teams; and that plaintiff was thereby prevented from passing through said place with his said teams for a period of about five and one-half days, to plaintiff's damage, two hundred and fifty dollars."

The answer denies the alleged forcible, unlawful and wrongful obstruction, and alleges that, at the time of the alleged obstruction, the highway was the defendant's private property under a lease from a corporation owning the same.

The respondent recovered judgment.

M. Baker and Bonham & Ramsey, for appellant.

L. Evarts, for respondent.

By the Court, PRIM, C. J.:

The first error complained of by appellant is the overruling of his motion for judgment on the pleadings. This mo-

tion, it appears, was interposed in the circuit court for the first time. It is based upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in this, it does not show that respondent suffered any special or peculiar damages not common to the public generally. The obstruction of a public highway is a public nuisance, and it is well settled "that no person can maintain an action for a common nuisance, unless he has suffered therefrom some special and peculiar damages, other and greater than those sustained by the public generally." Those who have no occasion of business or pleasure to pass over a road thus obstructed, and who have not attempted it, cannot maintain an action for the obstruction thereof. (*Brown v. Watson,* 47 Me. 161.)

By an examination of the complaint in this case, we find that it is alleged that respondent not only had an occasion of business to travel over the road, but did actually attempt to do so with his teams and wagons in order to deliver the freights with which they were loaded, and that by means of the obstructions complained of by respondent, he was prevented and delayed from doing so for a period of five and a half days, to his great damage, etc. These allegations we think are sufficient to show that respondent suffered special and peculiar damages other than those sustained by the public in general, who had no special occasion to travel over the road. This complaint would be good on general demurrer, and this motion could not be sustained unless the complaint is bad on general demurrer.

The next question of error is as to the admissions of oral evidence to prove that Orodell was in fact a town at the time of the alleged obstructions of the highway. At the trial it became pertinent for respondent to prove that Orodell was a town within the meaning of section 32 of the corporation law, which prohibits the establishment of toll-gates within the limits of any town, whether incorporated or not. In answer to a question propounded by respondent a witness was permitted to state that "there were about twenty-five houses in the town of Orodell, big and little, on the

twenty-sixth day of May, 1876, and that there were about eight or nine of them occupied with families. That Orodell is a town laid off into streets, alleys, blocks and lots. That there is one mill, one store, one blacksmith shop, one wagon-shop and a post-office." Another witness was allowed to state that he saw parties surveying the town and saw the stakes afterwards. To the admission of this evidence the appellant objected, on the ground that the existence of a town cannot be proven by oral evidence, but should be proven by a copy of a recorded plat. This ruling of the court is assigned and urged here as error.

We think there is nothing in this objection. A statute is cited which contains a provision that any person who shall dispose of, sell, or lease any lot, in any town which has been laid out, before the plat thereof has been duly acknowledged and recorded, shall forfeit fifty dollars, etc. But we are unable to see the bearing of that statute upon the question at issue. Any proprietor of land might cause a town to be laid out, and the plat thereof acknowledged and recorded, and yet we apprehend it would not be a town without houses and inhabitants.

The plat might exhibit the streets, alleys, blocks and lots and their localities, but oral evidence would be necessary to show that it had houses and inhabitants. It is also urged that the court erred in refusing to let appellant, as a witness in his own behalf, answer the following questions:

"State what plaintiff said to you at Orodell, on the twenty-sixth day of May, 1876, if anything about having had toll demanded of him at the toll-gate of the road company, at Lee's encampment in the Blue Mountains, before he reached Orodell on said trip, and whether he refused to pay the same then?" This question, we think, was properly refused. If respondent had refused to pay his toll at the place where appellant had a right to demand it, that did not justify him in obstructing the road at the place in question. If respondent had passed through the gate without paying his toll, appellant had his [illegible] and should have resorted to it. No [illegible]

law in his own hands and thus do an unlawful act in order to redress a wrong. There being no error affecting any substantial right of appellant, it is ordered that the judgment of the circuit court be affirmed.

Judgment affirmed.

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*JOHN R. ROY, Respondent, v. F. C. HORSLEY, Appellant.

JURISDICTION—TESTIMONY MAY BE TAKEN BY A PERSON APPOINTED FOR THAT PURPOSE, AND CAUSE SUBMITTED IN VACATION, IF PARTIES SO STIPULATED.—The parties after issue joined stipulated that the trial of the issues by a jury should be waived, that the evidence should be taken in writing before a referee and the case submitted to the judge for his decision at chambers. The evidence was so taken and submitted, and the court, having heard the evidence at chambers, finally decided the case and entered judgment in term: *Held*, that the judgment was not void for want of jurisdiction.

APPEAL from Grant County.

The facts are stated in the opinion.

James K. Kelly, for appellant.

W. B. Laswell, L. O. Sterns, and Bonham & Ramsey, for respondent.

By the Court, WATSON, J.:

At the September term, 1876, of the court below, the issues having been made up in this cause, the court below made and caused to be entered in the journal the following order: "And it appearing to the court that this was an action based upon mutual accounts, and from its nature improper to be submitted to a jury, it was ordered by the consent of the counsel that the testimony be taken before Phil. Metchan, clerk of this court, as referee, commencing on or before the first day of March, 1877, and that the testimony when taken be submitted to the judge of this court at chambers, the decision and judgment to be thereupon rendered and entered in the journal, enforced as of term time."

* See 25 Am. Rep. 537 and note.

At the June term, 1877, the court made and caused to be entered in the journal the following order: "John R. Roy v. F. C. Horsley—It is hereby ordered that the clerk of this court transmit the testimony in this case to the judge of this court, at chambers, at the Dalles, Oregon, so that the same shall reach the said place on the thirtieth day of June, 1877; and further, that between this date and the day of the transmission of the testimony he fix and appoint such times and places as in his judgment may seem proper for the examination or cross-examination of such witnesses as either party may desire to examine, and that he notify the counsel for the respective parties thereof to the end that this cause may be submitted without further delay."

At the September term, 1877, on the first day of the term, the judge filed his decision, dated the same day, and thereupon a judgment was rendered and entered in the journal in favor of the plaintiff and against the defendant, for the sum of two thousand four hundred and sixty-two dollars and sixty-four cents, in accordance with said decision. From that judgment this appeal is taken. The judgment contains the following recitals before the findings upon which it is founded. This cause came on to be heard at the regular September term, 1876, the plaintiff appearing by W. B. Laswell and L. O. Sterns of counsel, and the defendant by C. W. Parrish and M. L. Olmstead of counsel, and the case being one in which the examination of a large number of accounts was necessary, the counsel for the respective parties expressly waived the right of trial by jury and consented that a referee be appointed by the court to take the testimony, and that the case be submitted to the judge in chambers, upon the completion of the taking thereof. Therefore the court appointed Phil. Metchan, esq., sole referee to take the testimony and report the same as aforesaid, and the said referee duly proceeded to take, and did take, the testimony and reported the same on June 30, 1877, at which time counsel submitted written arguments and briefs. Thereupon the same was taken under advisement, and the decision thereon reserved until this day, and now being fully advised as to all questions of fact

and of law arising upon the record and the arguments submitted, the court finds the following conclusions of fact:

The transcript further discloses that on the seventh judicial day of the same term on motion of defendant the time for filing a bill of exceptions was extended thirty days, but it does not appear that it was ever presented or filed. The following are the assignments of error in the notice of appeal:

1. That the said court or judge erred in receiving and considering the pretended report of Phil. Metchan, made June 30, 1877, as the report of the referee in said case, for the reason that on the date of the making of the said report the said Metchan was not referee. It appearing from the record of said case that the power of the referee appointed by the court ceased March 1, 1877, and that during his said authority the referee in this case made no report as required by the order of said court and by law.

2. The court erred in proceeding to make up its findings of facts in this case from the said pretended report of the said Phil. Metchan before said report had been filed in said circuit court according to law. That said proceeding, to make up its findings prior to said filing was to the injury of a substantial right of the defendant in this: It deprived the defendant of his right to make objections to said report, which under the statute cannot be made until after the filing of said report. It appearing from the records of said case that said report never has been filed in said court or in said case.

3. The court erred in proceeding to make its findings of the law in this case upon the said pretended unfiled report of the said Phil. Metchan for the reason and with the effect stated above.

4. The court, by its findings in said case, determined erroneously that "the defendant undertook and promised to pay plaintiff wages at the rate of one hundred dollars per month, together with board and lodging." This being a finding of a special agreement to pay a certain fixed sum per month, a special contract, when the pleadings only set up an implied

contract as to price and value of services, *i. e.* upon *quantum meruit.*

5. The court erred in finding that the plaintiff is entitled to recover of and from defendant the full sum of two thousand four hundred and sixty-two dollars and sixty-four cents, together with costs and disbursements against defendant, for the reason that there is no evidence or testimony on file, and the records show none was taken orally in said case to sustain said finding. The records show that the only testimony in the case being that forwarded to said judge at chambers by Phil. Metehan, under date of June 23, 1877, long after his power as referee in said case had expired.

The first, second, third and fourth assignments of error are based on the theory, urged by counsel for appellant, that this was a trial or attempted trial before a referee, as provided for by title 6 of chapter 2 of the code of civil procedure.

Were this theory the correct one, the objections to the judgment of the court below urged would be well taken. It would have been necessary for the referee to make and file his report, stating separately his conclusions of law and fact, and on motion of either party the court should have set aside the report, or have confirmed the same and rendered judgment accordingly. (Civil Code, sec. 224.) The referee neither made nor filed a report as required by this section. But we do not think this was a trial by a referee. We are of the opinion that the journal entries in the transcript show that the parties in open court waived a trial by jury, and consented to try the cause before the court. They also stipulated that the evidence should be taken before a referee and submitted to the court or judge thereof at chambers. The trial then was a trial by the court in accordance with title 5 of chapter 2 of the code of civil procedure. It is claimed, by counsel for appellant that even if this were a trial by the court, the judgment is erroneous, because the evidence was taken before a referee and submitted to the court in writing and was not taken orally, as provided by section 217 of the code, which provides,

that the order of proceedings on a trial by the court shall be the same as provided in trials by jury. We think the parties had the right to insist that the evidence should be taken and heard orally, but we are of the further opinion that they could waive this right. In civil cases there are but few exceptions to the rule that a party may renounce a benefit or waive a privilege which the law has conferred upon him. In this case they expressly agreed to take the evidence in writing. The maxim *consensus tollit errorem* applies to all errors in civil trial, except those which go to the jurisdiction of the court. (Broom's Leg. Max. 135.)

It is also urged by counsel that the stipulation provided for a trial by the judge at chambers and that the parties cannot by consent provide for such a trial. It is not necessary for us, in this opinion, to pass upon the question whether they could provide for a trial and judgment in vacation. The record in this case shows that the trial was in fact concluded and the decision made and filed, and the judgment rendered and entered in the term of the court. No objection seems to have been made, and the assignment of errors in the notice of appeals does not show that any objection was made to this mode of trial.

It cannot be said that the judgment was without jurisdiction. The court was in session; it had jurisdiction of the subject-matter and of the parties; it was authorized to try the action. We have carefully examined the authorities cited by counsel for appellant, and while they fully sustain the principle contended for by counsel, we do not regard that principle as applicable to this case. The case of *Wicks v. Ludwig*, 9 Cal. 173, decides that no trial could be had at that time in that state, or judgment rendered except in term time. In this state a judgment may be rendered in vacation, but as in this case the trial was concluded and judgment rendered in term time, the cases are not parallel.

The case of *Norwood v. Kenfield*, 34 Cal. 329, turned on the validity of an order made by a county judge at chambers granting a continuance of a cause to determine an election contest, which was pending for trial and set down for trial at a future day in the county court, and upon the

question whether or not a trial could be had and judgment be rendered in vacation. As in the case at bar, the judgment complained of was rendered in term, the authority is not in point.

The case of *Bates v. Gage*, 40 Cal. 183, merely decides that consent of parties cannot confer jurisdiction upon a tribunal assuming to be a court. In *Ex parte Bennett*, 44 Cal. 83, both the trial and judgment of the court were in vacation pursuant to a stipulation of parties. Bennett disobeyed the decree and when arrested for contempt for his disobedience, applied to be discharged upon writ of *habeas corpus* upon the general ground that the decree was rendered without jurisdiction and was void. The court denied the application and remanded the prisoner, holding that the court had jurisdiction of the parties and the subject-matter, and that it could enter judgment either in term time or vacation. This was the only question before the court. None of the *dicta* in the decision sustain the theory of appellant.

The only theory upon which the appellant can claim a reversal of the judgment is that it was rendered without jurisdiction and is void. Appellant waived all objections to the form of the trial or manner of taking the evidence, either by his express assent in open court or by not making his objections at the proper time. Parties cannot speculate upon the decisions of the courts by passing over irregularities and taking their chances upon a judgment in their favor, and thereafter, if the judgment shall be adverse to them, raise those objections. The commencement of the trial in this case in vacation, not being fatal to the jurisdiction of the court, if appellant desired to object to the court's rendering a judgment without a further hearing they should have done so at the time.

There is another sufficient reason why we cannot consider the objections made by counsel for appellant orally in argument before this court to the trial below as having taken place in vacation. It is not contained in any of the assignments of error in the notice of appeal. This court has heretofore decided that it will not consider any errors which

are not set forth in the notice of appeal. (*Dolph v. Nickum*, 2 Or. 202; Civ. Code, secs. 527, 534.)

We do not think the fourth assignment of error is well taken. The complaint alleges that "between the eleventh day of October, 1869, and the twentieth day of May, 1873, in Grant county, Oregon, at the special instance and request of defendant, plaintiff performed work and labor for debt," etc. "That defendant undertook, promised and agreed to pay plaintiff the value of said work and labor as set forth in said bill of items to wit: the sum of one hundred dollars per month with board and lodging for plaintiff for said time."

The finding of the court complained of is almost in the very words of the allegation of the promise to pay in the complaint. There is certainly no substantial variance between the allegations and the proof in this respect. It is not claimed that defendant was misled by any such variance. (Civ. Code, sec. 94.)

It follows that there is no error in the proceedings of the court below, and the judgment must be affirmed.

S. J. SAXON, Respondent, v. C. CONGER and W. J. HILL, Appellants.

CRIMINAL ACTION—COMPROMISE OF.—There can be no legal compromise of a criminal charge, where the person charged has not been arrested, nor in any way held to answer the charge.

IDEM—PARTY INJURED CAN EXACT NOTHING BEYOND ACTUAL VALUE OF PROPERTY TAKEN AND EXPENSES.—In effecting a compromise of larceny, under the statute, the person whose property has been stolen has no right to exact or receive from the person committing the larceny, anything more than the property stolen or its value, and the necessary expense of reclaiming it.

IDEM—AGREEMENT TO ACKNOWLEDGE SATISFACTION, EFFECT OF.—A simple "agreement to acknowledge satisfaction," does not effect a valid compromise. The satisfaction must be unequivocally acknowledged.

HILL began a criminal prosecution in justices' court against Conger, charging him with the larceny of forty-six bushels of wheat. A warrant was issued, but no arrest was made. Hill owed Conger eighty-six dollars at the time the com-

plaint was filed. Two days after the complaint was filed, Conger, by his agent and Hill, made an agreement, by which Conger was to return to Hill forty-six bushels of wheat, valued at thirty dollars and fifteen cents, pay Hill's attorney for his services in the criminal proceeding, pay the expenses of following up the stolen property and release the debt of eighty-six dollars which Hill owed him. Hill, on his part, agreed to acknowledge satisfaction for the injury done him by the larceny of the wheat, and procure the dismissal of the prosecution. The wheat was returned, and the attorney's fee and other expenses paid by Conger. Hill made the necessary acknowledgment of satisfaction, and the prosecution was dismissed. Subsequently this action was brought against Conger, and garnishee process served upon Hill. Hill returned his certificate to the effect that he was not indebted to Conger. He was thereupon, by an order, required to appear and answer written interrogatories. He did so, and answered in effect that the eighty-six dollars due to Conger had been paid by his agreement not to prosecute. Such proceedings were had that a judgment was rendered against him for sixty-three dollars and costs of the garnishment proceedings. Upon appeal to the circuit court this judgment was affirmed, the court finding, among other conclusions, that the release by Conger of the debt due from Hill was fraudulent and void as to the creditors of Conger.

Conger and Hill appeal to this court.

G. B. Dorris, for appellants.

C. W. Fitch and J. M. Thompson, for respondent.

By the Court, MCARTHUR, J.:

Under the criminal law of this state certain crimes may be compromised, but the crimes must be of the general class known and denominated as misdemeanors. In order to effect a legal compromise, the defendant in the criminal action must have been held to answer on a charge of misdemeanor, and the same must fall under the category of those for which the law affords a civil remedy as well as a

penal judgment. (Crim. Code, sec. 315.) The crime charged against Conger was larceny of property of the value of less than thirty-five dollars, a misdemeanor, and Hill had a civil remedy for the trespass, involved in the larceny. But though a charge had been preferred against Conger for the crime, he was not arrested, nor was he in any way held to answer the charge. The crime was one that could have been compromised if he had been held to answer, but the manner in which Hill attempted to effect a compromise would have operated as a fraud upon Conger's creditors, even if he had been regularly held to answer the charge preferred. In effecting a compromise of a crime under the statute referred to, the person whose property has been stolen has no right to exact or demand or receive from the person committing the larceny anything more than the property or its value, and the necessary expense incurred in reclaiming it; that is to say, the law will not permit the process in a criminal case to be used as an instrument, by means of which a person can secure pecuniary benefits to the prejudice of the other creditors of the person charged with a crime. If the person whose property has been stolen desires more than a return thereof, and the necessary expenses incurred in reclaiming it, he must let the criminal law take its course, and resort to his civil remedy for the recovery of his damages.

In this case the court below found that the forty-six bushels of wheat, the subject of the larceny, were returned to Hill, and he was also allowed all the expenses he necessarily incurred in tracing it up. His indebtedness to Conger in excess thereof was, we think, a proper subject of garnishment by other the creditors of Conger.

There is a further reason why what was done cannot be regarded as a compromise. The facts show that Hill simply "agreed to acknowledge satisfaction." In order to effect a valid compromise, such a one as would bar the further or future prosecution for the crime he should have acknowledged satisfaction unequivocally, and the dismissal of the prosecution should have been based upon such unequivocal acknowledgment of satisfaction. The charges of

error in the findings of fact have not been examined into in this case for reasons apparent upon the record. We have confined our investigation into the legality and validity of the conclusions of law applied by the court below to the facts found.

Judgment affirmed.

MAHALA ADAMS et al., Respondents, v. MAHALA WILSON et al., Appellants.

STIPULATION—DECREE THEREIN.—By the terms of a will the estate of the testator was bequeathed to the appellant W. during her life, to be divided at her death among twelve persons, eleven of them respondents in the suit. The respondents having brought suit to restrain W. from disposing of the property and for other relief, for adjustment and settlement of the same, a stipulation was entered into and filed in the suit between W. and six of such respondents, providing for a settlement of the estate and a final distribution of the deceased's property among all the legatees. Subsequently, and before any proceedings were had on the stipulation, W. and the remaining legatee, who was a co-defendant in the suit, filed a motion to strike the stipulation from the files, and withdrawing W.'s assent from such stipulation: *Held*, that the court had no authority to decree a performance of the agreement contained in such stipulation between the parties thereto, that such a decree to be authorized must determine all the rights of all the parties in the controversy.

APPEAL from Umatilla County.

This suit was brought by the respondents, eleven in number, against Mahala Wilson and F. M. Wilson, the appellants. The respondents, and the appellant F. M. Wilson, are the children of the appellant Mahala Wilson and of John Wilson, deceased. John Wilson left a will, in which he bequeathed all his property, real and personal, to Mahala Wilson, during her life, and to her children equally upon her death (excepting one tract of land). The suit was brought to restrain Mahala Wilson and her agents from disposing of such property, for an account of the same, and for the appointment of a receiver to take charge of it.

For the purpose of adjusting the difference between the parties and settling such suit, a stipulation was, on the twenty-second of April, 1876, entered into between six of the respondents upon the one part and Mahala Wilson upon

the other, providing for complete settlement and distribution of the entire estate among all the parties to the suit. This stipulation was filed in the case on the twenty-eighth of April, 1877.

On the second of May following, Mahala and the appellant Francis W. filed motions to strike the stipulation from the files, and withdrawing, in the motion of Mahala, her assent to the stipulation.

On the twenty-ninth of October, 1877, the circuit court rendered a decree based on the stipulation, which in effect decreed a performance of the agreement contained in the stipulation between the parties signing it, and left the suit undetermined as to the remaining parties.

Lucian Evarts and W. W. Thayer, for appellants.

Sterns and Lichtenthaler, for respondents.

By the Court, SHATTUCK, J.:

The objections to the decree in this case are well taken. There are thirteen parties to the suit, and each has a pecuniary interest in the property in controversy. The property is the estate of John Wilson, deceased, held by the widow and defendant Mahala Wilson as devisee and tenant for life, under the will of deceased, solemnly executed and duly proven. The decree is not made upon the issues formed by the pleading and established by the proofs, but is based upon a stipulation or agreement of five of the parties, four of the plaintiffs and the defendant Mahala Wilson.

True, the decree does not attempt to enforce the stipulation, except as between these five parties, but it appears from the record that before the stipulation was filed Mahala revoked, as far as she could, her agreement set forth in the stipulation, on the ground of alleged mistake in its recitals, and because eight of the parties in the suit had neglected or refused to sign it.

The manifest intent of the stipulation, and the legal effect of its provisions are to alter the provisions of the will in respect to the use and disposal of real as well as personal estate, and to accelerate the performance of acts required

by the will to be done only at the death of Mahala Wilson. The common and joint interest of the parties to the suit in the property renders the accomplishment of such an intention and effect legally impossible, without the consent of all parties concerned. No division or withdrawal of the property for the benefit of any could be rightly had without the assent of all. No one party could equitably have a decree on the stipulation, unless the court were empowered at the same time to provide for each of the other parties interested in the property. But in rendering this decree in favor of four of the plaintiffs, they could not decree upon the stipulation in regard to the other eight children and heirs, because they had not assented to it, and were not bound by it. It could not decree for the eight under the will, according to the allegations of the complaint, because their rights in that regard were contested and put in issue, and the issues were not tried. Furthermore, the interference with and premature division of the property disposed of by the will, which would result from this decree, necessarily render the execution of the will according to its terms impossible, and nothing but the unequivocal assent of all parties interested can justify such an exercise of power by the court.

But if the stipulation had been duly signed by all the parties, this decree in its present form would be objectionable, even though it had provided for the remaining eight children, as it undertook to provide for the four; because it does not specifically decree in favor of the defendant, Mahala Wilson, as the stipulation had provided. According to the stipulation, she was to retain property, have certain rights and advantages in the estate of the deceased, as to which this decree is silent.

A decree in equity should determine all the rights of all the parties in the controversy, and should dispose of all the subject-matter of the suit. The decree now before us failing to do this and being objectionable in the particulars above referred to, should be reversed. There being no testimony in the case, this court cannot render any decree except one on the pleadings, and it appearing from the record that the

amount and condition of the property have changed since the commencement of the suit, and that supplemental pleadings will be necessary to a fair and full determination of the rights of the parties, we are of the opinion that the rights and interests of all concerned will be subserved by a dismissal of this suit without prejudice.

An order will, therefore, be entered reversing the decree below and remanding the cause to the court below with instructions to dismiss the complaint without prejudice.

DAVID TAYLOR, Respondent, v. UMATILLA COUNTY, Appellant.

COUNTY COMMISSIONERS—AUTHORIZED TO EMPLOY COUNSEL.—The county commissioners, setting as a board, are authorized to employ attorneys to represent the county in proceedings by or against it.

APPEAL from Umatilla County.

This was a motion to dismiss the appeal upon the ground that no sufficient notice of appeal had been served.

The notice of appeal is signed by Lucian Evarts, who certified that he was the appellant's attorney. It is not signed by the prosecuting attorney for the district which includes Umatilla county.

Arthur Crisfield, for the motion.

Lucien Evarts, contra.

By the Court, BOISE, J.:

That the board of county commissioners is authorized to employ attorneys to represent the county in proceedings to which the county is a party or where the interests of the county are involved, and that Evarts having been employed by the board of county commissioners of Umatilla county in the action, the notice of appeal signed by him as the attorney of the county is not defective on that account.

Motion overruled.

J. E. VAN SANT, Respondent, v. THE CITY OF PORTLAND, Appellant.

STATUTE CONSTRUED — ASSESSMENTS AND STREET IMPROVEMENTS, RECORDS OF COUNCIL MUST CONTAIN PROOF THAT DUE NOTICE OF WAS GIVEN.—Section 139 of the charter of the city of Portland provides that "in any action, suit or proceeding concerning any assessment of property or levy of taxes 'authorized by the act,' or the collection of any such tax, or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith, shall be presumed to be regular and duly done or taken, until the contrary is shown." *Held*: that this statute does not dispense with the necessity of showing by the record that the required notice of a proposed street improvement and assessment has been given.

IDEM.—When an ordinance or proceeding to improve a street or levy an assessment therefor is attacked by a writ of review, and the record certified in the return fails to show any proof that such notice was given as required by law, the presumption in favor of the correctness of the proceedings, provided by section 139 is overcome, and the proceeding should be reversed.

APPEAL from Multnomah County.

Respondent is the owner of certain lots in the city of Portland. On the seventeenth of January, 1877, the common council of the city passed an ordinance to improve the streets in front of those lots. On the eighteenth day of April, 1877, the council passed an ordinance assessing the costs of the improvement of said streets upon the adjoining lots. By this ordinance different sums were assessed on the several lots owned by respondent, amounting in the aggregate to the sum of eight hundred and eighty-three dollars and sixty-eight cents. These assessments were docketed in the city lien docket as provided by the charter of the city. Warrants were thereafter issued for their collection and the lots levied upon and advertised for sale. Respondent then sued out a writ of review in the court below, assigning as error in the proceedings of the city council, that no notice of the proposed improvement was given by sections 79 and 80 of the city charter, and that no notice was given of the assessment as required by section 89 of the charter.

The facts relating to the giving of notice of the proposed improvement and assessment, appearing by the return, are

as follows: The record of the proceedings of the city council shows that before the passage of the ordinance in question, the council made an order that notice of the proposed improvement should be given, and it also recites that a notice of the proposed improvement was published ten consecutive times in the Daily Oregonian, from December 25, 1876, to January 6, 1877, both inclusive.

A copy of the notice in due form appears in the record. The record recites the form of a notice of the proposed assessment, and that it was published in the Daily Standard ten consecutive times, beginning on the eighth of May, 1877. No other proof of the publication of the notice, either of the proposed improvement or of the assessment appears in the record. No affidavit of the printer or foreman of either paper of the service of either notice appears to have been filed.

The city recorder, in his certificate to the supplemental return, states that no other proof of the service of the notices is on file in his office, except the files of the Daily Oregonian and Daily Standard, in which they were published, and the bills of the publishers for publishing the notices, copies of which he embodies in the return, and which he states were examined by the council and ordered paid. He further states that the number of insertions claimed for in the bills were found correct by the counsel. The bills contain no copies of any notice, and have attached to them no affidavit.

J. C. Moreland, for appellant:

When a municipal corporation is entrusted with the execution of a power, and is not confined to a particular mode, but has a discretion in the choice of means, courts will not attempt to control the corporation, unless there is a plain, clear case of abuse of that discretion. (Dill. on Mun. Corp. sec. 58 and note; 2 Or. 146.) The certificate of the auditor and clerk shows that the publication was made, and the court will presume that his certificate is true. A statute should be construed so as to give full effect and force to all its provisions. (52 Barb. 533.) All statutes must be con-

trued according to the language employed. (54 N. Y. 226; 26 Id. 53.) The best rule by which to arrive at the meaning and intention of a law, is to abide by the words which he law-maker has used. (4 McLean, 463; 5 Id. 178; Devreaux, N. C. 158.) This section changes the burden of proof "in any action, suit, or proceeding concerning any assessment of property" authorized by the charter, from the ity to the person making the complaint.

Northrup & Gilbert, for respondents:

Assessments levied for the purpose of street improvements pon the property adjoining the street improved, are known s "local assessments," and are one species of taxation and a ranch of the taxing power. (Burr. on Tax. 460, 461; *Stark v. Starr*, 1 Saw. 30; *King et al. v. City of Portland*, Or. 147; Dill. on Mun. Corp. sec. 596; *Griffin v. Mayor f Brooklyn*, 4 Com. 419.) Every step required by the statte in making local assessments must be taken to confer jurisdiction. (*Himmelman v. Satterlee*, 50 Cal. 68; 61 Barb. 69; Dill. on Mun. Corp. sec. 610; Burr on Tax. 478; Blackell on Tax Titles, Mar., 44; *Hewes v. Reis*, 40 Cal. 262; *askell v. Bartlett*, 34 Id. 281; *Nicholson Paving Co. v. ainter*, 35 Id. 699; *Weker v. Potter*, 18 Ohio St. 85; *Sessg v. Crunkleton*, 20 Id. 359; *In re Eager*, 46 N. Y. 100; *Douglas*, 46 Id. 42; *In re Astor*, 50 Id. 363; *In re hitaps*, 60 Id. 16; *Dubuque v. Wooton*, 28 Iowa, 571; *Olett v. Robinson*, 20 Barber, 149.)

In this respect there is no distinction between an assessnt for local improvement and an assessment for raising venue for the support of the government. (*Smith v. Davis*, Cal. 536; Dill. on Mun. Corp. sec. 596; *Hill v. Higdon*, Ohio St. R. 246; Cooley on Tax. 452; Cooley on Const. im. 499.) Proceedings of this kind are judicial in their ature. (Blackwell on Tax Titles, Mar. 26; 79 Penn. 383.) The expression is constantly used by the courts that ery step in these proceedings required by statute must be ken to confer jurisdiction. Now, "jurisdiction of the use is the power over the subject-matter given by law of e sovereignty in which the tribunal exists." (Bouvier,

Title Jurisdiction.) Jurisdiction is the power to hear and determine. (*Grignon v. Astor*, 2 Howard 338.) The results of these proceedings, if regular, is to divest title. Not by legislative action, that has been exercised in the creation of the law, but by judicial action, the taking of the steps required by the law to divest title. One has a right to a hearing—a trial, before he can be deprived of life, liberty, or property. (Blackwell on Tax Titles, Mar. 22; 2 Or. 38.) "Every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued." (*Sharp v. Spier*, 4 Hill 76, 92; *Curran v. Shattuck*, 24 Cal. 427; *Creighton v. Manson*, 27 Cal. 628; *Stanford v. Worn*, 27 Cal. 171; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Williams et al. v. Payton et al.* 4 Whea. 394; *Rathbun v. Acker*, 18 Barber 393; *Hobart v. Frisbie*, 5 Con. 592.)

The charter of the city of Portland, under which the council acts in making local assessments, must be strictly construed. (*City of Portland v. Stock*, 2 Or. 70; Blackwell on Tax Titles, Mar. 39. 4 Or. 210.)

Notice must be given to the party in interest where a proceeding of a judicial nature is authorized. The right to a hearing is a constitutional right. If there is a right to a hearing, there is a right to a notice; and where the proceeding is before before an inferior tribunal, exercising summary power, the evidence that due notice was given must appear upon the face of the record. (*Lowell v. Wheelock*, 11 Cush. 391; 60 Ill. 324; 61 Ill. 352; Blackwell on Tax Titles, 39, 213; Cooley on Taxation, 337, 264, 265; *Thompson v. Multnomah County*, 2 Or. 41; *Ferris et al. v. Bramble et al.*, 5 Ohio St. 112; *Nicholls v. Bridgeport*, 23 Conn. 208; *Judson v. Bridgeport*, 25 Conn. 428; *Lowell v. Wheelock*, 11 Cush. 391; 5 Haywood, 295.) Notice stands in the place of process, in proceedings of this nature. (*Scammon v. Chicago*, 40 Ill. 146.)

But it is claimed by appellant that section 139 of the charter cures any error in the proceedings. Said section declares that all proceedings concerning assessments "shall be presumed to be regular and duly done, or taken until

the contrary is shown." This means, if anything, that the *onus* is on the petitioner, in this case. It is nothing more than the familiar rule that a tax-deed is *prima facie* evidence of title; and here, as in the case of a tax-title, by the record must the assessment stand or fall. Had the notices been given as required by law, and the council so found when it was proceeding in this matter, it would appear of record. Section 67 requires the auditor, under the direction of the council, to keep a record of its proceedings. (21 Wisc. 187; 29 Iowa 385.)

By the Court, Watson, J.:

Section 79 of the charter of the city of Portland, provides that "no grade or improvement mentioned in section 78, can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper published in the city of Portland."

Section 89 provides that "a sum of money assessed for the improvement of a street cannot be collected until by order of the council, ten days' notice thereof is given by the auditor by publication in a daily newspaper published in the city of Portland; such notice must substantially contain the matters required to be entered in the docket of city liens, concerning such assessment." The errors assigned in the petition for the writ of review in this case, are that the record attacked in this proceeding does not show that the notice required by the section just quoted was ever given. That such notice was given is essential to the validity of the ordinance, and the assessment cannot be questioned.

The city council of Portland in passing the ordinance and levying the assessment under review, was in the exercise of "a statute authority in derogation of the common law," which it could only exercise in strict pursuance of the mode prescribed by the statute. Without the notice prescribed by sections 79 and 89 of the charter, the proceeding was without jurisdiction and was void.

Appellants admit the correctness of these principles, and admit that it is a general rule of law that "the jurisdiction of limited and inferior tribunals must be shown affirmatively

to confer validity on their acts and will not be presumed," and they seek to sustain the ordinance and assessment under review, entirely upon the theory that section 139 of the charter of the city of Portland reverses the general rule of law, and imposes upon the party denying the validity of the ordinance and assessment the burden of showing affirmatively that the city council acted without jurisdiction.

It is conceded that but for this section of the charter it would be essential to the validity of the ordinance and assessment, that the records should contain legal proof that the requisite notices were published. It thus becomes necessary for us to consider the effect of section 139 of the city charter on this proceeding. That section provides that "In any action, suit or proceeding in any court, concerning any assessment of property or levy of taxes, authorized by this act, or the collection of any such tax, or proceeding consequent thereon, such assessment, levy, consequent proceeding and all proceedings connected therewith, shall be presumed to be regular, and duly done or taken, until the contrary is shown, and when any proceeding, matter or thing is by this act committed or left to the judgment of the council, such discretion or judgment, when exercised or declared, is final and cannot be reviewed or called in question elsewhere."

It may well be doubted whether this question can be so construed as to require the courts to presume the jurisdiction of the city council to pass an ordinance providing for a street improvement, or the levy of an assessment for such improvement upon the property adjoining, even in a collateral proceeding. Without jurisdiction there could be no assessment of property or levy of taxes, authorized by the act. The attempted assessment or levy would not be authorized by the act and would be absolutely void. No question as to its regularity could be raised. We think that the correct construction of the section is that after jurisdiction of the subject-matter and property is acquired, without which there could be no assessment or levy, the subsequent proceedings will be presumed regular and duly done or

taken until the contrary is shown. This construction is not inconsistent with the language used, and is in accordance with the established rules of law in regard to such sales.

We are further of the opinion that the decision of the court below would have been correct even if the presumption had been in favor of the jurisdiction of the city council. This proceeding directly attacks the ordinance and assessment. The petition alleges that no notice was given of the proposed improvement or of the assessment. To prove this, respondent caused to be presented to the court the record. He could only show the error by the record. The record, when produced, failed to show that notice was given. If the law required him to prove a negative, the want of notice, we think he did so when he caused the record to be produced, and that failed to show that it was given.

It follows from the views herein expressed, that the judgment of the court below ought to be affirmed.

DAVID TAYLOR, Respondent, v. UMATILLA COUNTY, Appellant.

CONSTRUCTION OF STATUTES.—In construing a statute, effect should be given to all the words of the statute.

IDEM—WORDS OF LIMITATION.—Where words of limitation are used in a statute, such words when unequivocal and clearly expressed will prevail to limit the words to which such words of limitation refer.

ASSESSORS—MILEAGE.—County assessors are not entitled to mileage.

APPEAL from Umatilla County.

The facts are stated in the opinion.

Lucian Evarts, for appellant.

Arthur Crisfield, for respondent.

By the Court, BOISE, J.:

From the complaint in this case, it appears that David Taylor was duly elected and qualified as assessor of

county of Umatilla for the years 1875 and 1876, and that he performed the duties of that office during that time.

In his complaint he alleges that in the execution of his duties as such officer for the years 1875 and 1876, he was obliged to, and did travel two thousand three hundred and ninety-eight miles in each of said years, in going to and returning from the several places where said services as assessor of said county were performed, making the whole distance so traveled four thousand seven hundred and ninety-miles, for which travel he claims mileage, and bases his claim on section 14, p. 605, of the general laws of Oregon. The complaint further states that he has presented this claim for mileage to the county court of Umatilla county for allowance, and that said county court refused to allow the same to him or any part thereof. The defendant (the county) demurred to this complaint, and the court below overruled the demurrer, and gave judgment for the plaintiff for the sum of four hundred and ninety dollars and sixty cents. From this judgment appellant appeals to this court. The decision in this case must depend on the construction of section 14, p. 605, general laws of Oregon, which section is as follows: "Every officer, or person, whose fees are prescribed in this chapter, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage, at the rate of ten cents per mile in going to and returning from the place where the service is performed."

Section 24 of this same chapter fixes the fees of assessor at three dollars per day, except in counties east of the Cascade Mountains, Multnomah, Josephine and Jackson counties, where assessors receive four dollars per day.

It will be observed in examining this chapter that sections 4, 5, 7, 8, 9 and 13, provide for the fees of those persons who are generally required to travel in performing public duties. Sheriffs, constables and coroners may be required to travel long distances and beyond the borders of their counties, so witnesses may be called from any part of the state, and will not be allowed per diem until they are in attendance on the court, and even jurors may be compelled

J. E. VAN SANT, Respondent, v. THE CITY OF PORTLAND, Appellant.

STATUTE CONSTRUED — ASSESSMENTS AND STREET IMPROVEMENTS, RECORDS OF COUNCIL MUST CONTAIN PROOF THAT DUE NOTICE OF WAS GIVEN.—Section 139 of the charter of the city of Portland provides that "in any action, suit or proceeding concerning any assessment of property or levy of taxes 'authorized by the act,' or the collection of any such tax, or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith, shall be presumed to be regular and duly done or taken, until the contrary is shown." *Held*: that this statute does not dispense with the necessity of showing by the record that the required notice of a proposed street improvement and assessment has been given.

IDEM.—When an ordinance or proceeding to improve a street or levy an assessment therefor is attacked by a writ of review, and the record certified in the return fails to show any proof that such notice was given as required by law, the presumption in favor of the correctness of the proceedings, provided by section 139 is overcome, and the proceeding should be reversed.

APPEAL from Multnomah County.

Respondent is the owner of certain lots in the city of Portland. On the seventeenth of January, 1877, the common council of the city passed an ordinance to improve the streets in front of those lots. On the eighteenth day of April, 1877, the council passed an ordinance assessing the costs of the improvement of said streets upon the adjoining lots. By this ordinance different sums were assessed on the several lots owned by respondent, amounting in the aggregate to the sum of eight hundred and eighty-three dollars and sixty-eight cents. These assessments were docketed in the city lien docket as provided by the charter of the city. Warrants were thereafter issued for their collection and the lots levied upon and advertised for sale. Respondent then sued out a writ of review in the court below, assigning as error in the proceedings of the city council, that no notice of the proposed improvement was given by sections 79 and 80 of the city charter, and that no notice was given of the assessment as required by section 89 of the charter.

The facts relating to the giving of notice of the proposed improvement and assessment, appearing by the return, are

the better construction is to conclude that the "travel necessary to be performed" by him in assessing the county is a part of the public duty which he is to perform in executing the duties of his office.

In construing this statute it is incumbent on the court to give effect to all the words if possible. The words, "every officer or person whose fees are prescribed in this chapter who shall be compelled to travel in order to execute or perform any public duty" would without qualification embrace every officer named in the chapter whose fees are prescribed in it. If the word "hereinbefore" had been used in this clause, then the provision would have been manifestly confined to those officers whose fees are prescribed in the preceding sections; that is, suppose the section reads as follows: "Every officer whose fees are hereinbefore prescribed in this chapter who shall be required to travel, etc., in addition to the fees prescribed, shall be entitled," etc., then the provision would be confined to those whose fees are prescribed in the sections preceding; but suppose instead of transposing the word "hereinbefore" to the first clause of the section, it remain where it is, and there be added after the words hereinbefore prescribed the words "to such officer," then significance and effect can be given to the word hereinbefore, and the grant of mileage be confined to those whose fees are prescribed in the prescribing sections. If the grant be extended to all officers whose fees are prescribed in the whole chapter, then the word "hereinbefore" must be rejected, which would be in violation of the rules of construction of statutes. (Broome's Legal Maxims, 664; Smith on Constr. of Stats. 650; 1 Cal. 164; 3 Id. 473.) The word "hereinbefore" either confines the grant of mileage to those officers whose fees are prescribed in the prescribing sections, or it has no meaning and is in the statute by mistake. And as the statute can be so construed as to give effect to this word, such should be the construction adopted. The word "hereinbefore" is a word of limitation, and such words when of unequivocal meaning and clearly expressed, will prevail to limit what goes before, to which such words refer. (Smith on Constr. 712.)

The judgment of the court below will be reversed.

*CORBITT & MACLEAY, Respondents, v. THE SALEM GASLIGHT CO., Appellants.

VOID PROMISE.—A promise made by one party without a corresponding obligation or promise made by the other party is void.

STATUTE OF FRAUDS—VOID CONTRACT.—An agreement for the sale of personal property at a price not less than fifty dollars is void, under our statute of frauds, unless the same or some note or memorandum thereof expressing a consideration be in writing and subscribed by the party to be charged.

APPEAL from Multnomah County.

Respondents brought this action in the circuit court, for damages accruing by reason of appellants' failure to take and pay for certain coals, under a contract which is as follows:

"Portland, Oregon, December 16, 1875. This is to certify that the Salem Gaslight Company will purchase from Corbitt & Macleay, on arrival of ship from Sydney, Australia, due during the month of March, 1876, one hundred and fifty tons New Castle coal, delivered at Salem, at fourteen dollars per ton of two thousand two hundred and forty pounds. Payment, cash on delivery. (Signed) Salem Gaslight Co., per Miles M. Miller, Sec'y."

This contract is set out in the complaint, with an allegation that plaintiffs agreed to sell and deliver the coals, and with other proper allegations, to entitle them to recover the amount claimed. Appellants demurred because the contract is not in writing, and does not come within section 775 of the Civil Code, and because, if it is in writing, the consideration is not expressed. The demurrer was overruled, an anwser filed, and a trial had before the court, which resulted in a judgment for the respondents.

R. Mallory and J. A. Stratton, for appellants:

This is no agreement in law, for two reasons: 1. There is no mutuality of agreement or of obligation; 2. The alleged contract is within the statute of frauds, and it contains no statement of a consideration moving from the

* See 25 Am. Rep. 541 and note.

plaintiffs to the defendants to support the defendants' promise. One promise may be a good consideration for another, but there must be promises by both parties, and they must be mutual. (*Tucker v. Wood*, 12 John 190; *Keep & Hale v. Goodrich*, Id. 397; *Burnt v. M. Bisco*, 4 Id. 235; *Lester v. Jewett*, 12 Barb. 505; 1 Parsons on Cont. 449; 2 Kent. S. P. 465, T. P. 585; 1 Caines, 584; 1 McCord, S. C. 514; 3 Parsons on Cont. 13; 1 Id. 448; 52 N. Y.)

In this case there is neither mutuality of agreement or of obligation. The certificate simply says the Gaslight Company will buy the coals, but there is not a word tending to show that the plaintiffs ever agreed or in any manner obligated themselves to sell.

Under the statutes of Oregon a contract within the statutes of frauds is void, unless it contains a statement of the consideration. (Code, sec. 775, p. 264; 2 Smith's Lead Cas. 310; 3 John. 214.) The memorandum of a contract must contain everything necessary to the validity of the agreement. (*Waterman v. Meiggs*, 4 Cush. 497; *Morton et al. v. Dean*, 13 Met. 385.)

Catlin & Killen, for respondents:

It is not necessary under the statute of frauds that both parties shall sign the writing (3 Pars. on Cont. 9.) "It is enough, if from the instrument, by reasonable construction, the consideration can be collected." (*Douglas v. Howland*, 24 Wend. 35.) The consideration expressed in this contract is the agreement by Corbitt & Macleay to deliver the coals at Salem for fourteen dollars per ton.

It would not for a moment be claimed that if Corbitt & Macleay had signed this agreement, they could not have been held to deliver the coals at that figure. The consideration for the Gaslight Company's promise was Corbitt & Macleay's promise. Both parties need not sign the same paper. The written tender, alleged in the complaint, was a good signing by Corbitt & Macleay. (3 Pars. on Cont. 6.) It is not necessary to allege in the pleadings that the contract was in writing. (*Taylor v. T. Patterson & Co.*, 5 Or. 123.)

By the Court, PRIM, C. J.:

We are of the opinion that the demurrer to the complaint should have been sustained on the round that it does not state facts sufficient to constitute a cause of action. This action is based upon a written agreement which is set out in full in the complaint.

It is unilateral in its character, and is only signed by one of the parties. It is a mere proposition of one party, in writing, to purchase a certain quantity of coal from the other at a certain price mentioned, without any corresponding obligation upon the other to sell said coal at said price.

But it is suggested that it is averred in the complaint that respondents agreed to sell and deliver said coal at the price and time mentioned in said contract. This is true, but it will be noticed that the said agreement referred to in said averment, is the same agreement which is set out in full in the complaint. That averment amounts to nothing more than if the plaintiff, after having set out the written agreement, had said in his averment that the plaintiffs thereby agreed to sell and deliver said coal at the price and time mentioned, to said defendants.

A promise made by one party is good consideration for a promise made by the other party, but the promise must be concurrent and obligatory on both parties at the same time. A promise made by one party, as in this case, without a corresponding obligation or promise by the other, is void. (12 Barb. 502; 12 John 396.) But it is further claimed by appellant, that the alleged agreement set out in the complaint is within the statute of frauds, because there is no consideration expressed in it, as moving from the respondents to appellant to support the promises made by said appellant.

The alleged agreement is one for the sale of personal property at a price not less than fifty dollars, and there is no consideration expressed in the said writing, nor can any be inferred from anything that is expressed therein. Our statute of frauds provides that an agreement for the sale of personal property at a price not less than fifty dollars is

void, unless the same, or some note or memorandum thereof expressing the consideration be in writing, and subscribed by the party to be charged. (Civil Code, 264, sec. 775.) Thus it will be seen that our statute expressly provides that the consideration must be expressed in writing, or the agreement is void. Many of the New York decisions hold that the consideration must be expressed in writing under a statute which does not provide that the consideration must be expressed. (3 John. 239; 4 John. 335.) Respondent having averred in his complaint that the alleged agreement was in writing, and having set it out in full, it cannot be presumed that it was in writing, as in the case of *Taylor v. Patterson & Co.*

It follows, from the views herein expressed, that the judgment must be reversed and remanded to the court below for further proceedings.

Judgment reversed.

A. HINMAN et al., Appellants, v. D. K. WARREN et al., Respondents.

TIDE LANDS—TITLE TO, MUST BE ACQUIRED FROM THE STATE.—Tide lands, those that are covered and uncovered by the ebb and flow of the sea, belong to the state of Oregon by virtue of its sovereignty. The United States government has no authority to so dispose of lands within a territory as to make it impossible to admit such territory into the Union upon an equal footing with the other states. In all matters that touch the sovereignty of the future state, the general government is simply a protector thereof, until such time as the territory becomes a state.

APPEAL from Clatsop County.

The facts are stated in the opinion of the court.

Hill, Durham & Thompson, for appellants:

The donation law of September 27, 1850, granted, upon the conditions therein expressed, lands to actual settlers. It was a manifest assumption of the sole right to control the public lands within the territory. The title to the land in controversy was in the United States at the time of the completion of the residence and cultivation of McClure, and his rights became vested under the donation law.

The act of congress, admitting the state of Oregon into the Union, February 14, 1859, contained grants of certain lands, but no provision in anywise affecting the title to the tide lands or the swamp lands of the state, and that the title to these lands was not deemed affected by any provision grant, is shown by act of congress of March 12, 1860, extending the "act to enable the state of Arkansas, and other states, to reclaim the swamp lands within their limits" to the state of Oregon. It is an incontrovertible fact that to this day no act of congress has been passed, either directly or by implication, granting the tide lands to the state of Oregon. The ground upon which the right of a state to the tide lands within its limits is said to rest, is "the sovereign control of the state over the easement, or right to navigation." (*Gray et al. v. Hermana,* 5 Cal. 74.)

If this is the correct doctrine, then it follows that the right of a state is only a sovereign right, attaching when the state becomes a sovereign by reason of its admission into the Union. But prior to that time the United States is the sovereign, and has all the powers which the state afterwards acquires, which is the right, as is contended by respondent, to dispose of the legal title to the tide lands, as well as other public lands. In this case, the right of the United States having been exercised, and the land disposed of before the admission of Oregon into the Union, no rights of the state ever attached. (*Pollard v. Hagan,* 3 Howard, 212.)

All the lands within the territories are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times and in such modes and by such titles as the government may deem proper. (*Irvine v. Marshall,* 20 How. 558.) The land in controversy was granted before the state of Oregon acquired any rights in relation to the public lands within its territorial limits.

Dolph, Bronaugh, Dolph & Simon, for respondents:

Public grants are to be construed strictly. (6 Pet. 691; 11 Pet. 420; 1 McAllister, 512; 23 How. 66, 68; 11 Pet.

544; 1 Black. 358.) Patents for lands, the sale of which has not been authorized by law, are void. (*Morton v. Nebraska*, 21 Wall. 660; *Brownline v. Clements*, 3 How. 580; *Sherman v. Buick*, 93 U. S. 209.)

The patent for a donation claim conveys no new title. It is merely confirmatory of the previous grant made by the law; evidence that the conditions of the law have been complied with by the donee. (*Langdeau v. Hanes*, 21 Wall. 521.) Tide lands are not granted by the donation law. The public lands intended to be granted by this act are clearly those which are susceptible of cultivation. Residence and cultivation are the principal conditions required of the settler. (Donation Act, secs. 4, 5.)

The whole policy of the government relating to the disposition of the public lands is against the proposition that tide lands are included and intended to be granted by the act. The instructions to government surveyors to meander the public surveys by ordinary high water-mark, and the practice of the government in the public surveys, give a settled construction to the law. (Zabriskie's Land Laws, 523; Rev. Stat. sec. 2476, p. 456.) Such is the construction given to the land laws by the courts. (*Barney v. Keokuk*, 4 Otto, 338; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. City of Keokuk*, 4 Id. 199; *Tomlin v. Dubuque R. R. Co.*, 32 Id. 106.)

If this view of the case be incorrect, still the patent did not issue until long after the state was admitted into the Union. As by the act of admission no reservation of the tide land in controversy was made in favor of the government or of appellants as its alleged grantees, the land passed to the state when she entered the Union, as completely and effectually at law as though the United States had then issued a patent to the state for it.

By the Court, MCARTHUR, J.:

This is an action of ejectment. The land in dispute is tide land on the Columbia river. It is embraced within the description of land patented to John McClure and wife by the United States, March 27, 1866. The McClures received

the patent by virtue of compliance with the provisions of the donation land act. Their residence thereon and cultivation thereof began before the passage of said act, which took place September 27, 1850. The appellant claims by a chain of conveyances from the McClures. The respondents claim to have derived title from the state of Oregon by deed from the state authorities of date ——, 1875. The north line of the McClure donation claim runs north sixty-eight degrees east, and is some distance beyond the line of the ordinary high tide of the Columbia river. The land in controversy is a small cuniform tract near the north-west corner of the McClure claim, lying wholly within the limits described by the lines marking the ebb and flow of the tide.

Upon these facts two questions arise: 1. Do the tide lands belong to the state? 2. Did the patent of the United States invest in the McClures any estate in the land lying between the north line of their claim, as described in the patent, and the line which marks the ordinary high tide?

In answer to the first question our response is that the tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the state of Oregon by virtue of its sovereignty. This doctrine is the clear result of the principle announced in all the cases from *Pollard's Lessees v. Hagan*, 3 How. 230, to *Barney v. Keokuk*, 4 Otto, 324.

But it is contended that this sovereignty did not attach until the state was admitted into the Union. This is true, but it is also equally true that the United States government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other states of the Union. In all matters which touch the sovereignty, the general government is, in the very nature of our system, simply a protector thereof until the territory assumes the ampler powers of a state, and becomes thereby enabled to assert and protect its own sovereignty. (*Pollard's Lessees v. Hagan, supra.*)

As the state became owner of the tide lands, it had the power, under the provisions of the act providing for the sale

of such lands, Mis. Laws, p. 644, to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public.

The second question finds its solution in the application of the familiar principle that "a grant of land adjacent to a navigable river, below the farthest point inland to which the neap tide flows, extends only to the meander lines of high tide." This is the rule laid down by the general government to guide its surveyors. It is of no consequence that the calls of the McClure patent place the north line between high and low water-mark. In thus describing the land, the officers of the United States government acted without the authority of law, and it is well settled that an unauthorized act binds no one. (*Barney v. Keokuk, supra; McManus v. Carmichael,* 3 Iowa, 1; Haight v. Keokuk, 4 Id. 199; *Harbor Co. v. Munroe,* Walker Ch. R., Mich. 155.)

Judgment affirmed.

J. L. ALBERSON, Respondent, v. P. A. MAHAFFEY, Appellant.

APPEAL—AFFIDAVITS OF SURETIES IN, MUST BE FILED WHEN.—The affidavits of the sureties in an undertaking on appeal must be filed contemporaneously with the filing of the undertaking.

CROSS-MOTION—WITHIN WHAT TIME MUST BE MADE.—A cross-motion for leave to file a new undertaking must be made before a motion to dismiss the appeal because of the defective undertaking.

APPEAL from Union County.

L. B. Ison, for appellant.

L. O. Sterns, for respondent.

A motion was made in this case to dismiss the appeal upon the ground that no affidavits by the sureties in the undertaking on appeal as to their qualifications were filed with the un-

dertaking. Upon the hearing of the motion, appellant asked leave to perfect his appeal by filing a new undertaking.

By the Court, SHATTUCK, J.:

The undertaking on appeal is defective. There is no affidavit of the surety as to his qualifications, and no recital or averment whatever of his qualifications. This case is within that of *Holcomb v. Teal*, 4 Or. 352, which requires the affidavits of the sureties in an undertaking on appeal to be filed contemporaneously with the filing of the undertaking. The motion to dismiss the appeal because of the insufficiency of the undertaking, should be allowed. No amendment of the undertaking, or leave to now perfect the appeal by filing a new undertaking, can be allowed. The rule announced on this subject in *Cross v. Chichester*, 4 Or. 114, should apply to this case. The application to file a new undertaking ought to have been made in the form of a cross-motion before the hearing of the motion to dismiss.

Motion to dismiss allowed.

THOMAS L. HORRELL, Appellant, v. HENRY MANNING, Respondent.

PLEADING—BILL IN EQUITY TO SET ASIDE CONVEYANCE, WHEN INSUFFICIENT.—An allegation which charges a party with having made false representations, is, in a suit to set aside a conveyance because of such representations, insufficient, unless it alleges that the party injured relied upon such representations and was by them misled to his injury.

IDEM—INTEREST OF DEFENDANT MUST BE ALLEGED.—The complaint, in a suit to set aside a deed on account of alleged false representations, must show that the defendant is or was at the time the complaint was filed the owner of the land in controversy.

APPEAL from Marion County.

This is a suit in equity to set aside two deeds. The following is an abstract of the bill: On the twenty-sixth day of August, 1864, in consideration of two thousand six hundred dollars paid down, the appellant purchased of Narcissa Herpin three hundred and forty-six acres of land in question. The money was paid some time before the deed was

made. The deed was drawn up by one B. DeLorme, who was acting for the respondent, delivered to him and by him recorded. It was the agreement and understanding that the deed should be made to the appellant when the two thousand six hundred dollars was paid, but instead of being so made, it was made jointly to the appellant and respondent. The deed was not read to the appellant, nor was he present, and he did not know that it was so jointly made to him and respondent for a long time thereafter.

Between the time of payment of said two thousand six hundred dollars and the making of said deed, appellant and respondent entered into an agreement, in effect, that if respondent would deed to him an undivided half interest in respondent's donation claim, which he falsely represented as being three hundred and twenty acres of land, then, and in that case, the appellant would deed to the respondent one half of the tract purchased of Herpin. Thereafter and before the fourth day of November, 1864, the appellant and George A. Manning, a brother of respondent, entered into an agreement whereby the appellant agreed to convey to George A. Manning, one hundred and sixty-eight acres of land from the south side of the land in question, in consideration of one thousand two hundred and eighty-three dollars, to be paid by George A. Manning, the appellant.

On November 4, 1865, the appellant and wife made such conveyance to George A. Manning. The deed was drawn and brought to the appellant by DeLorme, who was acting for George A. and Henry Manning, and who stated to appellant that he and wife and Henry Manning and wife would have to join in the deed, and that would make it "all right and proper." So the appellant signed said deed, supposing he was only conveying the said one hundred and forty-eight acres. Appellant did not read the deed, nor did he know for eight years that it purported to convey all of the appellant's interest in said land. Nor was any consideration ever paid for the other half of said land.

The same day, without consideration or consent or knowledge of the plaintiff, Geo. A. Manning and wife conveyed to the respondent the north half of said premises. The ap-

pellant had no knowledge that said deed had been made for over eight years, but he supposed he retained his half interest in the land. That all of said deeds were so drawn for the purpose of cheating and defrauding the appellant out of his interest in said lands. That the representations of the respondent that his land claim in Clackamas county contained three hundred and twenty acres of land were false and fraudulent; that the said claim contained only two hundred and fifty acres of land, all of which was well known to respondent, and they were made to cheat and defraud the appellant; and that respondent has never deeded said land to the appellant or any part of it, nor has he paid anything for the land in question.

Wherefore, appellant asks that the deeds from himself to Geo. A. Manning, and from Geo. A. Manning to Henry Manning, may be set aside, etc. Defendant filed a general demurrer to the complaint, which was sustained by the court below, and the plaintiff appeals.

Addison C. Gibbs and Loyal B. Stearns, for appellant.

B. F. Harding, for respondent.

By the Court, McARTHUR, J.:

We are of opinion that the demurrer was well taken, and that the court below did not err in sustaining the same and in dismissing the suit. It appears that the business of making the purchase and receiving the deed from the Herpins was performed by B. DeLorme, who under a fair construction of the complaint must, we think, be regarded as having acted as the agent of the appellant. In making the purchase it does not appear that the appellant or his agent had any understanding or agreement with the respondent, and it is impossible to discover with whom the understanding and agreement referred to in the second allegation was had or made. It certainly does not appear that the respondent was in any way connected therewith or interested therein. There is nothing in the complaint showing that the respondent is in any manner chargeable with what seems to have been the appellant's own negligence in not being present and definitely as-

certaining the nature and contents of the deed from the Herpins. It is nowhere alleged that the respondent did any act or uttered any word which induced the appellant or his agent to purchase the land or to neglect to examine the deed.

The execution of the deed of November 4, 1865, by appellant and wife and respondent and wife to George A. Manning, is a solemn ratification of the act of DeLorme in making the purchase from the Herpins and in receiving their deed and estops the appellant from now asserting that he did not know the quantity and quality of the estate granted.

The allegation of false representations charged to have been made by respondent in relation to the donation claim in Clackamas county, is defective and insufficient. It is not enough that the respondent be charged with falsely representing that there were three hundred and twenty acres of land in said claim, the appellant must also allege that he trusted in and relied upon such representations, and was by them misled to his injury or prejudice.

The complaint contains an allegation which relates to a deed executed by George A. Manning and wife to respondent. He is not a party to this suit. The matters set forth in that allegation cannot be examined into or passed upon in this suit. But if they could be, there is nothing whatever to show that he was not a purchaser in good faith, for a valuable consideration, or that he had any notice whatever of the prior existing equities, if any, between appellant and respondent.

Furthermore, it does not appear that the respondent is at present or was at the time of the filing of the complaint the owner of the land, and it would be impossible to afford the appellant any relief under this complaint unless such fact was alleged and proved.

Decree affirmed.

IRA COGSWELL, Administrator of the Estate of FRANKLIN COGSWELL, Deceased, Appellant, v. THE OREGON AND CALIFORNIA RAILROAD COMPANY, Respondent.

NONSUIT—SHOULD BE GRANTED WHEN THE EVIDENCE WILL NOT SUSTAIN A VERDICT.—Where the evidence produced by the plaintiff in a case is not sufficient to sustain a verdict, it is proper for the court to order a non-suit on the motion of the defendant.

NEGLIGENCE—RAILROAD NOT REQUIRED TO STOP, WHEN.—Managers of a train are not bound to apply the brakes in time to stop the train before it would reach a man seen walking on the track, apparently in possession of his ordinary faculties. The managers of a railroad train (running on the track), seeing a person walking laterally along the track, may reasonably suppose that he will get out of the way of the train on sounding the alarm.

GROSS NEGLIGENCE—INJURED PERSON GUILTY OF, IN WHAT CASE.—It is gross negligence for one who is deaf to walk laterally along the track of a railroad where trains are liable to pass.

APPEAL from Multnomah County.

This action was brought to recover five thousand dollars for injuries to Franklin Cogswell, caused by respondent's railroad engine and tender, while he was walking upon the latter's track.

This appeal is from a judgment of nonsuit, granted upon the motion of the respondent, after the appellant had rested his case in the court below.

Additional facts are stated in the opinion of the court.

William Strong and T. R. Strong, for appellant:

Section 243, subdivision 3, and section 244, of the civil code, provide that a nonsuit may be granted on motion of the defendant, "when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury." "A cause sufficient to the jury, is one where it appears that, if the jury were to find a verdict for the plaintiff, * * * the court ought, if required, to set it aside for want of evidence to support it."

The court will notice the language of this statute. It is not to be set aside because there is a lack of sufficient

dence to support it, but for want of evidence. It does not leave the court to determine the sufficiency of the evidence as in the case of a motion for a new trial (sec. 232, subd. 6), but impliedly requires the motion for a nonsuit, if there is any evidence tending to prove the issue, to be overruled. This view is supported by the provisions of section 835, code of civil practice. This question must also be considered with reference to the situation of the parties and their power to produce evidence upon points where the evidence of the plaintiff fails to be as full or definite as might be desired. By a motion for a nonsuit the defendant admits that it cannot explain any circumstance against it, left doubtful by the evidence for the plaintiff. For instance, the engineer upon the locomotive ought to be able to tell the rate at which he was running; whether he could have seen the man; whether he did see him; whether he rung his bell, blew his whistle or made any effort to stop the train.

The failure to produce such witness, leaves the feeble evidence of the plaintiff to go to the jury, under subdivisions 4 and 5 of sections 766, civil code, with all the force of the most positive testimony. Where there is any evidence, however weak, tending to establish a material question in the case, it is error for the court to instruct the jury that there is no evidence. So, if there is any conflict in the evidence, upon a material point, the court may (must) refuse a general charge in favor of either party, and a charge that the plaintiff must recover, when inferences of fact must be drawn, is erroneous. So, if the plaintiff offers evidence to prove his allegations, it is error for the court to instruct the jury that no evidence was offered which would warrant the jury in finding a verdict for the plaintiff. * * Such a charge, therefore, should never be given when there is any evidence which reasonably tends to establish the plaintiff's case. (Hillard on New Trials, chap. 11, sec. 37, p. 222; Proffatt on Jury Trials, sec. 355; 8 Wall, 243; 35 N. Y. 9, 35; 20 N. Y. 492; 1 E. D. Smith, 78.)

It was claimed by the defendant, in the argument upon the motion to nonsuit, that the plaintiff could not complain of the failure of the defendant to run his locomotive as re-

quired by the ordinance of East Portland, because the liability for a violation of the city ordinance was a matter to be settled by the city authorities and in which the traveling public had no interest. While some cases look this way, we believe the better doctrine to be that expressed in Sherman & Redfield on Neg., secs. 13a and 54a. The point is expressly ruled in *Jetter v. N. Y. and Harlem P. R. Co.*, 2 Keyes, 154.

It was also claimed, in the argument below, that the regulations of the defendant forbidding loose engines to be run between the car shops and East Portland depot at a rate of speed greater than six miles an hour, and requiring them to be run with great care, and the bell to be constantly rung in passing between those two places, are matters exclusively between the company and its subordinates and do not concern the public. Such an opinion, though supported by some authorities, is manifestly unsound, because: 1. No reason can be given for such regulations except that in the judgment of the officers of the company they are essential to the public safety, and the jury have a right to treat the failure of the defendant to exercise the care which it, by its regulations, admits is necessary for the public safety, as very strong, if not conclusive, evidence of gross negligence; 2. The presumption would be that the subordinates of the company conform to the regulations, and that the trains run in conformity with the regulations. The public see and know how locomotives are run and now the business is carried on, and it would make no difference whether or not it knows that the engineer is governed by regulations of the company or by a regard for the public safety only. Under the regulations whether known or unknown to the public, a custom would grow up, which would be known to the public, and on which it would have a right to rely, and a sudden deviation from such custom or usage, without notice to the public by which an injury was inflicted, will give a cause of action; and, 3. These regulations provide for nothing more than the common law requires. It is gross negligence not to exercise extraordinary care in running locomotives, particularly when not drawing regular

trains, through a city or where persons or property is liable to be upon the track. (S. & R. on Neg., sec. 484; 34 N. Y. 22; 41 N. Y. 296; 10 Cush. 561; 2 Cush. 539; 42 Ill. 449; *Schmidt v. Chicago and N. W. R. R. Co.*, Ill. Supt. Ct. Chicago News, Nov. 17, 1877, p. 67.)

Our supreme court in the case of *Bequette v. The Peoples' Trans. Co.*, 2 Or. 200, decided that the absence of care on the part of the plaintiff, contributing to the injury, but not amounting to a want of ordinary care, will not excuse gross negligence in the defendant. The same doctrine that gross negligence on the part of the defendant will excuse slight negligence on the part of plaintiff, has been announced as the rule, in other cases. The doctrine laid down by Shearman & Redfield, in their work on "Negligence," seems to be better defined, though entirely consistent with cases where the terms of gross negligence and slight negligence have been used.

Section 25. "One who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury, if he, by his own or his agent's ordinary negligence or willful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault, the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him."

This proposition is supported in all its points by numerous authorities, referred to in the notes. (10 M. & W. 546; 4 Ind. 95; 9 Id. 397; 26 Id. 76; 3 Ohio St. 172; 2 Duval, Ky. 114; 43 Mo. 384; 38 Ala. N. S. 76; 19 Ill. 499; 18 N. Y. 248, Harris J.; 19 Conn. 566; 3 Allen, 176; 47 Penn. St. 300; 40 Cal. 76; S. & R. on Neg., sec. 36; 5 Sneed, Tenn. 524; 21 Iowa, 102; 24 Vt. 487; 9 Allen, 545; *Toledo, etc. R. R. Co. v. O'Conner*, 77 Ill. 391; *St. Louis etc. R. R. Co. v. Mathias*, 50 Ind. 65; *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 475.)

Ordinarily negligence is a question for the jury. There is no absolute rule as to what constitutes it. Where there

is any testimony going to show negligence, it is a question for the jury. (S. & R. on Neg., sec. 11; 2 Red. on Railroads, sec. 177, subd. 11; 47 Penn. St. 300; 22 N. Y. 209; 28 Barb. 196; 5 McLean, 242; 21 Barb. 339; 20 Barb. 282; 54 N. Y. 31; 17 Ill. 509, 519; 22 Id. 264, 271; 67 Penn. St. 411; 40 Cal. 447; 28 Eng. L. and Eq. 48, 52, 55; 54 N. Y. 231; 5 Am. R. R. Rep. 455, 456, 462, 464; 4 Am. R. R. Rep. 516, 517, 518; 61 Penn. St. 58; 99 Mass. 164; 30 Md. 226; 52 Mo. 253; 44 N. Y. 430; 21 Ohio, 212; 100 Mass. 21; 4 Cent. Law Jour., No. 4, p. 83, 84; 69 Ill. 409; 79 Pa. St. 33.)

Dolph, Bronaugh, Dolph & Simon, for respondent:

The statute provides that a judgment of nonsuit may be given against the plaintiff in an action * * "When, upon the trial, the plaintiff fails to prove a cause sufficient to be submitted to the jury." (Code, p. 154, sec. 243.) To justify a recovery in this case, the testimony must show not only negligence on the part of respondent, causing the injuries complained of, but it must as necessarily show no lack of care on the part of appellant intestate, himself contributing to such injuries. (*Wilds v. H. R. R.* 29 N. Y. 315; *Galena R. R. Co. v. Jacobs,* 20 Ill. 478; *Wilcox v. Rome R. R.,* 39 N. Y. 358; *Baxter v. Troy R. R. Co.,* 41 N. Y. 502; *Havens v. Erie R. R. Co.,* Id. 296; *Chicago R. R. Co. v. Fears,* 53 Ill. 115; *Lafayette R. R. Co. v. Huffman,* 28 Ind. 287; *Slone v. Oregon City Manf'g Co.,* 4 Or. 53; *McGlyn v. Brodie,* 31 Cal. 376.)

And this care must be commensurate with the danger in which deceased had voluntarily placed himself, considering his own infirmities and all the circumstances under which the injuries complained of occurred. (Shearman on Neg., p. 33; *Cleaveland R. R. Co. v. Terry,* 8 Ohio, 570.) Appellant's intestate was a trespasser upon the railroad track of respondent. He went there, knowing the hazardous nature of the business for which the track was being used, and the great danger to which he thus exposed himself, and he was bound to use every precaution, every diligence, every care, against the possibility or probability of accident which might

happen to him there. (*Finlayson v. C. B. & Q. R. R. Co.*, 1 Dillon, 583; *Pa. R. R. Co. v. Lewis*, 79 Pa. 33.) And where plaintiff's evidence discloses negligence on his part, contributing to the injury complained of, he will be nonsuited upon motion of defendant. The negligence of defendant is the gist of the action, and the absence of negligence on the part of the plaintiff is equally important. (*Deyo v. N. Y. Central R. R. Co.*, 34 N. Y. 9; *Mackey v. Ives*, 27 Bar. 528; *McGlyn v. Brodie*, 31 Cal. 376; *Cleaveland C. & C. R. R. Co. v. Edgar H. Elliott*, 28 Ohio, 340.) It is negligence for any person to cross a railroad track, even at a crossing of the highway, without first looking up and down the track to see that no train is approaching. (*Arntz v. R. I & P. R. R. Co.*, 34 Iowa, 153; *Gonzales v. Harlem R. R. Co.*, 38 N. Y. 440; *Wilcox v. Rome R. R., supra.*) And *a fortiori* to walk laterally along the track. (*Poole v. N. C. R. R. Co.*, 8 Jones [N. C.], 340.)

Deceased was almost entirely destitute of the sense of hearing. He was not crossing the railroad, nor upon the highway, neither at any usual place of crossing the track; but was walking along the track at a place where, by using his eyes, he could have seen the approaching train for a long distance before it reached him. The injuries sustained were the result of his negligence, and for them appellant can not recover. (*R. R. Co. v. Buckner*, 28 Ill. 299; *Evansville R. R. v. Lowdermiek*, 15 Ind. 120; *Payne v. C. R. I. & P. R. R. Co.*, 39 Iowa, 523.)

But independent of the negligence of appellant's intestate, which the testimony shows not only contributed to, but was the cause of the injury complained of, and which, as before submitted as a matter of law, is a bar to recovery in this case, even though respondent were also shown to have been negligent, or to have disregarded some statutory requirement, we further submit that the testimony fails to show negligence on the part of respondent or its agents. The person injured was a man thirty-six years of age, in the full vigor of mature manhood, yet possessed of all the activity of youth. He was,

to all appearances, and for all that respondent's agents could know, in the full possession of his senses.

By the Court, Boise, J.:

The evidence in this case is all reported, and the only question for us to decide is whether there was a sufficient case proved by the plaintiff to be submitted to the jury—a case "not sufficient to be submitted to a jury, is one where it appears that if the jury were to find a verdict for the plaintiff, the court ought, if required to set it aside for want of evidence, to support it." (Civ. Code, sec. 244, p. 154.)

The circuit court having all this evidence before it, on the motion of respondent, ordered a nonsuit. This order must have been based on the ground that the plaintiff had failed to show any negligence on the part of the company, or that the deceased was guilty of any such contributory negligence as precluded a recovery, or on both these grounds. After carefully examining this case we find no proof of any negligence on the part of the respondent, unless it be that the engine was running at an unauthorized rate of speed, did not ring the bell or make sufficient effort to stop the train.

The evidence tends to show that in the opinion of witnesses the engine was running at the rate of fifteen or twenty miles an hour; these estimates are necessarily very uncertain. The directors of the company and the ordinance of the city required a less speed, and there was some evidence to show that the speed was above what was authorized, and above what travelers across the track had reason to expect, and therefore might increase the danger of accidents.

It seems also that the bell was not rung, or if rung the sound was not noticed by the witnesses, and this neglect was a breach of duty on the part of the company, who, in view of the danger of collisions from great speed of engines and very serious nature of such accidents, should exercise great care in giving the required signals of approaching trains. It is the duty of the managers of moving trains to stop them when approaching any apparent danger. In this case the evidence shows that the view of the track was unobstructed for three-fourths of a mile; and for aught that appears, the engineer saw

the deceased for that distance before he was struck; and had he supposed there was danger could have stopped the train. But we think he had a right to suppose that the deceased would observe the train by his senses, and that he was in no danger until the train was so near him that he ought to be leaving the track to avoid it.

A person of ordinary activity can leave the track in less time than is required to stop the train, and if a person in his ordinary senses neglects to leave the track when the ordinary signals are given, he is guilty of such gross negligence as will preclude his right to recover for an injury occasioned by a collision, which by the exercise of ordinary care he could have avoided. (Sherman on Neg. 33; 60 Mo. 475; *Wilds v. H. R. R. Co.*, 29 N. Y. 315; *Galena R. R. Co. v. Jacobs*, 20 Ill. 478; *Baxter v. Troy R. R. Co.*, 41 N. Y. 502; *Chicago R. R. Co. v. Flarr*, 53 Ill. 115.)

In this case it is alleged in the answer, and shown by the evidence of the plaintiff, that the deceased was so deaf that he carried a slate to converse with persons whom he met, or with whom he had business. There is the evidence of his father, to the effect that he could hear a bell, and he says, on cross-examination, that the only time he observed him to come to the sound of a bell was when called to dinner by it, and he admits on cross-examination that at that time he was looking at the bell, and might have been induced to come to his dinner from seeing the bell rung, and not from hearing it. And from the evidence in this case it appears that unless he was very deaf he would have heard the whistle of the engine, and been warned of its approach in time to escape from the track, and we think that the evidence shows that his deafness was the proximate cause of the injury, and he being aware of this infirmity was guilty of gross negligence in being on the track as he was walking laterally along it. It was a position of great danger to one who could not hear, and shows recklessness in the deceased.

To establish the doctrine contended for by appellant that it was the duty of the engineer to apply the brakes in time to stop the train before it could have reached the deceased,

would render it necessary for trains to be stopped in all cases when persons are seen walking before them on the track, before coming within the distance over which a train must go in being stopped; this would be an impracticable rule, and we think that when a train is moving over the track at its ordinary speed (twenty miles an hour is not extraordinary), and a person is seen walking on the track apparently in the possession of his ordinary faculties, the engineer may justly suppose that he will get off the track on sounding an alarm that the train is coming; and under the evidence in this case, if the deceased had not been deaf, we think his remaining on the track was such gross negligence that no recovery could be had.

While those who operate railroads should be held to observe the utmost skill and care in running of trains, persons who go on or about the track must be held to extraordinary diligence in looking after their own safety, and become trespassers on the rights of the company when they obtrude themselves in the way of the free passage of trains, and in case of receiving injury will not be entitled to recover, unless in case of very grave negligence on the part of the company; and we think in this case, as shown by the pleadings and evidence, that had the circuit court submitted this case to a jury and a verdict been found for the plaintiff, it would have been the duty of the circuit court to have set the verdict aside on motion of the respondent.

The judgment of the court below will be affirmed.

STATE OF OREGON, Appellant, v. GITT LEE et al., Respondents.

INDICTMENT FOR GAMBLING—THE NAME OF THE GAME PLAYED NEED NOT BE SET FORTH.—In an indictment for playing, dealing, or carrying on an unlawful game under section 1 of the act of the legislative assembly of the state of Oregon, approved October 20, 1876, entitled "An act to prevent and punish gambling;" it is not necessary to name the unlawful game, or the device by which it is played.

GAMBLING DEVICE—DESCRIPTION OF, NECESSARY IN THE INDICTMENT.—It is necessary in an indictment for a violation of said section to describe the device by which the unlawful game is played, and

to set forth that it was adapted, designed, devised or used for playing games for money, etc.

STATUTE AGAINST GAMBLING—WHEN SUFFICIENTLY DEFINITE.—That portion of said section one, which prohibits "any banking or any other game played with cards, dice, or any other device, whether the same be played for money, checks, credits or any other representative of value," is not too indefinite to describe a crime. It is not necessary that the game or device should be named in the statute.

APPEAL from Grant County.

The respondents were indicted for the crime of dealing, playing and carrying on as proprietors a banking game played for money.

The indictment charges that "the said Gitt Lee, Ah Foy and Ah Gau, on the fourteenth day of February, A. D. 1877, in the county and state aforesaid, did willfully and unlawfully deal, play and carry on as proprietors thereof a banking game played for money; but of what name, is to the said grand jury unknown, said game being played with copper devices for money, as representatives of money and value."

Respondents demurred to the indictment for the reason that it did not state facts sufficient to constitute any crime. The demurrer was sustained and defendants were discharged.

The district attorney appeals to this court.

L. B. Ison, District-attorney, for the appellant.

No appearance for respondents.

By the Court, WATSON, J.:

The verdict in this case is founded on section 1 of the act of the legislative assembly of the state of Oregon, approved October 20, 1876, entitled "An act to prevent and punish gambling." The section is in these words: "Section 1. Each and every one who shall deal, play, or carry on, open, or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette rouge et noir, lansquenette, rondo, vingtun (or twenty-one), poker, draw poker, brag, bluff, thaw or any other game played with cards, dice or any other device,

whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid; *provided*, that such person so convicted shall be imprisoned one day for every two dollars of such fine and costs, and provided further that such imprisonment shall not exceed one year."

We are of the opinion that it is not necessary in an indictment for a violation of this statute to state the name of the game or the name of the device by which it is played. There is much force in the suggestion of the district attorney; that if it were essential either in a statute defining the offense of gambling, or in an indictment for the violation of such statute, to give the name of the game or of the device by which it is played, it would always be easy to evade the statute by changing the name of either the device or the game. We think that part of section 1, which prohibits "any banking, or any other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value" is sufficiently definite, and renders unlawful all games not previously enumerated in that section, and which are played for "money, checks, credits, or any other representative of value," with "cards, dice, or other device."

We are, however, of the opinion that the indictment in this case does not sufficiently describe the offense. It does not appear therefrom that the game was played with any device whatever. If the clause "said game being played with copper devices for money, as representatives of money and value" means anything, it is that the "copper devices" therein mentioned were used to represent money and value, and were the stakes played for; not that they were the device by means of which the game was played.

It is entirely consistent with this indictment that the game therein charged may have been played by means of some "intangible" mental device which is not within the

prohibition of the statute. In *State of Oregon v. Hann*, 2 Or. 238, this court used the following language in defining what constitutes a "gambling device:" "It must be something tangible and adapted, devised, or designed for the purpose of playing a game of chance for money."

The indictment should describe the device with which the game was played, not necessarily by its name, but by its adaptation and use, and it should appear therefrom that a "tangible device" was used, and that it was adapted, devised and used for the purpose of carrying on or playing a "banking or other game for money, etc.," or if it was not devised originally for that purpose that it was so adapted and used. In this respect the indictment is deficient and the demurrer was properly sustained.

The judgment of the court below will be affirmed.

STATE OF OREGON, Respondent, v. JOHN C. WILSON, Appellant.

MOTION FOR NEW TRIAL—ORDER ON, NOT REVIEWABLE.—The denying of a motion for a new trial, based upon the insufficiency of the evidence to support the verdict, involves a question of fact resting on the sound discretion of the court below, and is not reviewable.

IDEM.—The judgment or order appealed from can only be reviewed as to questions of law appearing upon the transcript.

INDICTMENT — VARIANCE. — Where, in an indictment for larceny, the stolen property is alleged to be the property of A., proof showing it to be the partnership property of A. and B., is not sufficient to sustain the allegation, unless it appears from the evidence that such property was in the possession of and under the control of A., under some arrangement of the parties creating a special property in A.

APPEAL from Umatilla County.

John Wilson, the appellant, was indicted jointly with George Wilson for the larceny of a steer, alleged to be the property of one Waugh. They were tried separately, and found guilty as charged. A motion for a new trial, upon the grounds stated in the opinion of the court, was interposed and overruled by the court, whereupon this appeal was taken.

Sterns & Lichtenthaler and J. H. Turner, for appellant.

L. B. Ison, Prosecuting Attorney, for respondent.

By the Court, PRIM, C. J.:

Two grounds of error are presented by appellant upon which he relies for a reversal of the judgment: 1. The insufficiency of the evidence produced at the trial to support the verdict; 2. Error in the instructions of the court to the jury.

The first ground of error we do not regard as being a subject for review by this court, for the reason that it does not involve a question of law, but one purely of fact, which rested in the sound discretion of the court below. Section 245 of the criminal code provides that "upon an appeal, the judgment or order appealed from can only be reviewed as to questions of law appearing upon the transcript." Section 246 provides that "after hearing the appeal, the court must give judgment without regard to the decisions of questions which were in the discretion of the court below." But this cannot now be considered an open question in this state, as it has already been passed upon in several cases decided by this court. (*Rowen v. State,* 1 Or. 270; *State v. Fitzhugh,* 2 Or. 227.) But if it were reviewable, we do not think the court, would be warranted in setting aside the verdict in this case, for the reason that it appears that there was considerable evidence tending to support it, and there being no statement in the bill of exceptions that it contains all the evidence, the court must presume that it was sufficient to sustain the verdict.

We will now pass to the consideration of the second ground of error, which is that the court erred in its instructions to the jury. The jury were instructed as follows: 1. "If you find that the property mentioned in the indictment was the property of a partnership embracing A. Waugh and William Leyden, then you should find the defendant not guilty. But if you find from the evidence that the property mentioned in the indictment was the property of a partnership, and that Waugh, the person named in the indictment

as owner, has a special charge of the goods, and that he is responsible to the company for the property, then the allegations of ownership in Waugh is sufficiently supported;" 2. "When property is stolen which belongs to a partnership and it is alleged to belong to A., and the proof shows another is a partner or part owner with A. in said property, and it also appears that A., by the consent and agreement of the other partner or part owner, had the possession, control and management of the stolen property at the time of the larceny, such proof will sustain the allegation of the property in A."

3. Where ownership is alleged in A., and the proof shows that another has some contingent interest therein, to become actual upon the happening of some event, which contingency or event has not yet happened, the ownership is properly alleged in A., because the interest of the other has not become real or actual.

These instructions we think contain a very fair statement of the propositions of law applicable to the case. The stolen property is alleged to be the property of A. Waugh, and under the rules of evidence, the proof must correspond with the allegations of the indictment or it cannot be sustained. This proposition is clearly announced in the former part of the first instruction.

The first and second instructions, when taken together, amount to this. If the jury find that the property stolen was partnership property they must acquit the defendant, unless they also find that the property at the time taken was in the possession of A. Waugh, under some arrangement between the parties, by which a special property was created in him.

The third instruction is unquestionably correct. But it is claimed by appellant that there was no evidence upon which such instructions could be based. To this we answer that it appears from the bill of exceptions, that there was some evidence tending to show such an arrangement, and if there was any, however slight, it was sufficient to warrant the instruction given. But on the other hand, if there were none, the court would have to presume such evi-

dence in the absence of a statement in the bill of exceptions, that it contains all the evidence.

Finding no error in the record by which appellant has been injured in a substantial right, the judgment must be affirmed.

THE BANK OF BRITISH COLUMBIA, Appellant, v. W. W. PAGE and ALBINA PAGE, Defendants, and W. E. ELLIS and MARY E. ELLIS, Defendants and Respondents.

FOREIGN CORPORATIONS—STATUTORY PROHIBITION AGAINST.—Section 8 of the act of the legislative assembly of Oregon, entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the state," approved October 21, 1864, is an indirect prohibition against such corporations transacting business in the state until they shall have executed and recorded the power of attorney required by that section.

IDEM.—CONTRACTS BY, WHEN VOID.—A contract made by such corporation in this state before it shall have complied with the provisions of said section 8 is as to third parties void, and cannot be enforced by the corporation against such parties.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

W. H. Effinger, for appellant.

There was no appearance on behalf of respondents.

By the Court, WATSON, J.:

The following facts appear in the transcript, and are necessary to a correct understanding of this opinion: The plaintiff is a foreign corporation, incorporated under the laws of (Great's) the Kingdom of Great Britain.

On the first day of November, 1871, defendant, W. W. Page, being indebted to the appellant in the sum of two thousand, five hundred dollars, on a promissory note in writing given by him to appellant, August 3, 1871, he and defendant, Albina Page, who is his wife, in order to secure the payment of the principal and interest of said note, made and delivered to appellant their mortgage of and upon certain real prop-

erty in the city of Portland. Thereafter on the sixth day of November, 1871, the said W. W. Page and his wife made their mortgage of and upon the same property described in the mortgage given to appellant, to the defendant, Mary E. Ellis and to Lucy J. Bennett, to secure the payment to them the sum of two thousand dollars, which W. W. Page then owed them upon his promissory note previously given to them. Before the commencement of this suit, Lucy J. Bennett assigned her interest in said note and mortgage to defendant, Mary E. Ellis.

At the time of the execution of the note and mortgage given by defendants W. W. Page and wife to appellant, appellant had not executed or filed any power of attorney, as required by section 8 of the act of the legislative assembly of the state of Oregon, entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the state," approved October 21, 1864.

This suit was brought by appellant to foreclose its mortgage, and defendants W. E. Ellis and Mary E. Ellis were made defendants therein as subsequent lien-holders. Defendants W. W. Page and wife made default, and stipulated the facts upon which a decree was entered against them. The court below held that the mortgage of appellant was void as to that in favor of defendant Mary E. Ellis, and decreed that her mortgage should be first satisfied out of the proceeds of the sale of the mortgaged premises. The Bank of British Columbia appeals from so much of the decree of the court below as provides for the prior satisfaction of the mortgage in favor of defendant Mary E. Ellis.

Defendants W. W. Page and wife not being before this court either as appellants or respondents, it is not necessary for us in this opinion to decide the question whether or not they, having dealt with the corporation, are estopped to deny its capacity to contract in this state. A mortgage in this state is a mere security for the debt; and we do not think that defendant Ellis, by taking a mortgage of the premises, so succeeded to the estate of Page therein as that she became bound by his estoppels.

As the decree of the court below provides for the prior satisfaction from the proceeds of the sale of the mortgaged premises of the subsequent mortgage in favor of defendant Ellis, it becomes necessary for us to pass upon the validity of the note and mortgage given to appellant. Of course, if valid, they, constituting a prior lien and being properly recorded, should be first satisfied, and the decree of the court below should be reversed.

The grounds upon which the court below held appellant's mortgage void as to the mortgage in favor of Ellis are that the appellant, being a foreign corporation, and at the time of the execution of the note and mortgage not having executed or filed a power of attorney, as required by our statutes, before doing business in this state, its contracts as to third persons were void, and that as against defendant Ellis its note and mortgage could not be enforced. Whether the court below was correct in this theory of the law depends upon whether section 8 of the act entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in this state," approved October 21, 1864, was intended by the legislature as a prohibition against such corporation doing business in this state before it shall have complied with the provisions of that section. The intention of the legislature must be ascertained by the established rules of construction of statutes. The *status* of a corporation doing business in a state other than that in which it was incorporated was clearly defined by the supreme court of the United States in the case of *The Bank of Augusta v. Earle*, 13 Pet. 538: "It exists only in contemplation of law and by force of the law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot emigrate to another sovereignty." Yet, a corporation of one nation may transact business in another by its permission. Such permission may be granted by express enactments, or if not injurious to the interests of the state or contrary to the policy of its laws, it may be implied from its silence. Any state may exclude foreign corporations

altogether, or it may qualify its consent that they may transact business within its limits by imposing such terms and conditions as its legislature may deem proper. (*La Fayette M. Co. v. French*, 18 How. 407; *Ducot v. The City of Chicago*, 10 Wall. 400.)

A contract entered into in violation of some statutory provision is not always void. In *Pangburn v. Westlake*, 36 Iowa, 546, Cole, J., in announcing the opinion of the court, says: "While as a general rule a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment, and if from all these it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the courts will so hold, and construe the act accordingly." To the same effect is the opinion in the case of *Lester v. Howard Bank*, 33 Md. 558. We apply these rules of construction to our statute. Section 8 already referred to in this opinion provides that "A foreign corporation before transacting business in this state must duly execute and acknowledge a power of attorney," etc.

Were the word "before" omitted, it might, with better reason, be claimed that the section is merely directory. It would then read, "A foreign corporation doing business in this state must duly execute," etc. But we think that the section, by going further and using the language "before doing business," etc., amounts to the same thing as if it read, a foreign corporation "shall not transact business in this state before it shall have duly executed," etc. The section is, in our opinion, an indirect prohibition against a foreign corporation doing business in this state before it shall have complied with its provisions. In support of this construction, we may add that it is the only construction that can give any effect to the statute.

No penalty is provided for the violation of its provisions. If this construction is not the true one, a foreign corporation in willful disregard of the law may transact business in this state, binding our citizens whenever it chooses to sue

them in our courts, and leaving them without jurisdiction over it unless it chooses to appear and submit itself to their jurisdiction.

The statute is not of the same nature as laws providing for the formation of domestic corporations. It could not have been intended to give foreign corporations permission to transact business here, because they already had that permission implied from the comity of nations and the silence of our laws.

Without it they could transact business, hold property, and sue in our courts, in every respect, upon an equal footing with domestic corporations. It is evident that the legislature had another object in view. At the time of its enactment, corporations in the other states of the union were rapidly increasing in number and wealth. The facilities for their formation were greatly increased. All of these things had added opportunities for fraud in their management. It was perceived that in the absence of legislation, while foreign corporations had the unrestrained right to transact business with our citizens and to sue them in our courts, they frequently had no property in the state, and could not be sued therein without their consent. To compel our citizens to go to the distant states of their incorporation to sue them amounted to a practical denial of any remedy against them. To remedy this evil, the statute was enacted. As to all corporations mentioned in the title of the act, their right to transact business in the state was restricted by the condition that, until they should make and cause to be recorded such a power of attorney, as that our courts could obtain jurisdiction over them without further consent, they should not do business here. As to some it was further provided that they should make such a deposit in the state, as that judgments of our courts against them might be satisfied out of the same in the state. We regard all of these provisions of the statute as wise and necessary; and we think they should be so construed as to give them full force and effect. It was suggested in the argument of this case that a contract, made in violation of some of the provisions of the statute is not necessarily void. Some

authorities were cited which give countenance to this view of the law. We think that in some cases it may be true. The general rule is that a contract in violation of law is void. The only exception to the rule is that when a law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of such a statute is not void. (*Lester v. Howard Bank,* 33 Md. 558; *Watrous v. Blain,* 32 Iowa, 58; *Mowing and Reaping Company v. Caldwell,* Supreme Court of Indiana, Am. Law Reg., vol. 16, No. 9, p. 554.)

We do not think this statute belongs to the excepted class. The legislature has prohibited the contract. It has provided no penalty for its violation. Unless the contract shall be held void, the statute is of no effect. We do not think such was the intent of the legislature. We may add that the entire question involved in this appeal was presented *In re Comstock,* decided in the United States district court for this district, and reported in 3 Sawyer, 218. The learned judge of that court, whose familiarity with our statutes entitles his opinion to peculiar weight, has in that case examined the question with his usual learning and research, and as far as it is necessary for us to go in this opinion we have adopted his views of the law therein expressed.

It follows that the decree of the court below must be affirmed.

PATRICK DONEGAN, Appellant, v. DANIEL MURPHY, Respondent.

APPEARANCE—ABANDONMENT OF DEFENSE ON APPEAL IN EQUITY, PRESUMED.—Where an appeal in a suit in equity is taken to this court, and the respondent, being the defendant in the court below, fails to appear, such failure will be regarded as an abandonment of the defense. And if the appellant, being the plaintiff in the court below, makes a *prima facie* case he will be entitled to a decree.

APPEAL from Jackson County.

W. W. Thayer, for appellant.

No appearance for respondent.

By the Court, MCARTHUR, J.:

This is a suit in equity and is here to be tried anew. The appellant appeared and submitted his case. The respondent appeared not. Such being the fact we are compelled to regard the non-appearance of the respondent (defendant in the court below), as an abandonment of the defense. The only course we can pursue is to examine the pleadings, and the evidence submitted by the appellant, and if a *prima facie* case is shown, he should have a decree.

The complaint alleges that the appellant and respondent are owners and tenants in common of about four hundred and sixty-eight sheep, of the value of eight hundred dollars, the former being the owner of the undivided three fourths, and the latter the owner of the undivided one fourth. That the respondent took exclusive possession and control of about one hundred and thirty of the best and most valuable of the sheep without the knowledge or consent of the appellant and keeps possession, claiming them as his individual property.

That at different times the appellant urged the respondent to make division of the flock according to their respective rights, and each time was met with a refusal. That the remainder of the flock not taken by the respondent are in possession of one Samuel Centers. That the respondent threatens to control and dispose of the said one hundred and thirty head of sheep without consulting the appellant, and in fraud of his rights. The answer denies the allegations of the complaint, and alleges that a division of the flock was made with the consent and approval of the appellant, and that upon such division the said hundred and thirty fell to the respondent. The reply denies the affirmative allegations of the answer. The testimony presented by the appellant sufficiently sustains the allegations of the complaint and he should have a decree.

Decree reversed.

DAVID McCULLY, Appellant, v. S. O. SWACKHAMER, Respondent.

DISPUTABLE PRESUMPTION—SALE OF PERSONAL PROPERTY.—The retention of personal property by the vendor after a sale thereof, creates a presumption of fraud, as against his creditors; but such presumption is a disputable one, and may be rebutted by testimony showing that the sale was made in good faith. The question as to whether the sale was made in good faith should be submitted to the jury.

APPEAL from Union County.

The facts are stated in the opinion of the court.

J. H. Slater, Tilman Ford and John Kelsay, for appellant.

Sterns & Lichtenthaler for respondent.

By the Court, PRIM, C. J.:

This is an action commenced by appellant against respondent to recover the possession of two horses, one set of harness and a wagon. The complaint contains the usual allegations of fact in such actions, and are sufficient to constitute a cause of action. The answer undertakes to justify the taking and detention of the property in question by alleging that it was levied upon and sold as the property of John W. McCully, by virtue of an execution duly issued against him and placed in the hands of respondent as sheriff of Union county. The allegations of the answer were put in issue by the replication.

A jury trial was had, and respondent recovered judgment from the court below, from which appellant has appealed to this court. The evidence produced at the trial tends to show that on February 7, 1877 (which was prior to the levy), the horses, harness and wagon were the property of John W. McCully. That on that day it was in his possession, and that he executed a bill of sale of said property to appellant, who is his father, at the same time turning the property over to John Creighton, the son-in-law of appellant. That on the next day the property was taken back into the possession of said John W. McCully under an agreement with said Creighton, the authorized agent of

appellant, to pay him one dollar per day for every day he should use the same. The property continued in the possession of said John W. McCully until it was taken by respondent on the levy. The principal issue made by the pleadings and evidence is whether this sale was made in good faith for a valuable consideration or whether a mere sham to defraud creditors, and on this issue the evidence was conflicting.

The principal error complained of is as to the instructions of the court upon this point. The court below instructed the jury as follows: 1. If the jury believe from the evidence that there was any agreement entered into at the time of the execution of the bill of sale whereby the said J. W. McCully was to receive back in his possession said property described in the complaint, and did so receive it back into his possession pursuant to such agreement, then the sale was such that the plaintiff cannot recover in this action; 2. If there was a condition in the sale between David and J. W. McCully, whereby J. W. McCully was to receive any benefit, either by the use of the property or by the right of redemption thereof, then the jury should find a verdict for defendant; 3. In order to take a sale out of the statute of frauds it must be absolute, unqualified and unconditional. There must be no condition which would give vendor the right to take the property back upon any condition whatever, and if you so find you will find a verdict for defendant but this condition must appear to be acquiesced in by both parties.

These instructions we think, were erroneous, for the reason that they exclude from the consideration of the jury the questions of fact as to whether the sale was made in good faith or merely to defraud creditors. There was some evidence tending to rebut the presumption of fraud, and that evidence should have been submitted to the consideration of the jury.

Under our code "every sale of personal property capable of immediate delivery * * * unless the same be accompanied by an immediate delivery and be followed by

an actual and continued change of possession, creates a presumption of fraud as against creditors of the seller * * * disputable only by making it appear that the same was made in good faith." (Civil Code, 262, sec. 766, sub. 40.) Under this provision of the code, the retention of the possession of the property in question by the vendor after sale, created a presumption of fraud as against his creditors; not conclusive, however, but a presumption that might be rebutted "by making it appear that it was made in good faith."

This case, we think, comes clearly within the rule laid down by this court in the case of *Moore v. Floyd,* which we re-affirm. (4 Or. 101.) There are some other assignments of error contained in the notice of appeal in relation to the rulings of the court upon the admission of evidence, but we do not regard them of sufficient importance to merit the attention of the court. As the instructions complained of by the appellant may have operated to prejudice a substantial right of appellant, we think the judgment of the court below should be reversed.

It is therefore ordered that the judgment be reversed and the case remanded to the court below for a new trial.

Judgment reversed.

THOMAS SMITH, Respondent, v. W. C. GRISWOLD, Appellant.

EQUITY JURISDICTION—FRAUDULENT SALES.—Courts of equity will entertain jurisdiction in cases of fraudulent sales where deceit is alleged in a sale, although the plaintiff might maintain an action for deceit.

PROOF—NO PREPONDERANCE OF, WHEN.—When there is an issue of fact, and the plaintiff supports the allegations in his complaint by his deposition and no other testimony, and the defendant in his depositions denies these allegations, there is no preponderance of proof. The court will not reject the testimony of a witness who is not in any way impeached.

APPEAL from Multnomah County.

Smith was the owner of three claims against the government of the United States, aggregating one thousand three hundred and seventy-five dollars. They were for services as a packer and for the use of a horse in the volunteer ser-

vice in the Indian war of 1854, nine hundred and sixty dollars; for the use of a mule furnished in the Indian war of 1855-6, two hundred and thirty dollars, and for the value of the mule, lost while in such service, one hundred and eighty-five dollars.

In 1873 Smith employed B. F. Dowell to collect these claims from the government, and executed in his favor a separate power of attorney in each case.

The complaint alleges, in effect, that in June, 1874, Griswold, for the purpose of inducing Smith to sell to him these claims at less than their value and with the intent to defraud him, represented to Smith that no compensation would be allowed him for the loss of the mule, by the government or by the court of claims; that not more than three hundred dollars would be allowed for Smith's services as packer and for the use of the horse; that Dowell never could collect any of the claims, and that if he did collect them, Smith could not make anything out of him; that Dowell had transferred all his property to his family, and that he was insolvent; that the claims were worth no greater sum than three hundred dollars, and that he, Griswold, would not make anything out of them if he bought them at that figure, and the only reason why he was willing to give so much was that he wanted to "buck" against Dowell.

The complaint further alleged in effect, that Griswold had been engaged in prosecuting claims against the government, and that Smith was aware of this fact and placed confidence in his statements on account of it; that he was induced by these statements to sell Griswold all the claims for three hundred dollars; that Griswold collected them in full in September, 1874; that the statements of Griswold were false and fraudulent. The complaint prays that the contract of sale be set aside and for judgment for one thousand three hundred and seventy-five dollars, the sum of the claims, less the three hundred dollars received on the contract of sale, and interest.

The answer admits the purchase by Griswold of the claims for three hundred dollars, but denies all material allegations in the complaint, which go to charge Griswold with false or

fraudulent representations, and alleges that the purchase was in good faith, and that the three hundred dollars in gold was the full market value of the claims when the purchase was made. There was no testimony except that of the parties to the suit, their testimony going to sustain their respective pleadings.

The court found that the allegations of the complaint were true, and it set aside the sale and rendered judgment in accordance with the prayer of the complaint.

Thayer & Williams and Rufus Mallory, for appellant.

A suit can only be maintained when there is not a complete, plain and adequate remedy at law. (G. L. of Or., sec. 376; *Milton v. Scammon,* 52 N. H. 609; Story's Eq. Jur., sec. 33, 473; 3 Black. Com. 431; *Learned v. Holmes,* 49 Miss. 290.) If the plaintiff can recover at all, he has a complete remedy in an action at law for the deceit. (5 Cranch, 439; *Grant v. Bontz,* 2 Cranch, 184; *Shaffer v. Slade,* 7 Blackf. 178; *Milton v. Scammon,* 52 N. H. 609.) The alleged false representations are mere statements of opinion, for which no action or suit will lie. (*Ellis v. Andrews,* 56 N. Y. 85; *Van Epps v. Harrison,* 5 Hill, 63.)

This suit will not lie for a false representation when the plaintiff, by the exercise of common prudence, could have learned the fact. (*Slaughter v. Gleason,* 13 Wall. 379; *Moore v. Subeville,* 2 Bibb, 602; *Sitzan v. Wilson,* 4 Iredell, 501.) The plaintiff did not establish his cause of suit by preponderance of evidence. There was no testimony as to what was said when the bargain was made, except that given by plaintiff and defendant. To say the least, they are entitled to equal credit, and their statements are in direct conflict. In such a case the plaintiff must necessarily fail.

A. C. Gibbs and B. F. Dowell for respondent.

Fraud and deceit are always good grounds for equity jurisdiction. The legal and equitable maxim is *suggestio falsi* or *suppressio veri* amounts to fraud and will avoid a contract at law, or be a good ground of relief in equity, whenever the plaintiff is deceived by the defendant to his injury. (2

Tucker's Com. 421; 1 Story's Eq. Jur. sec. 184.) At common law trespass or trover would lie in all cases by the lien creditor against the debtor or his assignee, and for fraud and deceit the action of deceit would lie. In modern times a special action on the case or bill in equity has superseded the action of deceit, and for all contracts expressed or implied, for money, the action of assumpsit has been substituted for the action of deceit or a special action on the case. Courts of equity take jurisdiction in such cases, not on the ground that there is no remedy at law, but on the doctrine that Griswold held the funds in trust for the plaintiff, and its remedy is more adequate than the remedy at law.

In cases like those described in this complaint, it would have the assignors and Griswold both before the court, and if equity demanded it at the hearing, it would decree for each of the assignors and Griswold to pay the plaintiff, and also render a decree over in favor of Griswold; or annul the contract, and compel Griswold, on account of his fraud, to pay the whole amount he received, less the amount he paid to each of his assignors. (1 Story's Eq. Jur. sec. 451; 2 Id. sec. 1226.) The action of assumpsit and a bill in equity are frequently concurrent remedies. (1 Story's Eq. Jur. sec. 60.) Where Stewart had a mail contract, and he assigned it to Bradley, and afterwards Stewart gave an order on the postmaster-general for six hundred and twenty-five dollars, to one Root, who collected the money, it was held that Root was liable to Bradley for the amount he collected on the order. (*Bradley v. Root,* 5 Paige, 632.)

Mr. Meigs, one of the ablest attorneys that ever practiced law in Tennessee, truly says: "Many *dicta* are to be found in the books confining this action for money had and received to cases where they say there has been privity of contract, as between payee and maker of a note, payee and acceptor of a bill, indorsee and immediate indorser; and this doctrine being advanced at *Nisi Prius,* 1 Camp. 175, has been introduced into the text of some editions of 'Chitty on Bills.' But it is not supported by the decided cases, as may be seen from *Grant v. Vaughan,* 3 Burrow, 1525-9; *Fatlock v. Harris,* 3 T. R. 174; *Rabord v. Peyton,* 2

Wheaton, 385; *Pierce v. Crafts,* 12 Johnson's R. 90; *Dickson v. Cunningham,* M. and Y. 221." (Meigs' Digest, p. 93, sec. 9.)

In the case of *Raborg v. Peyton,* Judge Story says: "The old doctrine upon this subject has been very considerably shaken in modern times. An *indebitatus assumpsit* will now lie in favor of the payee against the acceptor; and it is generally true that where such an action lies, debt will lie." We see no inconvenience in adopting a rule more consonant to the just rights of the parties, as recognized in modern times. In so doing we apply the well-settled doctrine that debt lies in every case where the common law creates a duty for the payment of money, and in every case where there is an express contract for the payment of money. (4 Wheat. 175.)

In the case of *Dickson v. Cunningham,* reported in Martin Yerger's Report, 221, Judge Catron says: "It is objected by counsel, that there it no privity of contract between the parties; and several authorities were cited to show that *indebitatus assumpsit* will not lie, except between privies.

To this objection there are two answers — first, there is a legal privity of contract between the parties in this case; secondly, it is not true that the action for money had and received can only be grounded on privity of contract. It is the proper remedy to recover money obtained by fraud or deceit." This case was a very complicated, fraudulent transaction. It nearly equaled Griswold. The Reporter makes this syllabus of the case: "Where the defendant was indebted to A., who was indebted to B., who was indebted to plaintiff—and they all met together and defendant aided and assisted A. in successfully assigning to the plaintiff a debt, which belonged to neither; and by this means, A. paid his debt to B., and B. paid his debt to the plaintiff, and A. credited defendant, held, that plaintiff might disaffirm the contract and maintain an action for money had and received against the defendant." (M. and Y., p. 203.)

Judge Crabb, in delivering the opinion of the court, tries to sum up the fraud in a few words: "That Dickson did have and receive money, which, by law, was for the use of

Cunningham. By aiding Garner in successfully assigning to Cunningham a suit which belonged to neither, Dickson contributed towards Cunningham's giving a credit to Rhea in account, in other words paying money to Rhea; and Rhea giving Garner a credit, in other words, paying money to Garner; and Garner giving Dickson a credit, in other words, paying money to Dickson. It was no strained inference, then, but one believed to be authorized by the decided cases, that Cunningham's money went to Dickson. The whole transaction being disaffirmed, as grounded in *mala fide,* Dickson was the man who had the money; he was the proper person for Cunningham to sue." (Id. 220.) There is more privity between the plaintiff and Griswold in these actions than there was between Cunningham and Dickson.

Judge Tucker says: "This action lies to recover back money embezzled, or which any person has been defrauded of, by cheating or otherwise." (2 Tucker's Com., 132.) The action of assumpsit is an equitable action and it will lie at common law, whenever a man has received money, which, equitably, belongs to the plaintiff. (*Thallheimer v. Brinkerhoff,* 3 Cow. 624; *Mier v. Schenck,* 3 Hill, 228; Story on Agency, sec. 397.)

The case of *Upton v. Vail,* 6 Johns. 181, was an action on the case, and Chief Justice Kent, after reviewing the authorities, says: "I place my opinion upon the broad doctrine that fraud and damage coupled together will sustain an action." Or a suit in equity could be sustained on the lien for an account and for the fraud. (Story's Eq. Jur., sec. 506.) Inadequacy of price is a badge of fraud. (1 Bac. Abridg. 161; 1 Story's Eq., sec. 246; Bump on F. C., 43; *Sheton v. Church,* 38 Conn. 416; 39 Ill. 264; Johns. Ch. 35.) Misrepresentations make acts void. (1 Story's Eq. Jur., sec. 191; Smith's Man. of Com. Law, 67; Chitty on Cont. 753; 2 Parsons on Cont. 774.)

By the Court, BOISE, J.:

The first question presented for consideration is, has a court of equity jurisdiction of this case? It is claimed by the appellant that the plaintiff has a complete remedy for the injuries complained of in an action for deceit.

In this case there had been a sale of certain claims against the United States by the plaintiff to defendant (Griswold), and a bill of sale executed by the plaintiff, which made Griswold the legal owner, and enabled him to collect the same for his own use. The complaint alleges that Griswold in order to induce the plaintiff to sell these claims, amounting to one thousand three hundred and seventy-five dollars, for the sum of three hundred dollars, falsely represented to him that no allowance would be made for the use of a mule, which constituted one of the claims, and in substance that no more than three hundred dollars, or thereabouts, would be allowed and paid for all these claims, and that such representations were false, and that the defendant knew them to be false when he made them, and that by reason of such representations the plaintiff was induced to part with his property. These facts might be the foundation of an action for deceit, and the plaintiff in such action claim as damages the balance of said claims above three hundred dollars. And the question is, can he maintain this suit in equity, in which he asks that said bill of sale be set aside and canceled, and the defendant be declared his trustee for the balance of the one thousand three hundred and seventy-five dollars, after deducting the amount paid, three hundred dollars. It would be necessary to invoke the aid of a court of equity to cancel this bill of sale, if that is necessary, to complete relief, but it is urged that, it appearing from the complaint that the defendant has the money, and the amount is certain, it is not necessary to have any accounting between the parties, that the remedy by an action would be complete, and that nothing would be gained by having this sale rescinded and this bill of sale canceled. We think that as this bill of sale transferred the property to defendant and was evidence of the sale, the plaintiff had a right to seek redress in a court which could rescind the contract and place him in the condition as to the ownership of the property in which he was when the sale was made. Such jurisdiction is exercised in courts of equity, notwithstanding there is a remedy at law. (Story's Eq. Jur., secs. 190, 191.)

It is also insisted that the complaint does not state facts sufficient to constitute a cause of suit. That whatever false representations were made by Griswold were mere matters of opinion as to the value of these claims. The complaint says he represented that nothing would be allowed for the mule, and not more than three hundred dollars would be paid on all the claims, and that he (Griswold) knew these statements were false. These are sufficient allegations of fraud to sustain the complaint. If it had been alleged that he said that in his opinion no pay would be allowed for the mule, and that no more than three hundred dollars would be paid in all, and it were further alleged that when he pretended to express such an opinion he knew to the contrary, this would have been deceit, and have been *suggestio falsi*, and would have made him responsible so that he could not profit by his fraud.

It is further suggested by the defendant's counsel that the plaintiff ought not to recover, because that by proper diligence and prudence he could have known that his claims were allowed to the amount of one thousand three hundred and seventy-five dollars. That a court of equity will not aid a person who had an equal opportunity to be informed as to the subject-matter of the contract. And it is true, as said by Judge Field in the case of *Slaughter v. Gleason*, 13 Wall. 383, cited by appellant, that "a court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness when the means of knowledge are at hand and equally available to both parties, and the subject of the purchase is alike open to both parties for their inspection." But this is not such a case. The subject of the purchase was not alike open to the inspection of both parties. The complaint says that Griswold knew his representation that nothing would be allowed for the mule was false. It appears that at the time of the sale he had information of the allowance of these claims which was not equally possessed by the plaintiff, and of which he had then no means of knowledge at hand. The evidence was at Washington city, and it makes no difference that he could have obtained it

before the defendant prepared to purchase. The rule as to voluntary blindness applies only to cases where the parties have equal opportunities to know, at the time of making the trade or pending negotiations thereto.

We are of opinion, therefore, that plaintiff is entitled to a decree, provided the defendant made the false representations alleged and the plaintiff was thereby induced to part with his property. And this being asserted on the part of plaintiff and denied by the defendant, we will have to look into the testimony to determine whether the plaintiff has proved his case by a preponderance of testimony. The only evidence as to the false representations is contained in the deposition of the plaintiff, who swears that they were made and gives the circumstances and the times and places when they were made.

The defendant in his deposition admits that he met the plaintiff at the time and place testified to by the plaintiff, and admits that he bought this claim for three hundred dollars and that he told the plaintiff that Dowell was debarred from practicing at the departments, but positively denies that he made the false representations complained of. Both these parties had sworn to the same facts in their pleadings that they testified to in their depositions.

The question is, Has the plaintiff proved his case by a preponderance of evidence? If the parties are entitled to equal credit there is no preponderance, and the case of the plaintiff is not proved. We suppose it may be claimed that the fact that Smith sold his claim for less than its value is a presumption in his favor, but the fact that a party has sold his property at a price less than its real value will not defeat a sale unless the purchaser made fraudulent representations which induced the sale, and the fraudulent representations must be proved and will not be presumed, so the only question after all is, were they made, and in order to find that fact from the evidence before us we must reject the evidence of the defendant. He is not impeached, and the court cannot reject his evidence without violating the rule that the evidence of a witness not impeached must be considered, and we think that when parties come and submit a case—

each supporting his pleading solely by his own testimony—there is no preponderance of testimony. The court might as well decide that the sworn complaint of the plaintiff shall prevail over the sworn one of the defendant. And in order for the plaintiff to overcome the evidence of the defendant, he should produce some other evidence to corroborate his testimony, else the case stands as to the preponderance of proof where it did when the issue was made.

The case will be reversed and the plaintiff's bill dismissed.

LETITIA McKAY, Respondent, v. WALTER FREEMAN, Appellant.

Dower—Assignment of, not Necessary to Right of Action.—A widow entitled to dower which has not been assigned to her, may maintain an action at law against the grantee of her husband who denies her right to recover the same.

Idem—Complaint, when Sufficient.—In such action it is not necessary that the complaint in addition to the allegation that defendant wrongfully withholds the possession shall allege that he denies plaintiff's right. This may be shown in evidence.

Idem—Donation Act—Right of Widow under, where Donee Died before Final Proof.—A donation claimant under the fourth section of the donation law, complied with the conditions of the act so as to entitle him to a patent. He thereafter conveyed the tract. His wife did not join in the conveyance. He died before the issue of the donation certificate or patent: *Held*, that his widow was entitled to dower in the tract.

Appeal from Washington County.

This is an action to recover an estate of dower. Plaintiff is the widow of Charles McKay, deceased, who died intestate on or about the twenty-eighth day of May, 1873.

McKay took six hundred and forty acres of land under the donation act, one half to himself and the other to his wife the plaintiff. The required residence and cultivation was completed on the twenty-seventh of September, 1854; but the final proofs were not made until subsequent to his death. On the thirtieth of April, 1865, McKay, for a valuable consideration, sold and conveyed two hundred acres of that portion of the donation subsequently allotted to his heirs to the appellant. His wife, the respondent, did not

join in the conveyance. In April, 1875, upon final proofs being made, a patent certificate was issued allotting the east half of the section to the respondent, and the west half, of which the land conveyed was a part, to the heirs at law of Charles McKay.

The respondent brought an action of ejectment to recover the possession of an undivided one-third of the two hundred acres sold by McKay in April, 1865, alleging that she is seised of an estate in dower for her own life therein. She alleges that the appellant wrongfully withholds and has so withheld the possession of the premises from her for two years prior to the commencement of the action, to her damage, etc., and that she demanded the possession from him.

The demand for possession is admitted. The case was tried by the court, without a jury, upon facts stipulated between the parties and upon the allegations and proofs. The court, among other findings of facts and conclusions of law, found that respondent demanded her dower on the thirteenth day of May, 1875, and "that the rental value of said code of civil procedure allows him ten per centum of the land, from May 13, 1875, to the date of the judgment, to wit, October, 1876, is three dollars per acre; that the respondent is entitled to recover dower or an interest and possession in the two hundred acre tract described in stipulated fact No. 6, equal to thirty-eight and one tenth (38 1-10) acres or any quantity to be admeasured and set out to her, to hold in severalty during her natural life, and that the plaintiff is entitled to recover of and from the defendant the sum of one hundred and fourteen dollars and thirty cents damages for withholding her said dower since demand thereof."

These findings and conclusions of law are assigned as error.

T. H. Tongue, for appellant:

The statute requires (Civ. Code, sec. 313) that the plaintiff have a legal estate in the property and a present right of possession. Until assignment dower is not a legal estate

and does not give a right of possession. (1 Wash. on Real Prop., 284, 288; Tyler on Infancy and Coverture, 581; 4 Mass. 387; 9 Id. 12; 16 Id. 193; 2 N. Y. 254; 8 Id. 113; 4 Kent, 63; 7 John. 247; 20 Id. 411; 19 Id. 167.) Before assignment, a widow cannot maintain ejectment for dower. (1 Wash. on Real Prop., 287; 4 Kent. 64; 15 John. 319; 5 Id. 80; 45 Bart. 265; Adams on Ejectment, 66.) Unless, therefore, the statutes clearly confer this remedy, plaintiff cannot maintain this action. (5 Or. 266.) If plaintiff can maintain this action, she must show a denial of right. (Civ. Code, sec. 324.) This cannot be shown unless averred. (4 Or. 11.) Plaintiff does not aver by what right she is entitled to dower. If entitled at all, it is not in her own right, but through the right of her husband, and right to continuance of his estate. (1 Wash. on Real Prop., 179.)

Her marriage and the seisin and death of her husband should have been alleged. An examination of whether the facts proved warrant the judgment of the court, involves the question whether a widow is entitled to dower in her husband's half of his donation claim when he has died, after completing the required residence and cultivation, but before making proof thereof and receiving patent. The reason of the law giving dower, as given by Blackstone (2 Black. Com. 130), is "for the sustenance of the wife, and the nurture and education of the younger children." (1 Wash. on Real Prop., 170.)

The reason of the law for giving dower is not applicable to the donation law. Much more ample means for the support of the widow have been provided. One-half of the entire claim is there given to her in her own right. Of the other half, the entire interest of the husband who dies before patent issues, is disposed of by that act. Nothing is left to which dower can attach. As we have seen, dower is a continuance of the husband's interest and estate. That interest is all disposed of. (1 Wash. on Real Prop. 179.) A donation claimant may sell or devise his half of his claim after completion of his residence. If he does neither, and dies before patent issues, the land must descend as pointed out by that act. (5 Or. 204; 1 Saw.

253; 2 Id. 273; 3 Id. 419; 1 Deady, 358; 13 Wall. 428; 4 Or. 155.)

In that act there is no provision for dower. To entitle the widow to dower in any land, the husband must have been seised, during marriage, of an estate of inheritance—an estate that would pass to his heirs as such (Civ. Code, Mis. Laws, chap. 17, sec. 1; 4 Kent 37; 1 Wash. on Real Prop. 179; 2 Or. 30.) But where the donation claimant dies before patent issues, the land does not descend to his heirs, as such, but to the persons designated in the act, excluding some of the heirs, such as grandchildren. (1 Deady, 358; 13 Wall. 428.)

In the second of Oregon 32, 33, this court held that dower did not attach to a donation claim until the conditions of the act had been complied with. Residence, cultivation and proof thereof are conditions necessary to be complied with before a donation claim ceases to be "an estate upon condition," "a base or conditional fee." (1 Deady 113; 5 Or. 202.) Respondent, if at all, can only recover damages from the time of demand. (Mis. Laws, chap. 17, sec. 25.) The complaint shows no time of demand.

Dolph, Bronaugh, Dolph & Simon, for respondent:

The findings of the court are equivalent to the special verdict of a jury, and will not be disturbed unless manifestly contrary to the evidence. (*Moore v. Murdock,* 26 Cal. 525.) There being no bill of exceptions in the case, the evidence upon which the court below acted is not before this court. This court will presume that there was evidence to sustain the finding, unless the contrary affirmatively appears from the record. (*Fulton v. Earhart,* 4 Or. 61; *Nelson v. Lemmon,* 10 Cal. 49.) A widow is entitled to dower "of one third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." (Mis. Laws, chap. 17, sec. 1.)

The land in controversy being a "donation claim," the title vested in fee-simple in the donors from the date of their settlement, or at least from the date of the act, subject

to be defeated by non-compliance with the conditions subsequent in the donation act expressed. (Civ. Code, sec. 329; *Dolph v. Barney*, 5 Or. 201; *Lee v. Summers*, 2 Or. 266; *Chapman v. School District No.* 1, 1 Deady, 113; *Lamb v. Davenport*, 1 Saw. 632; *Fremont v. United States*, 17 How. 559.) There is no pretense in this case that the conditions of the grant were not subsequently complied with.

But it was contended in the court below that as Charles McKay, the husband of plaintiff, died May 28, 1873, and the donation claim did not issue until April 16, 1875, by reason whereof plaintiff would have taken a child's portion of the husband's half of the claim, under the provisions of sections 4 and 7 of the donation law, if the husband had not alienated the land in his life-time, therefore she is not entitled to dower in the land. There is no reason why a widow may not accept the beneficence of the general government, and also assert her otherwise undisputed right under the laws of the state.

As the residence and cultivation required by law were completed long prior to the alienation of the land, the husband had a fee-simple title to it, when it was sold, and the wife not having joined in or acknowledged the deed, is not barred of her dower therein.

By the Court, Watson, J.:

Before examining the assignments of errors set out in the notice of appeal, it is necessary for us to pass upon the objections made for the first time in this court to the sufficiency of the complaint, and to the jurisdiction of the court below over the subject-matter of this action. It has been the practice of this court to consider the objections; that the court below had not the jurisdiction of the subject-matter, and that the complaint does not state facts sufficient to constitute a cause of action or suit, whether they are assigned as errors in the notice of appeal or not.

With these exceptions this court can only look into the errors assigned in the notice of appeal. (*Dolph v. Nickum*, 2 Or. 202.)

It is claimed by appellant that dower which has not been

assigned to the widow is not such an estate as that she can recover it in an action at law. While there is some conflict in the authorities on this question, we think that were it to be settled by the rules of the common law, aside from the provisions of our statute the theory of appellant would be found in accordance with the weight of authority. We are of the opinion, however, that our statutes make a full provision for the recovery of dower without reference to the rules of the common law.

Section 8, of title 1, chapter 17 of the General Laws of Oregon, page 585, provides that "when a widow is entitled to dower in the lands of which her husband died seised, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them, or either of them, it may be assigned to her, in whatever counties the land may lie, by the county court of the county in which the estate of the husband is settled," etc.

Title 1, of chapter 17, makes no provision for any assignment of dower by the county court where the right of the widow is disputed, and makes no provision for the trial of such dispute by the county court. Section 328 of the civil code clearly recognizes dower before admeasurement as such an estate as that the action provided by title 1 of chapter 4 of the code of civil procedure may be maintained by the tenant in dower to recover possession of it, with damages for withholding it. The section goes on and provides for a stay of execution on a judgment rendered in such action until the admeasurement of the dower therein recovered.

Section 324 of the code provides that in an action brought for the recovery of the dower before admeasurement, or by one tenant in common against another, "the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right, or did some act amounting to such denial." That is the only restriction. If the right is not denied, no adjudication is necessary to establish it, and the admeasurement may be made by the county court. This brings us to the consideration of the objection made that the complaint does not

state facts sufficient to constitute a cause of action, in that it does not sufficiently describe the estate of the plaintiff, and that it does not allege that defendant denied the right of plaintiff to dower.

We think that mere uncertainty in the description of plaintiff's estate should have been pointed out by demurrer in the court below, and was waived by answering over, but we also think that the complaint was sufficient in this respect, even if attacked by special demurrer. Section 315 of the code provides what the complaint shall contain: "The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee for life, or for a term of years, and for whose life or the duration of such term." The complaint in this case alleges "that she, plaintiff, is seised of an estate in dower for her own life." This description of the estate contains every requisite prescribed by the statute, and is sufficient. It is objected that the complaint should allege that defendant denied plaintiff's right. If this were necessary, we think the complaint sufficiently does so when it states "that plaintiff has demanded possession from defendant, and that he wrongfully withholds the same" to prevent its being obnoxious to a general demurrer. We do not think, however, that this is a matter which is necessary to plead in addition to the allegation that defendant wrongfully withholds the possession of the premises from the plaintiff. The first error assigned in the notice of appeal is that the court below erred in certain of its findings of fact. This court cannot review the findings of fact of the court below. They are as conclusive as the special verdict of a jury.

The second error assigned is that the court below erred in its conclusion of law from the facts stipulated and found, that the plaintiff was entitled to dower in the two hundred-acre tract described in stipulated fact No. 6. In passing upon this assignment of error it becomes necessary for us to decide the question whether or not the widow of a donation settler who has complied with the conditions of the fourth section of the donation law, so as to entitle him to a patent for the tract claimed by him, and who dies before the issue

of the donation certificate or patent therefor, is entitled to dower in such tract. The decision of this question depends upon the construction of the statute of this state regulating dower, and of section 4 of the donation law.

Section 1 of title 1 of chapter 17 of the general laws of Oregon provides: "That the widow of every deceased person shall be entitled to dower, or the use during her natural life of one third part of all the lands whereof her husband was seised of an estate of inheritance, at any time during marriage, unless she is lawfully barred thereof." This section is clear, plain and direct in its language. There is no necessity for construction. If a settler who has complied with the conditions of section 40 of the donation law, so as to entitle him to a patent of the tract claimed by him, is seised during marriage of an estate of inheritance, without the issue of the donation certificate or patent, then it follows, of course, that in the event of his death his widow is entitled to her dower, unless she is lawfully barred thereof by her own act. Is such a settler seised of an estate of inheritance? Section 329 of the code of civil procedure contains a legislative construction of the donation law which is, we think, applicable to the case. It provides that in an action at law for the recovery of possession of real property, if either party claims the property, as a donee of the United States under the donation law or its amendments, such party from the date of his settlement thereon, as provided in said acts, "shall be deemed to have a legal estate in fee in such property, to continue upon condition that he perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions."

This legislative construction is binding on this court, unless it has been overruled by the courts of the United States. It has not only not been overruled, but has been uniformly adopted by these courts whenever the question has been before them. (*Chapman v. School District No.* 1, 1 Deady, 113; *Adams v. Burke,* 3 Saw. 416; *Lamb v. Davenport,* 1 Id. 632.) An estate in fee being necessarily an estate of inheritance, we are of the opinion that the widow, in this case, was entitled to her dower by express provision

of the statutes of this state. If that provision were not too plain to leave any room for construction, it might be added that the right of the widow to dower in her husband's donation claim, in cases where he died after a compliance with all of the conditions of the law so as to entitle him to a patent, but before its issue, has been generally recognized by the profession, and acted upon by the courts of the state until it has become a rule of property which ought not to be disturbed upon any doubtful construction of the law.

The decision and judgment of the court below must be affirmed.

LOUIS NICOLAI, Respondent, v. S. M. LYON, Appellant.

COMPOSITION AGREEMENT—IN WHAT CASE LIABILITY OF THIRD PERSONS TO CREDITOR DISCHARGED BY.—N. deposited two thousand dollars with L. to be loaned to U. upon the security of a first mortgage on certain real estate. L. loaned the money, but took a second mortgage. The property was absorbed in discharge of the first mortgage. U., having become insolvent, compromised with his creditors. N. signed the composition deed without notice to L., who was a creditor of U. on a separate account, and who also signed it: *Held*, that N., by entering into the composition agreement, released L. from liability for a breach of the agreement under which the two thousand dollars was loaned.

APPEAL from Multnomah County.

Nicolai gave Lyon two thousand dollars to be loaned to the Uptons, secured by a first mortgage upon certain real estate for a compensation to be paid him. Lyon loaned the money to the Uptons, taking a second mortgage upon the property in question. The property, excepting an inconsiderable residue, was all applied in discharge of the first mortgage. The Uptons became insolvent and made a composition agreement with their creditors, which was signed by Nicolai without notice to Lyon. The Uptons were indebted to Lyon at the time this agreement of compromise was made, and the latter signed the agreement. A judgment was rendered in the court below upon a verdict in Nicolai's favor. One of the in-

structions to the jury in the court below is contained in the opinion of the court.

Dolph, Bronaugh, Dolph & Simon, for appellant.

Catlin & Killen, and William Strong, for respondent.

By the Court, MCARTHUR, J.:

We think the court below erred in giving the following instruction: "That if the jury should find from the evidence that defendant made the contract with plaintiff alleged in the complaint, and then loaned plaintiff's money to the Uptons upon the second mortgage alleged in the complaint, by reason whereof plaintiff has failed to collect from the Uptons any of said money loaned them, and if the jury should find that plaintiff afterwards signed the composition agreement between the Uptons and their creditors, and that the Uptons complied with their part of that agreement, the effect thereof was to release defendant from responsibility to plaintiff for such breach of contract, unless the jury should also find that defendant himself signed said composition agreement, in which latter event the effect was to release the Uptons from their contingent liability over to defendant but that defendant would not in that case be released from his liability to plaintiff for said breach of contract." The latter part of this instruction beginning with the words "unless the jury should also find," etc., does not state the law correctly.

By signing the composition deed the appellant only released the Uptons from further personal liability upon the claim he held against them, amounting it appears, to three hundred and seventy dollars. At the time he placed his signature thereto, he had no right, either fixed or contingent, against them, arising out of the contraction between himself and the respondent. Consequently he could have intended nothing more than to release them personally from their then ascertained liability to him. If he failed in his contract with respondent, and the respondent was about to lose his money because of the insufficiency of the mortgage security, he had a right to be subrogated to the rights of the respondent. The respondent could not cut him off from recourse over against the Uptons without his consent, and

that we do not think can be implied from the fact that he signed the composition deed.

For the error in this instruction, it not being caused by any other, we think the judgment should be reversed and a new trial granted.

Judgment reversed.

JOHN J. BRUGGER et al., Appellants, v. ISAAC BUTLER et al., Respondents.

MILL AND MILL PRIVILEGES—RIGHTS OF GRANTEE OF.—An agreement in writing to convey by warranty deed a tract of land, together with the tenements, easements, saw-mill, mill privilege and appurtenances thereto belonging, carries with it whatever is necessary to the full enjoyment of such land and property rights. Under such an agreement the dam to the mill described may be tightened or raised higher if necessary, in order to create a sufficient head of water to run the saw-mill successfully.

APPEAL from Washington County.

The appellants are the owners of a tract of land upon which there is a grist-mill and a saw-mill. Both mills are run by a small stream of water known as Rock creek, the grist-mill being above the saw-mill.

They made an agreement in writing on May 8, 1875, with the respondents, by which they agreed to convey to them, within two years, a portion of the land in question, upon which the saw-mill is situated, with the tenements and easements, saw-mill, planing-mill, machinery, mill and water privileges, etc. Under this agreement the respondents took possession of the property, and tightened and raised the dam by which water for the saw-mill was supplied through a race for that purpose. These repairs and alterations upon the dam had the effect to fill up the race leading to the grist-mill of appellants to their injury and damage. Whereupon the appellants brought this action.

A. C. Gibbs, for appellants:

The defendants cannot exercise their rights so as to diminish those of the plaintiffs; nor can they decrease the flow of the water to plaintiffs' race by filing it up, or otherwise dam-

age the plaintiffs in any manner. Both mills being in existence at the time of the purchase, and supplied from the same pond, created by the same dam, it is to be conclusively presumed that the defendants purchased with a full knowledge of the rights of the plaintiffs, and that the condition of the respective races, as well as the dam, was to remain the same, subject to repairs, however. (*Stone v. Clark,* 1 Met. 380; *Jones v. Percival,* 5 Pick. 486; Angel on W. C., sec. 224; *Jennison v. Walker,* 11 Gray, 426; 7 Penn. St. 442; *Brannon v. Angier,* 2 Allen, 128; *Hoyyand* v. *Robinson,* 3 Mason 272; 1 Sumner, 503; 1 Wood & M. 288; Angel on W. C. sec. 155; *American Co. v. Bradford,* 27 Cal. 368; *Hill v. Smith,* 27 Id. 481; 46 Id. 346; *Patten v. Marden,* 14 Wisc. 517.

T. H. Tongue, for respondents.

In conveying this property to respondents they impliedly conveyed to them whatever was necessary, for the full enjoyment of it for the purposes granted, with all the easements and appurtenances attached to and in use therewith at the time of sale. (2 Wash. on Real Prop. 36; 10 Pick. 138; 1 Cush. 285; Wash. on Easements, 31; 4 Vt. 199; 1 Serg. & Rawle, 169; 21 N. Y. 507; 2 Cush. 327 and 331. What were the "mill privileges," and "water privileges," if not the right to raise and use sufficient water to successfully operate the mill; to use the creek in a manner "necessary" to a good successful saw-mill? (2 Wash. on Real Prop. 28; 13 Pick. 326; Wash. on Easements, 34; 15 Ill. 581; 10 Me. 224; 17 Id. 281; 43 Ill. 71; 12 Id. 381.)

Appellants could not, in derogation of their grant to respondents, reserve by implication the right to divert water for the use of their own mill. (Wash. on Easements, 32; 19 Conn. 128; Wash. on Easements, 35; 17 Me. 169; 10 Id. 224; 21 Wend. 290; 7 Md. 352; 7 Allen, 370.)

By the Court, PRIM, C. J.:

This was an action commenced in the circuit court of Washington county, by appellants, to recover damages and to abate a nuisance resulting from the erection and raising of a dam across Rock creek, above the saw-mill of respond-

ents, situated on said creek. It is alleged substantially in the complaint that appellants are the owners in fee-simple of a certain tract of land situated in Washington county, which is fully and particularly described in said complaint, and that the respondents are, and have been since the eighth day of March, 1875, in possession of a certain portion of said tract, under and by virtue of a certain agreement with appellants to purchase the same. That Rock creek, a small stream, runs through said piece of land, and that since the said eighth day of March, 1875, respondents have wrongfully and without the consent of appellants erected and raised a dam across said creek, by means of which appellants have suffered damages.

In answer to this complaint it is alleged by respondents that they are in the possession of the premises described in the complaint under and by virtue of an article of agreement with appellants, whereby they conveyed the same to them for two years from March 8, 1875, with an agreement for further conveyance, with full warranty, within two years from said date. That said premises were described in said deed as "containing four acres, more or less, together with all the tenements, easements, saw-mill, planing-mill, machinery, saw-mill and water privileges, and appurtenances thereunto belonging."

It is further alleged that Rock creek runs through the land described in the complaint, and upon which there was a saw-mill at the time said piece of land was purchased by respondents; and that on or about the ———day of ——, A. D. 1850, a dam was erected across said stream by appellants which has been maintained ever since by said appellants until the date of said agreement, for the purpose of retaining and utilizing a sufficient quantity of said water to propel the machinery of said mill. That said premises were purchased for the purpose of obtaining the saw-mill and water privileges connected therewith, and engaging in the manufacture of lumber and dressing the same; and that they have not been used by respondents for any other purpose since they went into possession of the same.

It is also alleged that they have done no more than was

necessary for the full and proper enjoyment and use of the mill and privileges therewith connected; that they have done no more to said dam than was actually necessary to keep it in the condition in which it was maintained by appellants when sold by them to respondents. At the trial of this cause the agreement set up in the answer having been admitted by appellants, the court instructed he jury "that under said contract the respondents had the right to use all the water in said Rock creek, if necessary to a good and successful saw-mill, and if necessary for that purpose the respondents might raise the dam and close up the race leading from said pond to said grist-mill." To which instructions appellants then and there excepted. They then asked the court to instruct the jury "that if they find from the evidence that the lines are as claimed by appellants, then respondents had no right to raise the dam so as to wash out or stop up appellants' race leading to their grist-mill, or in any other manner to fill up said race."

This instruction was refused by the court, to which appellants also excepted. We think the instruction given by court to which exception was taken, was correct and properly given.

Rock creek, it appears, runs through the piece of land purchased from appellants, and furnishes the motive power by which the saw-mill and other machinery connected with said mill were run. That a race had been constructed for the purpose of diverting a portion of the water of said creek from its natural channel above the saw-mill of respondents so as to conduct a portion of said water to appellants' grist-mill; and that the stopping up of this race is one of the alleged causes of damages for which this action is brought.

Appellants having sold and conveyed the premises together with the saw-mill thereon, and mill and water privileges connected with and appurtenant thereto, granted to respondents whatever was necessary for the full enjoyment thereof. If it were necessary to fill up the race spoken of and to tighten or raise the dam higher in order to acquire a sufficient head of water to run the saw-mill successfully, they had the right under said agreement to do so. This

doctrine is fully sustained by the following decisions: *Ruckley v. Sprague,* 17 Me. 281; *Atkinson v. Bordman,* 2 Metc. 463; *Thayer v. Payne,* 2 Cush. 327.

In the first case cited above, it was held that "the grant of a saw-mill and grist-mill carries also the use of the head of water necessary to their enjoyment, with all incidents and appurtenances, so far as the right to convey to this extent existed in the grantor."

Atkinson v. Bordman is a much stronger case than the one under consideration. The opinion of the court was delivered by Mr. Chief Justice Shaw. In that case it was held that "the grant of a mill actually driven by water, though not described as a water-mill in the deed, carries with it a right to the stream which supplies the mill, although it comes to the mill wholly through other land of the grantor. He cannot divert it and thus derogate from the beneficial effect of his grant." The instruction asked by appellants was inconsistent with the propositions contained in the cases just cited above, and we think was properly refused by the court.

No error having been committed in this case affecting any substantial right of the appellants, the judgment of the court below should be affirmed.

MARY WETMORE, Appellant, v. MULTNOMAH COUNTY, Respondent.

ASSESSMENT—INDEBTEDNESS, DEDUCTION OF, DOES NOT RENDER TAX UNEQUAL.—The statute which permits deductions for indebtedness to be made from the assessed value of property does not operate to render taxation unequal.

APPEAL from Multnomah County.

The facts are stated in the opinion of the court.

O. P. Mason, for appellant.

Raleigh Stott, District Attorney, for respondent.

By the Court, McARTHUR, J.:

Appellant appeared before the board of equalization of Multnomah county in June, 1877, and objected and protested against indebtedness within the state being deducted from the gross value of the property of certain persons whose names appeared upon the assessment roll. She declared that she was a taxpayer, and urged that the assessment was not equal and uniform, by reason of said deductions of indebtedness being allowed, and therefore was unconstitutional. The board overruled the objections, and allowed the roll to stand as returned by the assessor. Afterwards, and when the county court of said county were considering the subject of levying a tax on said assessment, she appeared with a similar protest and objection which was likewise overruled. She then brought the matter before the circuit court on writ of review, and after argument thereon the writ was dismissed, and judgment rendered against appellant. From said judgment this appeal is prosecuted. We think the court below proceeded correctly. The matters complained of and set forth in the petition for a writ of review cannot be reached or corrected in the manner desired by the appellant. The law permits the deduction of indebtedness within the state. (*Ankeny v. Multnomah County*, 3 Or. 386.) The question which counsel for appellant argued so exhaustively cannot be considered in this proceeding; it could only arise and be presented if the assessor had refused to allow a deduction for indebtedness within the state. Then, perhaps, we could consider the numerous constitutional questions presented in the argument. As it is, the appellant has not shown that the assessor or the county court exceeded their respective jurisdictions by improperly levying a tax against her property. Indeed, it is conceded that her assessment was correct, and it is only claimed that the taxes are unequal upon the ground already mentioned. The tax levied operates uniformly upon all taxable property; for by permitting deduction of indebtedness within the state, the statute in effect declares that only the excess of the value of the property over and above the indebtedness of the owner within the state shall be deemed taxable property.

The defects in our revenue laws, which the appellants' counsel was at great pains to point out, cannot be corrected by the courts, they must be corrected, if at all, by the legislature. We must administer the law as we find it upon the statute book.

Judgment affirmed.

In the Matter of the Claim of L. B. ISON, Appellant, for Fees in Certain Cases.

DISTRICT ATTORNEYS—ACTIONS BY THE BOARD OF SCHOOL LAND COMMISSIONERS.—In suits brought by the board of school land commissioners, in the name of the state, for the foreclosure of mortgages to secure school moneys, the state is a party within the meaning of section 945 of the civil code. In such suits it is the duty of the district attorney for the district where the suit is brought to prosecute or defend the same, as the case may be, and he is entitled therefor to the fee of twenty-five dollars, prescribed in subdivision 5 of section 1041 of the code of civil procedure. The board has authority in its discretion to employ counsel to assist in such prosecution or defense.

APPEAL from Union County.

Appellant was, at the October term, A. D. 1877, of the circuit court for Union county, and still is, district attorney of the fifth judicial district of the state of Oregon, in which district Union county is situated. During the term appellant applied to the court to ascertain and allow and order paid to him by the state of Oregon, certain fees for his appearance in a number of civil suits, brought in the name of the state by the board of school land commissioners, which had been tried and determined at said term. The court rejected the claim, and from its order thereon this appeal was taken.

L. B. Ison, appellant, appeared in person.

Bonham & Ramsey, for the Board of School Land Commissioners, respondent.

By the Court, WATSON, J.:

We are of the opinion that the appellant had the right to appear in and conduct each of the suits named in the order

from which this appeal is taken, and that he is entitled to receive from the state of Oregon a fee of twenty-five dollars in each suit. The constitution of the state provides that the prosecuting attorneys "shall be the law officers of the state, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of law and general police as the legislative assembly may direct." (Const. of Oregon, article 7, sec. 17.)

Section 945, title 1 of chapter 13 of the code of civil procedure, provides that "he shall prosecute for all penalties and forfeitures to the state, which may be incurred in any county in his district, and for which no other mode of prosecution and collection is expressly provided by statute, and in like cases prosecute or defend, as the case may be, all actions, suits or proceedings in any county in his district, to which the state or such county may be a party."

Section 1041 of the code of civil procedure regulates the fees of the district attorney. Subdivision 5 of that section provides that he shall receive "for prosecuting or defending any other civil action, suit or proceeding, not herein mentioned, to which the state or any county in his district may be a party, twenty-five dollars."

Section 1042 of the code of civil procedure provides that at each term of court, the court shall ascertain the fees to which the district attorney is entitled for the term, and direct that an order be entered in the journal that the same be paid. It further provides that in a civil action, suit or proceeding in which the state is a party, the fees of the district attorney shall be paid by the state. The meaning of those provisions of the constitution and of the statute is clear. The district attorney, or, as named in the constitution, the prosecuting attorney, is the law officer of the state in his district. It is his duty to prosecute or defend, as the case may be, all actions, suits or proceedings in any county in his district to which the state or such county may be a party, except in cases where the statutes expressly provide for some other mode of prosecution or defense, and for so prosecuting or defending any action, suit or proceeding in which the state is a party, he is entitled to receive from the state a fee of twenty-five dollars,

where no other compensation is expressly provided by statute. It is the duty of the court at each term to ascertain the amount of his fees to which he is entitled at that term, and to enter in the journal an order that they be paid.

In the suits named in the order under review the state was plaintiff and it was the duty of the appellant to appear therein and prosecute or assist in their prosecution, and he was entitled to the fees prescribed by the statute for such services unless some other express provision of statute provides another mode of prosecuting such suits.

It is claimed by counsel, who have been permitted to file a brief on behalf of the board of commissioners of school lands, that for the prosecution of the suits for which fees are claimed by the district attorney in this case, another mode of prosecution is expressly provided by law. In support of this theory our attention has been directed to the provisions of section 5 of article 8 of the constitution, constituting the board of commissioners for the sale of school and university land, and for the investment of the funds arising therefrom, and to section 24 on page 635 of the general laws, and section 34 on page 637 of the general laws, and it is insisted that the board of school land commissioners, being intrusted by the constitution with the management of the funds arising from the sale of school and university land, and being by the statutes referred to expressly authorized to foreclose the mortgages mentioned in the order under review, and to contract for all legal services required by the board for the foreclosure of mortgages upon the best terms consistent with the interest of the fund, not to exceed ten per centum of the amount collected, the board has the right to prosecute suits to foreclose such mortgages as are given to the state for the benefit of those funds, in the name of the state, by counsel employed by the board, without the assistance of the district attorney, and that he has no right to appear in or claim fees in such suits. We are satisfied that the board has the right to employ counsel whenever it is necessary to foreclose mortgages, but we do not think that right inconsistent with the duty of the district

attorney to appear in suits brought to foreclose such mortgages when the state is a party to such suits. He is the "law officer" of the state. The state is a party. No matter how many counsel are employed to assist him in such suits, it is his duty to appear and represent the state, which can appear only by its attorneys. There is no repugnancy in the statutes defining his duties and those authorizing the board to contract for legal services in foreclosing mortgages. They may well stand together.

The rule of statutory construction that a special provision will control a general one and a subsequent enactment will govern a prior one, only applies when there is a repugnancy between such provisions or enactments. It is the duty of the district attorney to appear for the state in all cases in which it is a party. Whenever the state is a party to a suit to foreclose a mortgage given for the benefit of the school or university fund, it is his duty to prosecute for the state, and in such case his fee is fixed by law at twenty-five dollars. The board may leave the management of the suit to him alone, or if in their judgment it is necessary and to the interest of the fund to contract with other lawyers to assist him they may do so. It is to be presumed that they would only do this when in the exercise of a sound discretion they believe it necessary. This we take to be true rule of construction of all of the sections of the statute examined by us in this case taken together, and we think that it avoids any repugnancy between them.

It is not necessary for us in this opinion to pass upon the right of the district attorney to appear in any suits to foreclose mortgages in which the board of commissioners, for the sale of school and university lands and the management of the funds arising therefrom, are parties. It is objected to the claim of appellant to be allowed fees in these suits, that he did not actually prosecute them. The order shows that he appeared and offered to do so, but was prevented by other counsel assuming the management of the suits. We think he did all he could. It is not claimed that he in any way neglected his duty.

It follows from the views herein expressed that the judg-

ment of the court below should be reversed, and this case remanded to the court below, with the directions to allow the appellant the sum of twenty-five dollars in each of the suits named in its order, and that it cause to be entered in its journal an order that the same be paid by the state of Oregon.

In the Matter of the Claim of L. B. ISON, Appellant, for a Fee and Percentage.

UNDERTAKINGS OF OFFICERS—NATURE OF ACTIONS ON.—Actions brought on official undertakings are not for the recovery of fines, penalties or forfeitures within the meaning of subdivision 4 of section 1041 of the code of civil procedure, allowing district attorneys ten per centum of the sum recovered.

APPEAL from Union County.

Appellant was, on the twenty-third day of July, 1877, and thereafter until the present time, district attorney for the fifth judicial district of the state of Oregon. Union county is in that district. On the twenty-third day of July, 1877, an action at law was commenced in the circuit court for Union county by the state of Oregon as plaintiff, against James Hendershott, M. Baker, John A. Childers and Arthur Warwick. The action was brought on the official undertaking of the said James Hendershott, as register of state lands for La Grande district, to recover certain sums of money received by him as such register, and which he failed to account for or pay over. The undertaking is made payable to the state of Oregon. The action was commenced by James H. Slater, as attorney for the state, who was employed by the board of school land commissioners, and who conducted the same. Appellant filed his written notice of appearance in said action as attorney for the state of Oregon, and claimed the right to conduct the same in virtue of his office as district attorney. On the fourteenth day of September, 1877, the plaintiff recovered against the defendants, on stipulation, the sum of eight thousand seven hundred and thirty dollars. At the October term, 1877, of said court, appellant applied to the court to allow him as his fees in said action the sum of

twenty-five dollars, and as percentage upon the amount therein recovered the sum of eight hundred and seventy-three dollars. The court held that appellant had no right to appear in or prosecute said action, and disallowed his claim for fees or percentage. From its order this appeal is taken.

L. B. Ison, appellant, appeared in person.

Bonham & Ramsey, for the Board of School Land Commissioners, respondents.

By the Court, WATSON, J.:

We have just decided in another case that the district attorney is entitled to appear and prosecute all actions, suits and proceedings in his district in which the state is a party, and for the prosecution of which no other mode is expressly provided by statute, and to receive a fee of twenty-five dollars for prosecuting each of said actions, suits or proceedings.

We have further decided that while the board of school land commissioners are authorized by law to employ counsel to assist in the collection of money due and belonging to the school and university funds, such employment does not relieve the district attorney from the duty of appearing for the state in actions, suits or proceedings brought in its name for the collection of such money. That decision settles the question whether in the case under consideration the appellant was entitled to appear and receive a fee of twenty-five dollars therefor in the affirmative.

In this case appellant claims further that he is entitled to ten per cent. of the amount recovered. He urges this claim on the theory that the action was for the recovery of a forfeiture, and that subdivision 4 of section 1041 of the code of civil procedure allows him ten per cent. of the amount recovered in such actions. We do not think this was "a civil action for the recovery of a fine, penalty or forfeiture" within the meaning of subdivision 4 of section 1041 of the code. The civil action provided for in that subdivision are actions brought to collect fines, penalties and forfeitures for offenses

where by law such fines, penalties and forfeitures may be collected by civil actions.

This is the class of actions mentioned in sections 342 and 343 of the code of civil procedure. We think it also includes forfeited recognizances. The action for prosecuting which the appellant claims fees in this case, was brought on the official undertaking of James Hendershott as register of state lands to recover against Hendershott and his sureties certain sums of money due from him to the state. This action is provided for by sections 337, 338 and 339 of the code.

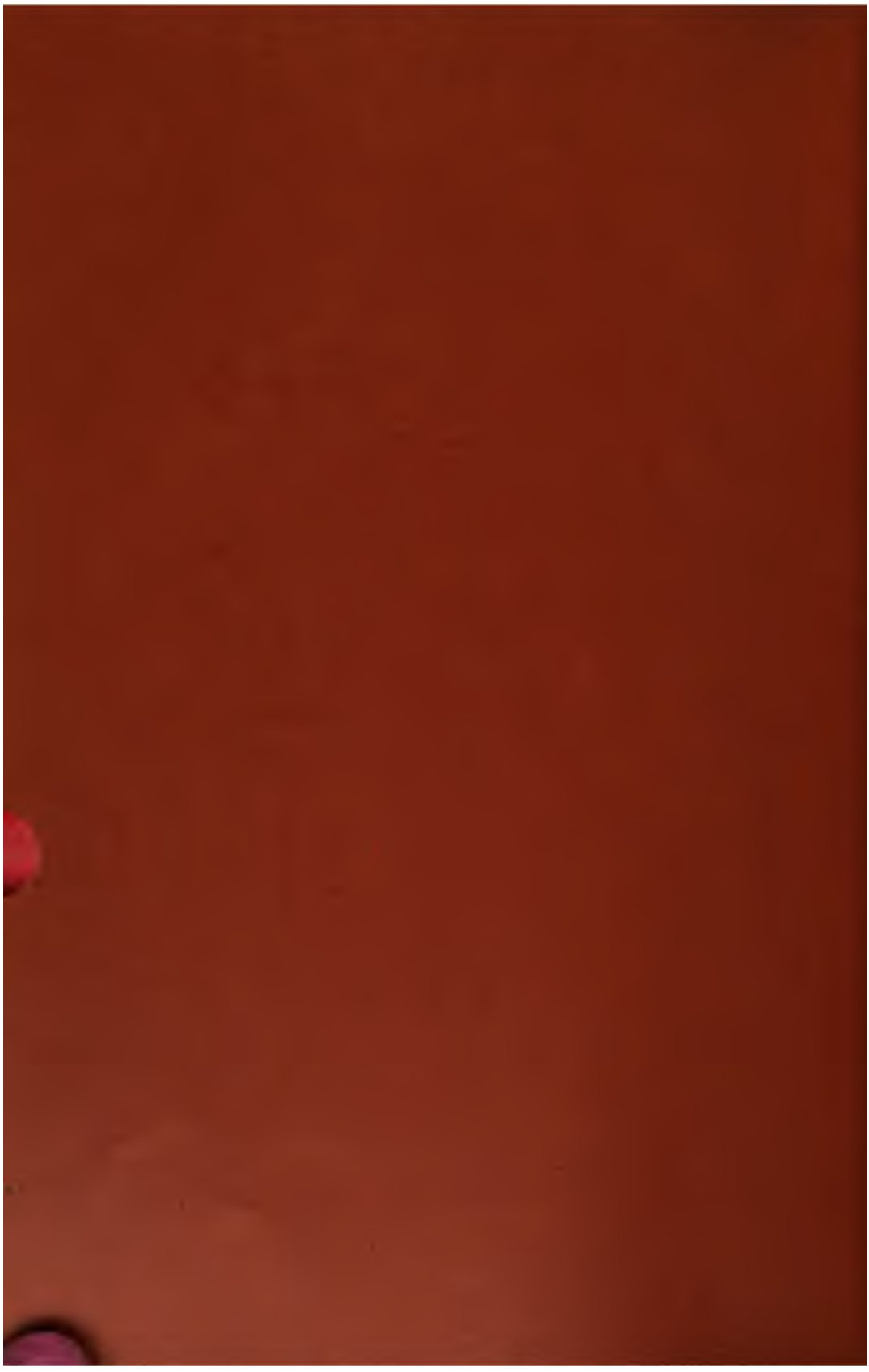
The undertaking in such cases is deemed a security to the state for the official delinquencies of the officer. No more could be recovered than the amount due the state. The undertaking, it is true, is forfeited, but this means no more than that the officer, by his misconduct, has rendered his sureties liable. It is no more an action to recover a forfeiture than it would be had the state sued Hendershott to recover from him the amount due from him, not upon his undertaking, but personally.

We are of the opinion that the court below correctly refused to allow the appellant the percentage claimed by him. The judgment of the court below will be so modified as that this cause be remanded with directions that it allow to appellant the sum of twenty-five dollars, and that it cause to be entered in its journal an order that the same be paid by the state of Oregon to the appellant.

EXTRA ANNOTATION

TO

PRECEDING VOLUME



NOTES

ON THE

OREGON REPORTS.

CASES IN 6 OREGON.

6 Or. 17–26, MURRAY v. MURRAY.

Appeal.—Requisites of Exceptions to Instructions Stated, p. 23.

Cited in Jensen v. Foss, 24 Or. 159, 33 Pac. 535, reaffirming the rule; Salamon v. Cress, 22 Or. 179, 29 Pac. 439, holding that the rule is sustained by the authorities and states the correct rule of practice; McAlister v. Long, 33 Or. 370, 54 Pac. 195, holding that exception must distinctly point out portion of charge to which it is directed.

Judgment.—Domestic Judgment cannot be Collaterally Impeached by evidence outside the record, p. 24.

Cited in Morrill v. Morrill, 20 Or. 105, 23 Am. St. Rep. 95, 25 Pac. 365, 11 L. R. A. 155, defining collateral attack and holding that a domestic judgment cannot be impeached collaterally for fraud; Henkle v. State, 40 Or. 351, 68 Pac. 399, holding decree subject to collateral attack when the record discloses want of jurisdiction.

6 Or. 26–31, MURRAY v. MURRAY.

Marriage is Prima Facie Proved by Cohabitation and reputation, p. 29.

Cited in Summerville v. Summerville, 31 Wash. 417, 72 Pac. 86, reaffirming the rule. Cited in notes in 57 Am. Rep. 456, on proof of marriage; 14 L. R. A. 542, on presumption flowing from marriage ceremony.

Abatement.—Objection in Abatement is Waived by going to trial without pleading it, p. 31.

Cited in Lassas v. McCarty, 47 Or. 477, 84 Pac. 78, approving and applying the rule.

6 Or. 31–50, HATCHER v. BRIGGS.

Action.—Equitable Cross-bill may be Interposed in a legal action, pp. 39–41.

Cited in South Portland Land Co. v. Munger, 36 Or. 472, 60 Pac. 9, to the same effect.

Improvements.—Right of Bona Fide Purchaser to reimbursement for, p. 50.

Cited in Walker v. Goldsmith, 14 Or. 141, 12 Pac. 552, approving the rule but holding it inapplicable to the facts; Cook v. Cooper, 18 Or. 150, 17 Am. St. Rep. 709, 22 Pac. 947, 948, 7 L. R. A. 273, holding that person erecting house on land may remove it without resorting to court of equity; Schetter v. Southern Or. etc. Co., 19 Or. 196, 24 Pac. 27, approving and applying the rule; Moore v. Simonson, 27 Or. 125, 39 Pac. 1107, holding doctrine inapplicable to one purchasing as trustee in the belief that she would be a life tenant only; Fire Assn. v. Allesina, 45 Or. 163, 77 Pac. 126, holding that defendant may file cross-bill seeking equitable relief and an answer to the action at law setting up a complete defense; Hall v. O'Connell, 52 Or. 172, 96 Pac. 1070, holding party cannot obtain compensation for improvements unless he pleads the issue; Bond v. Montgomery, 56 Ark. 568, 35 Am. St. Rep. 119, 20 S. W. 526, applying the principles to a purchaser at a void administrator's sale; Brown v. Baldwin, 121 Mo. 115, 25 S. W. 860, to point that constructive notice will not bar right to improvements; Kendrick v. Wheeler, 85 Tex. 253, 20 S. W. 46, holding purchaser at void guardian's sale entitled to refund of purchase money before setting aside the sale; Griswold v. Bragg, 48 Conn. 581, upholding Connecticut improvement statute; Griswold v. Bragg, 48 Fed. 522, affirming the last case; Anderson v. Reid, 14 App. D. C. 79, holding the rule inapplicable where the purchaser had constructive notice and the owner was not at fault; Effinger v. Hall, 81 Va. 104, holding rule inapplicable where possessor had means of knowledge equivalent to actual notice; Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 386, 30 C. C. A. 108, applying the rule by analogy. Cited in notes in 15 Am. Dec. 353, on compensation for improvements in ejectment; 30 Am. Dec. 177, 181, on rights of purchasers at void sales who have paid off claims on land; 2 Am. St. Rep. 330, on rights of purchaser at invalid judicial sale; 6 Am. St. Rep. 496, on rights to damages for failure to perform contract void under statute of frauds; 21 L. R. A. 50, on purchaser at execution or judicial sale as bona fide purchaser; 53 L. R. A. 339, on right to compensation for improvements on land, in good faith, under oral contract or gift; 69 L. R. A. 46, on relief of purchaser upon annulling judicial or execution sale.

6 Or. 51–55, COLLINS v. DELASHMUTT.

This case has not been cited.

6 Or. 55–62, EVARTS v. STEGER.

Principal and Surety.—A Bond Failing to Express the Sum in which the obligors are bound is invalid, p. 59.

Cited in Spring Garden Ins. Co. v. Lemmon, 117 Iowa, 693, 86 N. W. 36, reaffirming the rule.

6 Or. 62–66, EAST PORTLAND v. MULTNOMAH COUNTY.

Municipal Corporations.—Law Vesting Control of Streets and alleys in city upheld, p. 65.

Cited in Multnomah County v. Sliker, 10 Or. 65, 66, upholding the same law; Simon v. Northup, 27 Or. 499, 40 Pac. 562, 30 L. R. A. 171, upholding similar statute; City of Oregon v. Moore, 30 Or. 218, 46 Pac. 1018, upholding statute authorizing city to control expenditure of funds applicable to improvement of roads and streets in its limits, collected under general laws; Huddleston v. City of Eugene, 34 Or. 354, 55 Pac. 870, 43 L. R. A. 444, holding that changing county road to city street imposes no additional servitude.

Taxation.—If Rule of Apportionment be Uniform throughout the taxing district, the tax is uniform, p. 66.

Cited in Miller v. Wicomico County Commrs., 107 Md. 443, 69 Atl. 120, approving and applying the rule; Yamhill County v. Foster, 53 Or. 130, 99 Pac. 288, holding that perfect uniformity and equality is unattainable; approximation is all that can be had. Cited in note in 29 L. R. A. 406, on poll taxes.

6 Or. 66–71, 25 Am. Rep. 500, UNDERWOOD v. FRENCH.

Judgment.—Evidence Contradicting Record is Inadmissible to show that issues pleaded were not tried, p. 70.

Cited in Barrett v. Failing, 8 Or. 157, excluding evidence to show that an issue was withdrawn; Peay v. Salt Lake City, 11 Utah, 341, 40 Pac. 209, reversing judgment not sustained by pleadings; Glenn v. Savage, 14 Or. 575, 13 Pac. 446, Freeman v. McAninch, 87 Tex. 138, 47 Am. St. Rep. 79, 27 S. W. 99, Oster v. Broe, 161 Ind. 123, 64 N. E. 921, and Slater v. Skirving, 51 Neb. 114, 66 Am. St. Rep. 444 70 N. W. 495, all approving and applying the rule.

6 Or. 71–73, BAILEY v. WILLIAMS.

Process.—Summons is not a Process which must run in the name of the state, p. 73.

Cited in Comet Consolidated Min. Co. v. Frost, 15 Colo. 313, 25 Pac. 507, and Brooks v. Nevada Nickel Syndicate, 24 Nev. 323, 53 Pac. 599, both approving the rule; Whitney v. Blackburn, 17 Or. 571, 11 Am. St. Rep. 857, 21 Pac. 876, applying the principle to notice of election contest; McKenna v. Cooper, 79 Kan. 850, 101 Pac. 663, applying the principle to notice used in service by publication. Cited in note in 20 L. R. A. 425, on effect of writ or process issued without seal of court.

6 Or. 73–74, WOLF v. SMITH.

Appeal.—Appellant must Bring Up Perfect Record and lost papers must be supplied by copies, p. 74.

Cited in Wilkes v. Cornelius, 21 Or. 345, 23 Pac. 474, holding transcript necessary to appellate jurisdiction; Close v. Close, 28 Or. 109, 42 Pac. 128, dismissing appeal where part of record was lost and not supplied; In re Plunkett's Estate, 33 Or. 418, 54 Pac. 154, holding that appearance cannot cure want of record; Rodman v. Manning, 50 Or. 508, 93 Pac. 366, holding service and filing of notice of appeal indispensable and not capable of being waived; Lowery v. Lowery, 139

Iowa, 369, 115 N. W. 1037, where part of record was lost and not supplied.

Miscited in Roy v. Horsley, 6 Or. 272, to sustain presumption of residence of attorney in county where notice of appeal was served. Cited in note in 25 L. R. A., N. S., 862, on disposition of appeal where without fault of appellant record is lost or incomplete.

6 Or. 75–76, NURSE v. JUSTUS.

Costs.—Costs on Appeal from and to circuit courts, p. 75.

Cited in Burts v. Ambrose, 11 Or. 30, 4 Pac. 467, approving the construction of the statute; Lovel v. Joyce, 9 Idaho, 391, 74 Pac. 1075, dissenting opinion, majority holding that a reduction of the judgment appealed from does not carry costs. Cited in note to 88 Am. Dec. 181, on items of expense recoverable as costs.

6 Or. 76–78, HAWLEY v. BINGHAM.

Contracts.—Mutual and Dependent Covenants distinguished from independent ones, p. 77.

Distinguished in Burkharts v. Hart, 36 Or. 589, 60 Pac. 206, where the consideration of the note was the performance of an act by the payee.

6 Or. 78–82, SMITH v. LOWNSDALE.

Cited in notes to 39 Am. Dec. 95, on waiver of demand and notice by taking security; 29 L. R. A. 308, on necessity of new consideration to support waiver of failure to give notice of dishonor, or subsequent promise by indorser.

6 Or. 82–87, PADDOCK v. HUME.

Bail in Civil Actions not Conforming to statute is valid, p. 86.

Cited in County v. Clark, 15 Or. 7, 13 Pac. 513, in stating contentions of counsel; Taylor v. Fleçkenstein, 30 Fed. 103, upholding validity of contract under seal for release of debtor and agreeing to pay judgment.

Deeds.—Seal Imports a Consideration, p. 86.

Cited in Olston v. Oregon etc. Ry. Co., 52 Or. 354, 96 Pac. 1098, 20 L. R. A., N. S., 915, holding that a lease under seal may be attacked for fraud in the consideration.

6 Or. 87–93, WRIGHT v. YOUNG.

Execution.—Effect of Ineffectual Levy, p. 90.

Cited in Dixon v. Back, 32 Or. 231, 51 Pac. 731, to point that there can be no satisfaction of execution where debtor has neither paid the debt nor lost his property.

Execution.—Order Confirming Sale Concludes All Questions arising on proceedings concerning the sale, p. 93.

Cited in Leinenweber v. Brown, 24 Or. 553, 34 Pac. 477, and Ebner v. Heid, 2 Alaska, 605, both reaffirming the rule.

Constitution, Article 18, Section 7, Continued in Force all laws of territory not inconsistent with it, p. 91.

Cited in Re Morgan's Estate, 46 Or. 241, 78 Pac. 1030, to same effect.

6 Or. 93–105, STRONG v. BARNHART.

Judgment.—The Only Defense to Action for Leave to issue execution on dormant judgment is that there is no such judgment or its discharge, p. 103.

Cited in Allen v. Norton, 6 Or. 350, and Cassill v. Morrow, 13 S. D. 113, 82 N. W. 420, repeating the rule; Eddy v. Coldwell, 23 Or. 170, 37 Am. St. Rep. 672, 31 Pac. 478, construing code provision for issue of execution after five years. Cited in note to 122 Am. St. Rep. 104, on scire facias.

6 Or. 105–113, 25 Am. Rep. 504, PARLEY v. PARKER.

Deeds.—Deed of Insane Person is absolutely void, p. 111.

Cited in Elder v. Schumacher, 18 Colo. 440, 33 Pac. 178, Daugherty v. Powe, 127 Ala. 580, 30 South. 525, and German S. & L. Soc. v. De Lashmutt, 67 Fed. 400, all approving and applying the rule.

Departed from in French Lumbering Co. v. Theriault, 107 Wis. 639, 81 Am. St. Rep. 856, 83 N. W. 932, 51 L. R. A. 910, holding deed of insane person voidable only. Cited in notes in 19 L. R. A. 489, on validity of deed of insane person; 19 L. R. A., N. S., 464, as to whether deed executed by an incompetent not judicially declared such may be avoided in action at law.

Evidence.—Opinion of Intimate Acquaintance is admissible on question of insanity, pp. 111, 112.

Cited in State v. Feister, 32 Or. 263, 50 Pac. 564, applying the rule in a homicide case. Cited in note in 38 L. R. A. 730, 734, on non-expert opinions as to sanity or insanity.

Courts.—Under the Territorial Organization the Probate Court had only limited jurisdiction, p. 113.

Cited in Rutenic v. Hamakar, 40 Or. 450, 67 Pac. 199, stating presumption in favor of validity of judgment of court of general jurisdiction; Knight v. Hamakar, 40 Or. 430, 67 Pac. 109, to point that county court has general jurisdiction in probate matters.

Miscellaneous.—Molton v. Camron, 6 Eng. Rul. Cas. 76; Beverley's Case, Banks v. Goodfellow, 16 Eng. Rul. Cas. 739, 740, not accessible.

6 Or. 114–116, MULTNOMAH COUNTY v. ADAMS.

Municipal Corporations.—Provision in City Charter giving police judge jurisdiction of justice of the peace is valid, p. 115.

Cited in Adams v. Multnomah County, 6 Or. 117, construing same act; Clemmensen v. Peterson, 35 Or. 51, 56 Pac. 1016, upholding similar provision in charter of Mansfield.

6 Or. 116–118, ADAMS v. MULTNOMAH COUNTY.

This case has not been cited.

6 Or. 119–122, MONASTES v. CATLIN.

Courts.—County Courts, Acting in Probate Matters, are courts of general jurisdiction, p. 120.

Cited in Bewley v. Graves, 17 Or. 282, 20 Pac. 826, Knight v. Hamakar, 40 Or. 430, 67 Pac. 109, Rutenic v. Hamakar, 40 Or. 450, 67 Pac. 199, Henkle v. State, 40 Or. 351, 68 Pac. 399, Lawrey v. Sterling, 41 Or. 527, 69 Pac. 463, and Lydick v. Chaney, 64 Neb. 290, 89 N. W. 802, all approving the rule.

Courts.—The Appointment of Guardians of Minors and incompetents is the exercise of probate jurisdiction, p. 121.

Cited in Butterick v. Richardson, 39 Or. 250, 64 Pac. 391, Ex parte Scudamore, 55 Fla. 225, 46 South. 283, and Ex parte Emma, 48 Fed. 213, all approving and applying the rule.

6 Or. 122–124, SPORES v. BOGGS.

Pleading.—A Party cannot Rely upon an Admission in his adversary's pleading which he has denied, p. 124.

Cited in Boll v. New York & H. R. Co., 33 Misc. Rep. 43, 68 N. Y. Supp. 140, holding that a demurrer denies an admission resulting from the defense demurred to.

6 Or. 125–133, 25 Am. Rep. 506, LUSE v. ISTHMUS TRANSIT R. CO.

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Cited in Moody v. Richards, 29 Or. 285, 45 Pac. 778, where parties agree to the facts findings are not necessary; Wheeler v. Burckhart, 34 Or. 508, 56 Pac. 645, where answer in trover is stricken out the only issue is the value of the property; Reade v. Pacific Coast Home Supply Assn., 40 Or. 65, 66 Pac. 445, facts not in issue need not be found; Miller v. Head Camp, 45 Or. 195, 77 Pac. 84, facts admitted are tantamount to findings duly made; Jennings v. Frazier, 46 Or. 473, 80 Pac. 1012, admitted facts need not be found.

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Cited in Brown v. Farmers, 23 Or. 544, 32 Pac. 549, and Carrie v. Bowman, 25 Or. 375, 35 Pac. 850, both holding that corporate officers have no authority to mortgage corporate property; Crawford v. Albany Ice Co., 36 Or. 537, 60 Pac. 15, holding that president and secretary have no authority to execute a note unless empowered by the directors; Hadden v. Linville, 86 Md. 233, 38 Atl. 40, holding that general manager has no authority to transfer entire assets to preferred creditor on insolvency of corporation. Cited in notes in 23 Am. Dec. 744, on alienation or mortgage of corporate property; 50 Am. St. Rep. 156, on corporate seal; 14 L. R. A. 359, on powers of president and vice-president of corporation.

6 Or. 133–137, STATE v. CARR.

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6 Or. 137–141, WATSON v. JANION.

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Cited in Boyes v. Ramsden, 34 Or. 255, 55 Pac. 538, reaffirming the rule.

6 Or. 142–151, KNOTT v. KNOTT.

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Cited in Tenney v. Simpson, 37 Kan. 363, 15 Pac. 193, to point that partnership land may be considered the same as personalty; Flower v. Barnekoff, 20 Or. 137, 25 Pac. 371, 11 L. R. A. 149, and Meagher v. Reed, 14 Colo. 367, 24 Pac. 691, 9 L. R. A. 455, both holding that partnership to trade in lands may be established by parol.

Distinguished in Dodson v. Dodson, 26 Or. 361, 37 Pac. 544, on the facts. Cited in notes to 98 Am. Dec. 201, on lands becoming partnership property without writing; 31 Am. St. Rep. 934, on married woman as partner; 16 L. R. A. 746, on validity of parol partnership for dealing in lands; 27 L. R. A. 452, 456, 478, as to when real estate will be considered partnership property.

6 Or. 152–153, STATE v. SPENCER.

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Cited in Cutter v. Territory, 8 Okl. 110, 56 Pac. 863, State v. Guglielmo, 46 Or. 253, 79 Pac. 579, 69 L. R. A. 466, State v. Eddy, 46 Or. 628, 81 Pac. 942, and United States v. Clark, 46 Fed. 640, all reaffirming the rule.

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Cited in State v. Ah Lee, 18 Or. 542, 23 Pac. 425, State v. Woolridge, 45 Or. 394, 78 Pac. 335, State v. Jewett, 48 Or. 583, 85 Pac. 996, and State v. Harter, 131 Iowa, 202, 108 N. W. 233, all approving the rule. Cited in notes to 124 Am. St. Rep. 661, on indictments for perjury; 85 Am. Dec. 496, on perjury.

6 Or. 154–156, BURNSIDE v. SAVIER.

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Cited in Palicio v. Bigne, 15 Or. 148, 13 Pac. 768, stating limitations on power of court administering partnership estates. Cited in note in 28 L. R. A. 103, on rights of partners inter se in partnership realty.

6 Or. 156-158, DODD v. DENNY.

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Cited in Stokes v. Brown, 20 Or. 533, 26 Pac. 562, Denn v. Peters, 36 Or. 490, 59 Pac. 1110, Creecy v. Joy, 40 Or. 31, 66 Pac. 297, Brace v. Doble, 3 S. D. 420, 53 N. W. 860, and North Star Boot etc. Co. v. Stebbins, 3 S. D. 543, 14 N. W. 594, all approving and applying the rule.

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Cited in West v. Eley, 39 Or. 464, 65 Pac. 799, discussing effect of various kinds of variance.

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6 Or. 158-166, 25 Am. Rep. 510, PHILOMAH COLLEGE v. HARTLESS.

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6 Or. 166-167, DICK v. KENDALL.

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Cited in Long v. Thompson, 34 Or. 361, 55 Pac. 979, and White v. Ladd, 34 Or. 427, 56 Pac. 516, approving and applying the rule.

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6 Or. 167-171, ARRIGONI v. JOHNSON.

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Cited in Jennings v. Frazier, 46 Or. 474, 80 Pac. 1014, holding that premature entry of judgment does not affect right to move for new trial.

6 Or. 172-175, GRANGERS M. CO. v. VINSON.

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Cited in Coyote etc. Min. Co. v. Ruble, 8 Or. 297, 298, upholding the rule.

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EXTRA ANNOTATION

TO

PRECEDING VOLUME

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Cited in La Vie v. Tooze, 43 Or. 595, 74 Pac. 211, and Ruckman v. Imbler Lumber Co., 42 Or. 239, 70 Pac. 814, both approving and applying the rule; Jones v. Dove, 7 Or. 471, involving construction of same will.

6 Or. 193–198, STEPHENS v. MURTON.

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Cited in Shively v. Hume, 10 Or. 76, holding that equity will prevent diversion from natural channel; Keeney v. Carillo, 2 N. M. 495, recognizing right to defined subterranean channel.

Overruled in Hough v. Porter, 51 Or. 410, 98 Pac. 1099, reviewing a mass of decisions and showing that the exigencies of irrigation have changed the law of undiminished flow. Cited in note in 7 Am. Dec. 534, on property in water.

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Cited in Pacific States Telephone Co. v. City of Salem, 49 Or. 112, 89 Pac. 145, reaffirming the rule.

6 Or. 202-205, LINNVILLE v. SMITH.

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Cited in Springer v. Young, 14 Or. 284, 12 Pac. 403, as stare decisis. Cited in note in 6 L. R. A., N. S., 383, on creation of trust by investment by husband in own name of wife's separate property in real estate.

6 Or. 205-207, TICHENOR v. KNAPP.

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6 Or. 207-208, BRINEY v. STARR.

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Cited in Hennees v. Wells, 16 Or. 266, 19 Pac. 122, Bennett v. Minott, 28 Or. 343, 39 Pac. 997, and Rodman v. Manning, 50 Or. 507, 93 Pac. 366, all upholding the doctrine.

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6 Or. 208-212, SPAULDING v. KENNEDY.

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Cited in Lewis v. Birdsey, 19 Or. 168, 26 Pac. 625, as stare decisis; Marks v. Shoup, 181 U. S. 565, 21 Sup. Ct. Rep. 724, 45 L. ed. 1004, holding the rule applicable in Alaska.

6 Or. 212-214, LEVERICH v. FRANK.

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Cited in Moore v. Dozier, 128 Ga. 96, 57 S. E. 113, holding reputation of witness in community proper test of character. Cited in notes to 82 Am. St. Rep. 30, on evidence to show credibility or bias of witness; 14 L. R. A., N. S., 691, 695, 698, 708, on evidence of specific instances to prove character.

6 Or. 215-216, CROSSEN v. WASCO COUNTY.

This case has not been cited.

6 Or. 219-231, BOARD OF CANAL & L. COMMRS. v. WILLAMETTE TRANSP. & L. CO.

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Cited in Co-operative Bldg. & Loan Assn. v. State, 156 Ind. 468, 60 N. E. 148, upholding law authorizing search for unassessed property as reasonable.

6 Or. 231–238, 25 Am. Rep. 513, RUGH v. OTTENHEIMER.

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Cited in Besser v. Joyce, 9 Or. 317, reaffirming the rule; Velten v. Carmack, 23 Or. 287, 31 Pac. 660, 20 L. R. A. 101, holding that married woman may sell her separate property and convert the proceeds into other property which will be exempt; Stubblefield v. Menzies, 11 Fed. 272, 8 Saw. 4, holding that the constitution made donation separate property of wife not subject to husband's control; Hitz v. National etc. Bank, 111 U. S. 733, 4 Sup. Ct. Rep. 613, 28 L. ed. 580, holding curtesy exempt.

Disapproved in Rose v. Rose, 104 Ky. 53, 70, 84 Am. St. Rep. 430, 46 S. W. 526, 531, 41 L. R. A. 353, in main and dissenting opinion holding husband's right in wife's separate property a vested right; National etc. Bank v. Hitz, 1 Mackey (D. C.), 122, holding a life estate in wife's property a vested right. Cited in notes to 84 Am. St. Rep. 439, on constitutionality of statutes affecting rights based on pre-existing marriage; 19 L. R. A. 258, on power of legislatures to change or destroy estates by dower, curtesy, etc.

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Cited in Acme Dairy Co. v. City of Astoria, 49 Or. 523, 90 Pac. 154, stating a similar rule.

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Cited in Eikenbury v. Burns, 33 Ind. App. 72, 70 N. E. 838, dilating upon the sanctity and public nature of the marriage contract.

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Cited in Bruce v. German Sav. & Loan Soc., 24 Or. 490, 34 Pac. 17, Bays v. Trulson, 25 Or. 113, 35 Pac. 26, 27, and First Nat. Bank v. McDonald, 42 Or. 260, 70 Pac. 902, all approving and applying the rule; Duff v. Willamette Iron etc. Works, 45 Or. 482, 78 Pac. 365, and Springer v. Jenkins, 47 Or. 506, 84 Pac. 481, both stating defenses which must be specially pleaded. Cited in note to 27 Am. St. Rep. 344, on necessity of pleading estoppel.

6 Or. 238–241, KAMER v. CLATSOP COUNTY.

This case has not been cited.

6 Or. 241–242, DUNNING v. CRESSON.

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Cited in Britt v. Marks, 20 Or. 227, 25 Pac. 637, to point that representations must be made with intent to defraud; Poppleton v. Bryan, 36 Or. 78, 58 Pac. 769, reaffirming the rule; Anderson v.

Adams, 43 Or. 627, 74 Pac. 217, stating essentials of fraud by false representation. Cited in note in 37 L. R. A. 595, on right to rely upon representations made to effect contract as basis for charge of fraud.

6 Or. 243-250, KNAPP v. KING.

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Cited in Finn v. Hoyt, 52 Fed. 85, holding that necessary absence of judge on day set for trial does not oust jurisdiction.

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Cited in Southern Pac. etc. Co. v. Russell, 20 Or. 461, 26 Pac. 305, approving the rule.

6 Or. 250-254, GOLDSMITH v. REVENUE CUTTER, THE.

This case has not been cited.

6 Or. 254-258, 25 Am. Rep. 518, MOORE v. MILLER.

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Cited in First Nat. Bank v. McCullough, 50 Or. 514, 93 Pac. 369, holding that transferee takes note without indorsement subject to all equities; First Nat. Bank v. Moore, 137 Fed. 507, 70 C. C. A. 89, and Spinning v. Sullivan, 48 Mich. 9, 11 N. W. 759, to the same effect. Cited in notes to 33 Am. St. Rep. 372; 69 Am. St. Rep. 709.

6 Or. 258-266, SCHELAND v. HEPELDING.

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Cited in South Portland Land Co. v. Munger, 36 Or. 469, 60 Pac. 7, and Fire Assn. v. Allesina, 45 Or. 165, 77 Pac. 127, both approving and applying the rule. Cited in notes to 31 Am. Dec. 519, on apportionment of contracts; 59 Am. St. Rep. 278, on complete performance as essential to cause of action on entire contract.

6 Or. 266-270, MILES v. MILES.

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Cited in Walker v. Goldsmith, 7 Or. 181, holding purchaser of mortgaged premises liable only if he assumed the debt.

6 Or. 270-272, ROY v. HORSLEY.

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Cited in Bennett v. Minott, 28 Or. 344, 39 Pac. 997, and Hughes v. Clemens, 28 Or. 442, 42 Pac. 618, assuming that attorney served with notice of appeal was a resident of the county.

6 Or. 272–275, 25 Am. Rep. 524, MOORE v. FULLER.

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Cited in Grider v. American etc. Mtg. Co., 99 Ala. 285, 42 Am. St. Rep. 58, 12 South. 777, holding certificate impeachable only for fraud or duress; Johnson v. Van Velsor, 43 Mich. 219, 5 N. W. 273, demonstrating tendency of courts to uphold certificates of acknowledgment; Council Bluffs Sav. Bank v. Smith, 59 Neb. 93, 80 Am. St. Rep. 669, 80 N. W. 271, holding certificate conclusive in favor of those who, in good faith, rely upon it; Pickens v. Knisely, 29 W. Va. 10, 6 Am. St. Rep. 622, 11 S. E. 935, maintaining conclusiveness of certificate. Cited in notes to 29 Am. St. Rep. 483; 67 Am. St. Rep. 525; 54 Am. St. Rep. 155, on conclusiveness of certificates of acknowledgment of deeds.

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Cited in Gray v. Holland, 9 Or. 515, and Cartan v. David, 18 Nev. 328, 4 Pac. 69, both reiterating the rule; First Nat. Bank of S. Oregon v. Leonard, 36 Or. 393, 59 Pac. 873, stating purpose and effect of separate property laws; Cross v. Allen, 141 U. S. 538, 12 Sup. Ct. Rep. 67, 35 L. ed. 849, reaffirming the rule on the ground of stare decisis.

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6 Or. 275–279, MACK v. SALEM.

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Cited in Rice v. Wallowa County, 46 Or. 576, 81 Pac. 358, upholding the rule; Heilner & Co. v. Union County, 7 Or. 85, 86, 33 Am. Rep. 703, holding rule applicable to action against county for defective roads and bridges; Eastman v. County of Clackamas, 32 Fed. 35, 12 Saw. 613, holding that notice to a supervisor is notice to a county. Cited in note in 20 L. R. A., N. S., 692, on liability of municipality for defects or obstructions in streets.

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Cited in Wyatt v. Henderson, 31 Or. 52, 48 Pac. 791, reaffirming the rule. Cited in note in 59 L. R. A. 248, on sufficiency of general allegations of negligence.

6 Or. 279–281, MULTNOMAH COUNTY v. KNOTT.

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Cited in State v. Portland General Electric Co., 52 Or. 532, 98 Pac. 162, holding that ferry franchise may only be acquired by special grant. Cited in notes in 59 L. R. A. 518, on establishment, regulation, and protection of ferries; 37 L. R. A. 712, on right to take tolls without franchise.

6 Or. 281–283, FRUSH v. EAST PORTLAND.

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Cited in North Pac. etc. Co. v. City of East Portland, 14 Or. 7, 12 Pac. 6, and Pine Tree Lumber Co. v. City of Fargo, 12 N. D. 377, 96 N. W. 363, approving and applying the rule; Portland etc. Co. v. City of East Portland, 18 Or. 34, 36, 37, 22 Pac. 540, 541, 6 L. R. A. 290, recognizing power of city to create liability against itself for street improvement though no assessment be levied to pay it.

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Cited in Brown v. Brown, 12 S. D. 508, 81 N. W. 884, and Moody v. Richards, 29 Or. 285, 45 Pac. 778, to same effect.

6 Or. 284–295, HOWE v. TAYLOR.

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Cited in Hume v. Kelly, 28 Or. 405, 43 Pac. 380, holding that suit could be brought by any party interested.

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Cited in Howe v. Taylor, 9 Or. 291, approving the rule. Cited in notes to 94 Am. St. Rep. 468, on actions on lost instruments; 55 Am. Dec. 78, on jurisdiction of equity as affected by statute conferring similar jurisdiction on court of law.

Officers.—Action on Bond is Action on Liability created by statute and barred in six years, p. 295.

Cited in Multnomah Co. v. Kelly, 37 Or. 3, 60 Pac. 203, and Oregon v. Davis, 42 Or. 36, 71 Pac. 68, approving the rule.

6 Or. 295–297, TERWILLIGER v. MULTNOMAH COUNTY.

This case has not been cited.

6 Or. 297–299, NORTHUP v. THE PILOT.

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Cited in Yarnberg v. Watson, 13 Or. 13, 4 Pac. 297, defining vessel or boat.

6 Or. 299–307, DOUGLAS COUNTY R. CO. v. DOUGLAS COUNTY.

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Cited in Smith v. City of Portland, 25 Or. 301, 35 Pac. 666, Tyler v. State, 28 Or. 241, 42 Pac. 518, Oregon Coal etc. Co. v. Coos County, 30 Or. 309, 47 Pac. 852, McAnish v. Grant, 44 Or. 62, 74 Pac. 398, California & O. Land Co. v. Gowen, 48 Fed. 775, all to same effect; Douglas County Road Co. v. Canyonville etc. Road Co., 8 Or. 106, involving same facts and referring to the cited case for a history of the litigation.

6 Or. 308–312, THOMPSON v. WOLF.

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Cited in Johnson v. Crookshanks, 21 Or. 340, 28 Pac. 79, holding that plaintiff must have legal estate and present right to possession.

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Cited in Wolfer v. Hurst, 47 Or. 160, 80 Pac. 420, sustaining right to appeal in such cases.

6 Or. 312–316, SAUNDERS v. PIKE.

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Cited in State v. Houston, 36 Mont. 181, 92 Pac. 477, holding the better rule to be that justice may take case under advisement only when parties consent.

6 Or. 316–321, LADD v. SMITH.

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Cited in Welcome v. Hess, 90 Cal. 513, 25 Am. St. Rep. 145, 27 Pac. 371, implying acceptance of surrender of leased premises by accepting keys and reletting the building; Blake v. Dick, 15 Mont. 243, 48 Am. St. Rep. 671, 38 Pac. 1075, holding that retention of key will not imply acceptance of surrender. Cited in note to 114 Am. St. Rep. 719, on rights of landlord on abandonment of premises by tenant.

6 Or. 321–327, BARTEL v. LOPE.

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Cited in Pacific Coast Biscuit Co. v. Dugger, 42 Or. 516, 70 Pac. 525, merely referring to the case and not deciding the point.

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Cited in Ladd v. Mason, 10 Or. 318, Moore v. Norman, 43 Minn. 431, 19 Am. St. Rep. 247, 45 N. W. 858, 9 L. R. A. 55, and Thomas v. Seattle Brewing & Malting Co., 48 Wash. 563, 125 Am. St. Rep. 945, 94 Pac. 117, 15 L. R. A., N. S., 1164, holding lien discharged by tender. Cited in note in 33 L. R. A. 237, on effect of unaccepted tender on lien of mortgage or pledge.

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Cited in Noblitt v. Durbin, 41 Or. 558, 69 Pac. 686, holding declarations concerning title admissible as part of res gestae; Meyers v. Dillon, 39 Or. 583, 65 Pac. 867, placing common reputation on an equal footing with possession.

6 Or. 328–334, 25 Am. Rep. 527, PUTNAM v. DOUGLAS COUNTY.

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Referred to in Terwilliger v. Multnomah County, 6 Or. 296, as stare decisis. Cited in notes to 85 Am. St. Rep. 307, on elements of damages allowable in eminent domain proceedings; 45 Am. Dec. 532,

on setoff of benefits in eminent domain; 9 L. R. A., N. S., 819, on right to set off benefits against damages on condemnation.

6 Or. 334–338, KNOTT v. KNOTT.

This case has not been cited.

6 Or. 339–341, RICH v. PALMER.

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Cited in Rich v. Palmer, 7 Or. 137, and Abraham v. Chenoweth, 9 Or. 354, both approving the rule.

6 Or. 341–344, STATE v. BERGMAN.

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Cited in Hood v. Von Glahn, 88 Ga. 408, 14 S. E. 564, State v. Preston, 4 Idaho, 220, 38 Pac. 695, Town of Neola v. Reichart, 131 Iowa, 500, 109 N. W. 8, State v. Lee, 29 Minn. 453, 13 N. W. 915, Griffin v. State, 109 Tenn. 25, 70 S. W. 63, and State v. Baker, 50 Or. 384, 92 Pac. 1078, 13 L. R. A., N. S., 1040, all sustaining right of city to punish act punished by state; Town of Van Buren v. Wells, 53 Ark. 375, 22 Am. St. Rep. 214, 14 S. W. 40, holding conviction under statute no bar to prosecution under ordinance. Cited in notes to 92 Am. St. Rep. 100, on identity of offenses on plea of former jeopardy; 17 L. R. A., N. S., 70, on power of municipality to punish act also an offense under state law.

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Cited in State v. White, 48 Or. 421, 87 Pac. 139, Craynor v. City of Albany, 43 Or. 147, 71 Pac. 1043, and State v. Humphreys, 43 Or. 47, 70 Pac. 825, all sustaining conjunctive indictment in language of statute.

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Cited in State v. Nease, 46 Or. 440, 80 Pac. 898, holding a pool-room a public nuisance; State v. Waymire, 52 Or. 285, 132 Am. St. Rep. 699, 97 Pac. 47, 21 L. R. A., N. S., 56, holding that statute covers indictable common-law nuisances.

6 Or. 344–350, ALLEN v. NORTON.

Cited in note to 99 Am. Dec. 278, judgment by confession.

6 Or. 350–353, MORRIS v. PERKINS.

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Cited in Bowen v. Clarke, 22 Or. 568, 29 Am. St. Rep. 625, 30 Pac. 431, deprecating practice of giving abstract propositions of law to the jury.

6 Or. 353–355, STEPHENS v. SCHOOL DIST. NO. 21.

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6 Or. 356–362, MARSH v. TRULLINGER.

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Cited in Ankeny v. Fairview Milling Co., 10 Or. 401, disapproving the dictum but approving the decision. Cited in notes to 57 Am. Dec. 685, on rights and liabilities of owners of dams; 59 L. R. A. 897, on liability for damming back stream; 3 L. R. A., N. S., 912, on right to consider value as part of a natural water power, in fixing compensation on condemnation.

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6 Or. 366–367, STATE v. WITHAM.

Cited in notes to 85 Am. Dec. 497, on perjury; 124 Am. St. Rep. 658, on indictments for perjury.

6 Or. 367–378, RAMSEY v. LOOMIS.

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Cited in Hale v. Cottle, 21 Or. 586, 28 Pac. 901, reaffirming the rule.

6 Or. 378–382, 25 Am. Rep. 531, and note, MILARKEY v. FOSTER.

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Cited in Bayard v. Standard Oil Co., 38 Or. 445, 63 Pac. 614, City of Demopolis v. Webb, 87 Ala. 666, 6 South. 410, and Jones v. Bright, 140 Ala. 273, 37 South. 80, all illustrating and applying the rule; Ricket v. Metropolitan Ry. Co., note cited in 1 Eng. Rul. Cas. 601, not accessible; Van Buskirk v. Bond, 52 Or. 236, 96 Pac. 1104, to

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6 Or. 388–391, SAXON v. CONGER.

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6 Or. 391–394, ADAMS v. WILSON.

This case has not been cited.

6 Or. 394, TAYLOR v. UMATILLA COUNTY.

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Cited in People v. Nunley, 142 Cal. 109, 75 Pac. 678, and Territory v. Chavez, 6 N. M. 460, 30 Pac. 904, both approving the rule.

6 Or. 431–436, BANK OF B. C. v. PAGE.

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Denied in Washburn Mill Co. v. Bartlett, 3 N. D. 145, 54 N. W. 546, and Wright v. Lee, 2 S. D. 610, 51 N. W. 710, holding that such contracts are not void; Wright v. Lee, 4 S. D. 243, 55 N. W. 933, holding that state alone can question right of foreign corporation to do business; Pennybacker v. Laidley, 33 W. Va. 570, 25 Am. St. Rep. 925, 11 S. E. 38, holding contracts not void where the statute imposes a penalty for doing business; Kendrick v. Warren Bros. Co., 110 Md. 71, 72 Atl. 464, where the statute prescribes a penalty and expressly validates the contract. Cited in notes in 24 L. R. A. 318, on validity of contracts made by foreign corporations which have not complied with statutory requirements; 4 L. R. A., N. S., 692, on imposition of penalty as affecting validity of contract by foreign corporation without complying with statutory conditions of doing business.

6 Or. 436–437, DONEGAN v. MURPHY.

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6 Or. 438–440, McCULLY v. SWACKHAMER.

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6 Or. 457–459, NICOLAI v. LYON.

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6 Or. 459–463, BRUGGER v. BUTLER.

Cited in note in 59 L. R. A. 831, on liability for damming back stream.

6 Or. 463–465, WETMORE v. MULTNOMAH COUNTY.

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7 ORE.



EXTRA ANNOTATED EDITION.

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

JANUARY TERM, 1879.

C. B. BELLINGER,
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JUSTICES

OF

THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

JAMES K. KELLY (Chief Justice).

R. P. BOISE.

P. P. PRIM.

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ADMITTED DURING THE TERM OF THESE REPORTS.

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JANUARY TERM, 1879.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JANUARY TERM, 1879.

JOHN W. GREENWOOD and ELIZA SMITH, Appellants, v. MARY CLINE and OLIVE NEWSOM, Respondents.

WILL—UNDUE INFLUENCE—PRESUMPTIONS.—Where a will is shown to have been duly executed, the law presumes competency in the testator, and that it contains his unrestrained wishes in the disposition of his property; but these presumptions may be disputed.

IDEM.—WHAT PROOF SUFFICIENT TO SET WILL ASIDE.—What constitutes fraud and undue influence are questions that must depend on the circumstances of the case. They are in their nature inquiries which can not be referred to any general rule. Where an arbitrary and unjust will is made in favor of one occupying a relation of confidence towards the testator, and who might have influenced his mind, slight evidence that he did exercise his power may suffice to invalidate the will. It is the duty of one occupying such a relation to disabuse the testator's mind of any false impressions he may have concerning others entitled to his bounty, and the omission to do so may afford ground for imputing to him undue influence.

IDEM—CIRCUMSTANCES INDICATING UNDUE INFLUENCE.—Where the estate was large and was bestowed upon one daughter to the exclusion of other children having equal claims upon the testator's bounty, the favored daughter was alone present when the will was executed, and the transaction was kept a secret from the other children; the testatrix sustained relations of confidence towards the beneficiary under the will, and during such relation became imbued with groundless suspicion and aversion towards a son with whom she had formerly lived, and whom she had misled; while in her last sickness she made large donations to the legatee in money, and one day before her death executed a power in favor of the legatee's attorney to cancel a mortgage which she held against the legatee; these transactions and the approaching death of the testatrix were kept secret from the other children: *Held*, that these circumstances were indicative of fraud and undue influence.

IDEM.—UNUSUAL CLAUSES AND PRECAUTIONS.—Where the will recited that the testatrix was "not under any restraint or the influence or representations of any person," and the certificates of two physicians were procured to the effect that the testatrix was of "sound mind and perfectly competent to make a will"—the excluded heirs having no knowledge that a will was to be made, and never having shown any interest in the distribution of the estate: *Held*, that such recital and certificates indicated a consciousness of suspicion that is inconsistent with honest motives, and lead to a suspicion against the integrity of the will.

IDEM.—SPIRITUAL COMMUNICATIONS.—Where the testatrix, prior to the execution of the will, accompanied the legatee, a daughter, to a spirituaseance at the house of the legatee's attorney, where a pretended letter was read from the deceased husband of the testatrix, warning her against her son, and advising her to "fix" her property so that he should not get it: *Held*, that these facts were evidence of an attempt to unduly influence the testatrix in the disposition of her property by will, and went to impeach the will.

APPEAL from Clackamas County. The facts are stated in the opinion.

Thayer & Williams, J. A. Stratton and Wm. H. Holmes, for appellant.

Mallory & Shaw, and G. W. Lawson, for respondents.

By the Court, PRIM, J.:

This suit was brought in the county court of Marion county, to set aside a will made by Mrs. Elizabeth Greenwood, on the ground that she was of unsound mind when the will was executed, and that it was procured through fraud and undue influence of the respondents, Mary C. Cline and her daughter, Mrs. Olive Newsom. The will was executed on the twelfth day of October, 1872, and the testatrix died on August 9, 1875. She was sixty-two years of age at the date of the will, and sixty-four when she died. At the time the will was made she had three children living: Mrs. Cline, the eldest, about forty-four years of age; Mrs. Eliza Smith, thirty-seven years of age; and John W. Greenwood, the youngest of the family living, about thirty-five years of age. The will bequeathed to Eliza and William, the appellants, one hundred dollars each, and to Olive Newsom, the granddaughter of the testatrix, eighty acres of land, and the residue of the estate to

Mrs. Mary Cline. The whole estate was worth, at that time, about twenty-six thousand dollars. Shortly after the death of the testatrix the will was duly admitted to probate, in common form, and the executors having duly qualified proceeded to administer upon said estate, and thereafter, in August, 1876, made their report for final settlement, after giving the usual notice required by law. Thereupon appellants filed their petition, setting forth that said testatrix at the time of making her said will was not of sound mind. That in consequence of old age and other causes her mind was seriously impaired and shattered, her memory destroyed, and that she was incapable of exercising any judgment whatever. That her mental condition was such that she was easily persuaded in her course of conduct; and that her attempt to make and execute the will and dispose of her estate in the manner therein provided, was the result of undue influence exercised upon her by the said Mary Cline and Olive Newsom, or other parties acting for them or in their interest, and that the same was not in fact the will of said Elizabeth J. Greenwood. Respondents joined issue, denying all the above charges, and affirming the capacity and competency of the testatrix. All the testimony except two depositions having been taken orally before the county court and reported in short-hand, the cause was submitted and decided in favor of the contestants—that court holding that notwithstanding the testatrix had testamentary capacity, the will was executed under undue influence. The cause was then appealed to the circuit court. Upon hearing before that court the judgment of the county court was reversed. Whereupon the contestants have appealed to this court.

In examining the testimony bearing upon the mental condition of the testatrix during the last years of her life, embracing the time at which the will was executed, it appears that in 1866 the testatrix had a severe attack of paralysis, from the effects of which she never fully recovered. That her memory became defective; that she could not tell who was working for her; that she would lease a piece of land one day and the next day could not remember it, and would

ask the same questions over repeatedly at short intervals. Mr. Redfield, in his valuable work on wills, pp. 94 and 95, in speaking of this subject, says: "The loss of memory is one of the earliest and surest indications of the approach of mental infirmity."

Dr. Cusio, a witness, says that sometimes the testatrix was very despondent, and in many respects different from the majority of people; that at times there was some degree of mental obliquity. Dr. Peyton, a witness, who met her frequently while attending upon her late husband and her youngest son in their last sickness, says: "Her condition seemed to be that of impaired mental powers." He also states that her husband directed his attention to the fact that her mind was not what it had been. Sarah Buxton, another witness, says of her: "Her eyes had a dead expression, and her manner was sometimes like that of an intoxicated person." J. M. Hagey, a witness, says that "he noticed her acting very peculiar" in her conversations; that she would stop before she had completed the remarks she was making, and "never resume the subject or refer to it again." He noticed this peculiarity about 1872. Hardin McAllister, a witness, described her as absent-minded. He noticed her on one occasion, after she was attacked by paralysis, that while lying in bed she would imitate the actions of a person examining and breaking something in pieces which she held in her hand, pretending that she had a piece of quartz, which she was breaking up and examining for gold. This witness also testifies as to her disposition to yield her opinion to those with whom she talked. He says she was in the habit of talking a great deal about stock; and if she thought a great deal of a certain horse, and you would say another horse was a finer one, she would side with you, and conclude that it was a finer horse. A witness, Caleb Chapman, testifies that on one occasion, while the testatrix was going from Salem to Howell's Prairie alone, she became turned around in the road, and was coming back to Salem without knowing it when he met her. Another witness, Mary Sappingfield, describes her as appearing to be "in a kind of worry." Wilmot Scott, a witness, who had

lived at Cline's awhile, and afterwards stayed with the testatrix, says that the winter he was there she didn't appear to ever laugh or be cheerful; that she did not pay any attention to "her housework or anything that was going on." She told witness it "was from the effect of her head; that her head was hurt from the effect of a buggy running down hill with her." This witness also testifies that she said: "They all told her that she (testatrix) was not right." Delos Jefferson, another witness, testifies that about the year 1870 Mrs. Cline, the principal beneficiary under the will, told him that her mother's mind was not quite clear.

These are brief references to the testimony of such witnesses as were old neighbors and intimate acquaintances of the testatrix. Many of them are aged persons, and had been intimately acquainted with her for thirty years. Their opinions in relation to the mental condition of the testatrix are of paramount importance, because they are accompanied with a statement of the facts upon which they are founded. They have undertaken to relate the conduct, manners, bearing, conversation, appearance and acts of the testatrix, from which their impressions of her mental unsoundness were formed; and such opinions are entitled to more weight than the mere opinion of witnesses who do not give the facts upon which their opinions are based.

Mr. Redfield says that "testimony to establish partial or general insanity should come, as far as practicable, from those persons who have had extensive opportunity to observe the conduct, habits and mental peculiarities of the person whose mental peculiarities are brought in question, extending over a considerable length of time and reaching back to a period anterior to the date of the malady." (1 Red. on Wills, 136, 137.)

The respondents, to rebut the evidence heretofore tending to show the mental unsoundness of the testatrix, have introduced another class of witnesses, among whom are many of the leading business men of the city of Salem, who had had some acquaintance with the testatrix and occasional business transactions with her. They are men, not only of intelligence but of high standing and character, and their evidence is en-

titled to consideration. Among them are Asa and David McCully, J. H. Alberts, A. W. Kinney, E. N. Cooke, Dr. Weatherford, and others. These gentlemen were acquainted with the testatrix—some of them for several years. They are men engaged in business in the city of Salem. She resided on a farm in Howell's Prairie, several miles away, and they met her occasionally when she came to town on business. In their opinion she was of sound mind and sufficient mental capacity, so far as they had observed, to transact her own business and understand ordinary business affairs.

The business transactions referred to by the witnesses were very plain transactions, which called for the exercise of neither judgment, foresight, prudence, information nor memory. The routine of drawing her dividends when due, on the P. T. company stock, was very simple. Her transactions with Mr. Alberts were of a similar nature. Mr. Kinney says: "She was very tedious to do business with; it took a good deal of time. I think her mind was sound, but she was quite an old lady and was in quite poor health."

It will be unnecessary to notice this branch of the evidence any farther, as it was conceded in the argument that the testatrix had sufficient mental capacity to make a will if allowed to exercise her own unbiased judgment, free from undue influence. But it was claimed that the testatrix was old and in feeble health; that her mind was weak and impaired to such an extent that she was infirm of purpose and easily persuaded and influenced in her conduct by any one possessing her confidence.

Dr. Francis Willis, a person of great name as connected with mental disorder, defines the difference between an unsound mind and a weak one as follows: "A sound mind is one wholly free from delusion. Weak minds only differ from strong ones in the extent and power of their faculties. An unsound mind is marked, on the contrary, by delusion, by an apparent insensibility to or perversion of those feelings which are peculiarly characteristic of our nature." (1 Redfield on Wills, 78 and 79.)

On May 23, 1869, William Greenwood, Sr., the husband

of the testatrix, died possessed of a considerable estate, which was equally divided between his children. They were three in number: Mrs. Mary Cline, the eldest, Mrs. Eliza Smith, and John W. Greenwood, the youngest of the three. They were grown at that time, and each of them had a family. The will, as has already been stated, was executed after this, on the twelfth day of October, 1872. At that time Mrs. Cline had a husband, and was in business, but not in affluent circumstances. Her daughter Olive was married to John Newsom, a man in prosperous circumstances. Mrs. Smith had a large family of children, seven in all; several of whom were small. At that time she was in reduced circumstances, her husband having been broken up a short time before. The testatrix knew their circumstances. They were then keeping boarders for a living and residing in Umatilla county. Eight months after the execution of the will the husband of Mrs. Smith died. John W. Greenwood was a thrifty farmer and a married man, his wife being the sister of John Newsom, the son-in-law of Mrs. Cline. The three children had shared equally in their father's estate, Mrs. Cline's portion being represented by the half of a lot and brick building in Salem —at that time having bought the other half, she owned the entire property, and was in receipt of an income from it.

At the time the will was executed the estate of the testatrix was quite large, amounting to twenty-six thousand dollars.

The testatrix and her son William were co-administrators upon the estate of William Greenwood, which was settled up about the year 1870.

In the years 1869-1870 John W. managed the farm of his mother, and the profits of her share in the crops for those years amounted to five thousand dollars. In 1871-72 Mrs. Greenwood managed the farm herself. After the death of the husband of the testatrix, Mrs. Cline and her husband resided in Salem for several years, she being engaged in the millinery business. About 1870 she moved to Kalama, where she resided until about August, 1873, at which time she moved upon the farm of the testatrix, and resided with her

until her death. Prior to the execution of the will the testatrix wrote to Mrs. Cline to meet her in Salem, that she wished to see her on important business; but without, as Mrs. Cline states, disclosing the nature of the business. Mrs. Cline came to Salem as requested, when she met her mother, and was present at the execution of the will. The circumstances attending the transaction will be presently referred to.

Dr. Richardson testifies that Mrs. Greenwood came to his office in company with Dr. McCurdy on the twelfth of October, 1872, and that they examined her with reference to her sanity, and gave her a certificate to the effect that she was of sound mind, and competent to make a will. He remembered but little of what occurred—recognized his signature to the certificate, and this was about all he knew of the transaction. The examination of the testatrix was very short, and he could not remember the questions asked her. He remembers that she gave as a reason for making the will as she proposed, that the other children had already had more than their proportion of the property.

Mrs. Smith testifies that her mother was a little hard to get along with at times, but was always good to her; that she never saw her but once after they moved to Umatilla, and that was when she, the witness, came down to get her child doctored; that her mother was stopping at Mrs. Cline's at that time, on the place that had formerly been given to her brother William; that the witness stopped at her brother William's during that visit, and her mother came there to see her; that the last time she saw her mother was at Chappel's on her father's old place, the day before she returned to Umatilla; that she told her mother that she was going to leave next day, and never expected to be there again; and her mother said she would get in the hack next day and go to Salem with her; but when the hack came along she was not in it, and witness never learned why she did not come; that while her mother was living with her on the place Mrs. Cline tried to persuade her to go to Salem and live with her, and on one occasion went out in the Silverton stage to her mother's place, and told her mother that their father's spirit rode out

with her, and talked with her, and wanted her mother to move to Salem and live with her, Mrs. Cline.

William J. Greenwood lived with his parents until a short time after he was married, when he went upon a piece of land, a part of his mother's donation claim. After his father's death he lived with his mother, and took charge of her affairs until 1870; Mrs. Cline was living in Salem then; William testifies that every time his mother came to town she would get the idea that a final settlement of his father's estate could be made in six months, and it would take him some time to convince her that it could not be done; that she would be all right then until she would make another visit to Salem; that she always visited Mrs. Cline when she came to town. After William was married he talked of moving east of the mountains, but his father and mother were opposed to his doing so, and told him if he would settle on the eighty-acre tract on the prairie they would give it to him; it was unimproved. He went upon this land and improved it, and remained there until 1872, when his mother came to him and told him she wanted it back again. He told her she could have it back if she wanted it. He had fenced it and set out an orchard. He told her he wanted five hundred dollars for the improvements; she said that was too much. The land was worth at that time about four thousand dollars. He also testifies to the same circumstance spoken of by Mrs. Smith in reference to Mrs. Cline going out to the place and telling his mother that her father's spirit rode out with her in the stage, and wanted their mother to go to Salem and live with Mrs. Cline; that his mother appeared serious over the matter; that she and Mrs. Cline went off together; that every time his mother went to Salem Mrs. Cline would try and get her to come and live with her.

While it is conceded by the contestants that the testatrix had sufficient mental capacity to make the will if allowed to exercise her own judgment, free from all improper interference they claim that it appears from the evidence that she was old and feeble; that her mind was weak and impaired to such an extent that she was easily persuaded and in-

fluenced in her conduct by any one possessing her confidence. And that the attempt to execute the will in question and distribute the property as therein provided was entirely the result of undue influence exercised upon her by her daughter, Mrs. Cline, and her granddaughter, Mrs. Newsom, the beneficiaries of the will, and other parties acting in their interest.

When a will is shown to have been duly executed, the law presumes competency in the testator, and that it contains his unconstrained wishes in regard to the disposition of his property. But this presumption may be rebutted by showing that it was obtained by fraud and imposition practiced on the testator, or undue influence.

"What constitutes undue influence is a question which must depend very much on the circumstances of each case. It is in its nature one of those inquiries which can not be referred to any general rule." (11 Harris, 375; 2 Leading Cases in Eq., 1271.)

While "it is always allowable to employ argument, persuasion or even importunity to induce one to do that from which no rule of law or morals bids him to refrain;" yet "if where a legatee obtains a preference by a false statement concerning one who has a legal or paramount claim on the testator's bounty, there is a palpable fraud which avoids the bequest." (2 Leading Cases in Eq., 1273.)

It is laid down by the author of the Notes in Leading Cases in Equity that "the weight of authority accordingly is that although the mere existence of a confidential relation does not shift the burden of proof; yet where the will is one which the testator could not make consistently with the claims of duty and affection, and therefore, presumably would not have made if he had been left to the dictates of his own judgment, the bequest should be pronounced invalid, unless some evidence is adduced which overcomes the unfavorable influence arising on the face of the transaction." (2 Leading Cases in Eq., 1275; *Meek v. Peery*, 36 Mis. 196; *Harvey v. Sullens*, 46 Mo. 146; *Brand v. Pratt*, 18 Pick; *Morris v. Stokes*, 21 Ga. 552; 16 Vermont, 335; *Tyler v. Gardner*, 35 N. Y. 554, 559.)

While the above doctrine may be a little too strong we think "it is clear that where an arbitrary and unjust will is made in favor of one occupying a relation of special confidence who might have influenced the testator's mind, slight evidence that he did exercise his power may suffice to invalidate the will." (*Coleman v. Robertson*, 18 Ala. 84; *Harvey v. Sullins*, 46 Mo. 147; *Harrell v. Harrell*, 1 Duvall, 203; *Patterson v. Patterson*, 6 Ar. R. 53; *Tyler v. Gardner*, 35 N. Y. 559.)

It is said that "fraud and undue influence are not ordinarily susceptible of direct proof, and in a majority of cases can only be inferred from the nature of the transaction or from the relations of the parties to each other. In *Marsh v. Tyrrel*, Sir John Nicholl said: "The ground for imputing it must be looked for in the conduct of the parties and in the documents rather than in oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the court."

In New York "the fact that the donor was brought before the execution of the instrument to a state of causeless alarm as to the condition of his property, and groundless suspicion against the members of his family, was held to be a circumstance indicative of undue influence."

It becomes necessary to look into the documents, the relation of the parties to each other, and the circumstances surrounding the whole transaction, in order to ascertain whether there exists any grounds for imputing fraud and undue influence in the execution of the will.

The testatrix was an old woman in feeble health, with a mind weak and impaired to such an extent that she was easily persuaded and influenced by those possessing her confidence. She had a large property, amounting in value to twenty-six thousand dollars, all of which she bequeathed to her daughter, Mary Cline, and to her granddaughter, the daughter of Mrs. Cline, except two hundred dollars, which she gave to the other two children, to keep them "from breaking the will." After the death of her husband she and her son William were co-administrators upon his estate, which was duly settled up according to law. For two years after the death of her hus-

band William superintended and managed her farm and business for her, and the crops of those two years brought five thousand dollars. Up to the time that she commenced to reside with the Newsoms and Clines she was on good terms with William and her daughter Eliza. After that she became distrustful of them, and especially of William. Prior to and at the time the will was executed she resided with John Newsom, the son-in-law of Mrs. Cline, and from about the time the will was executed up to her death, with Mrs. Cline. Between these two families on one side and William and Eliza on the other there was bitter enmity.

At the time of the execution of the will the relation between the testatrix and Mrs. Cline was one of unusual confidence. Prior to the execution of the will the testatrix had visited Mrs. Cline twice at Kalama, in Washington Territory, remaining one time two or three weeks and the other five or six weeks. And from all the evidence bearing upon this point we infer that the will was executed shortly after this last visit.

According to the testimony of Mrs. Cline she was sent for to Kalama, in order that she alone of all the children should be present when the will was executed. William had been expelled from the eighty-acre tract of land given him by the testatrix when a boy, for no assigned cause except that she wanted it herself, and she had let Mrs. Cline have it free from rent. She loaned Mrs. Cline three thousand dollars in money, keeping the transaction a secret from the other children and neighbors, which loan became in effect a gift. And yet about this time she was heard by some of the witnesses to express fears of coming to want, and said she was "as poor as she could be." The will itself is not only an unusual one as to the distribution made of the property of the testatrix, but unusual and extraordinary as to some of its recitals, one of which is as follows: "I, Elizabeth Greenwood, being of sound and disposing mind, and not under any restraint or the influence or representation of any person whatever," etc.

The procuring of the certificates of two physicians attached

to the will to the effect that they have examined the testatrix and find her in all respects in good health and of sound mind, and "perfectly competent to make her will," is an unusual circumstance in the execution of such an instrument. In Twine's case (Abridgment of Coke's Rep. 62) it was held that a clause in a deed that it was made honestly, truly, and *bona fide,* was an unusual clause, which lead to a suspicion against the integrity of the instrument.

In *Taylor v. Taylor,* 8 Howard 183, the court took a similar view of such a clause in a deed, holding that such an unusual clause indicated an "apprehension or consciousness of suspicion" that is inconsistent with honest motives, and that "suspicions and surmises" on the part of those participating in the transaction were the offspring of cold calculation and of the compunctious visitings that wait on contemplated wrong. In this case the transactions between Mrs. Cline and the testratrix are not only unusual in many respects, indicating "apprehension" and a "consciousness of suspicion," but such apprehensions are repeatedly avowed.

Neither William nor Eliza knew that a will would be made. Neither had shown any disposition to control the testatrix in the disposition of her property; and yet it appears that the "apprehensions" were so great that doctors were hired to certify that the testatrix was "perfectly competent to make her will;" and under this apprehension two thousand dollars were obtained from the testatrix, and an attempt was made to obtain four thousand dollars more, to be used in "fighting for the will."

According to Mrs. Cline's testimony she made a two days journey here from Kalama, at the request of the testatrix, to be present at the execution of the will. But when she met her mother on the street in Salem, and was informed that she was going to make a will and desired her to accompany her to the office of Judge Terry for the purpose of having it drawn, she refused to go with her, and assigned as a reason that it would not look altogether right. She states that at this time she had not been informed by her mother how she intended to make her will. At this point it appears the question was raised as

to whether it would be prudent to get Lawson to draw the will on account of the report that he was crazy, and of the probable effect such report might have on the will if contested. If Mrs. Cline did not know that the will was to be made in her favor, and that the other children would be excluded, why should she conclude that it would not "look altogether right" for her to be present? According to her story, up to that time she had never said a word to her mother upon the subject, and yet she felt a consciousness in her own breast that it would not look well for her to be present. After some hesitation she finally consented, however, to accompany the testatrix, and be present when the will was executed. When they were about half way up the stairway leading to Terry's office her mother told her how she intended to make her will, and here another discussion occurred between them as to how much should be given to Eliza and William to keep them from "breaking the will." The testatrix only wanted to give them five dollars each, while Mrs. Cline thought they ought to have more. She thought a hundred dollars would be "a mere nothing" out of such a large estate as her mother's. She pleaded earnestly that they should have more than her mother proposed to give them, but the testatrix was firm, and could not be induced to give another cent beyond one hundred dollars to each. It will be observed, however, that this remonstrance and earnest plea in behalf of William and Eliza were not made upon the ground of the injustice done to them; but upon the ground that it was too small a sum to prevent them from making a successful fight against the will. She said to her mother that she wanted her "to fix it in a way that we will not have trouble"—that she knew her "brother's turn." To which her mother replied that she would do her business up in such a manner that it could not be broken; that her dealings should be with the "very best and most influential persons of Salem, whose characters were entirely above suspicion, and whose oaths would be of great weight, and far above anything William could bring into court to upset it," but that if she was afraid she would give her means to fight with, as the sequel shows she did. As to the next occurrence there is

a material conflict between the evidence of Mrs. Cline and that of David McCully. She states that after her mother had a talk with Cooke and the McCullys in relation to her will, she and her mother went immediately to Terry's office, and that the will was drawn up under her mother's personal instructions; while McCully states that he met the testatrix in the street near Bush's bank, and after obtaining the consent of himself and his brother to act as her executors, he and the testatrix proceeded alone to the office of Terry, where she was going to sign her will, and that while on the way she informed him how she was going to make her will, and the reason why she was going to do so. This occurred not to exceed five or ten minutes prior to the signing of the will. When they arrived at Terry's Mrs. Cline was there, and the will was already drawn up and ready for the signature of the testatrix. The inference to be drawn from this evidence is that Mrs. Cline went to the office of Terry and had the will drawn before her mother arrived there. If this is not the correct inference why has Terry not been called to explain this matter? Mrs. Greenwood is in her grave, and Terry is the only disinterested witness in existence who knows what occurred there. McCully is a man of high standing and the truth of his statement can not be questioned.

While the Clines and Newsoms claim that they never did or said anything to influence the testatrix to make a will in their favor, John Newsom admits that she advised with him in relation to the matter; that she wanted to know what he would do if he were in her place. He says he told her that if she wanted to make any special disposition of her property it would be necessary to make a will. Mrs. Newsom admits that she had two conversations with her about the matter. She heard the testatrix say that she did not intend to give William and Mrs. Smith any more than enough to prevent them from breaking the will; that when Mrs. Smith went away she had given her all she ever intended her to have; that she had already received considerable; and that William had received more than his share from his father's estate in settling it up.

One of those conversations occurred in June, 1872, and the other about October 1, of the same year, only a few days before the will was executed. But the evidence goes further and shows an attempt to influence the mind of the testatrix by "means of pretended spiritualism."

After the death of the testatrix's husband Mrs. Cline was very solicitous to have her mother go to Salem and live with her, but the testatrix was not disposed to comply with her wishes in that respect. On one occasion Mrs. Cline went out to visit her mother and told her that her father's spirit had ridden out with her in the stage, and that he was very anxious that she should move to Salem and live with her. About this time it also appears that the testatrix was in the habit of attending spiritual seances in company with the Clines at the house of Mr. Lawson, who had been the attorney of Mrs. Cline during and since the settlement of her father's estate. Mrs. Cline, Lawson and his wife were avowed spiritualists. Mrs. Lawson claimed to be a spiritual medium, and on one occasion when the testatrix was present, a pretended letter was produced, purporting to come from the deceased husband "Uncle Billy Greenwood," as the witness called him. This letter undertook to advise the testatrix about matters in this world in regard to her son William. It said that Mr. Greenwood, in looking back into the world, "thought William was rather a rough character and liable to squander her property; hat she ought get it all out of his hands if she could and place it in such 'condition or fix' that he could not get hold of it." George Roland, a witness, says Lawson exhibited this letter to him the next day, and read it to him, and wanted to know if it did not sound like "Uncle Billy Greenwood talked." Witness replied that it did sound like "Uncle Billy."

This witness says Mrs. Greenwood appeared rather nervous over the matter, and was anxious to have a manifestation from Mr. Greenwood. He also says that he saw the testatrix and the Clines there on several different occasions, and that there was always some manifestation from Mr. Greenwood. The witness says he met Mrs. Greenwood going

there on another occasion on which she told him that Mrs. Lawson was going to "develop some more for her."

Mrs. Cline admits that she and her mother were at Lawsons on one occasion when a communication was received purporting to come from her deceased father, but pretends that she did not know what it was; that she gave but little attention to the matter. She claims, however, that it produced no impression upon her mother except that of disgust; that she looked upon Mrs. Lawson as a humbug, and Mr. Lawson as too smart a man to be so easily duped.

We are left in doubt by the testimony as to whether the testatrix became a believer in the doctrine of spiritualism or not. Some of the witnesses say that she did, while others claim that she did not. The question therefore does not arise in this case whether the will of a spiritualist can be maintained where it appears to be the "direct and obvious offspring of spiritual communications and influences."

This transaction does show, however, that there was an evident attempt by means of these pretended spiritual communications to produce an improper impression upon the mind of the testatrix, in regard to her son William, the object of which was to impress upon her mind that William was a bad character; that he was not only faithless but dishonest, and would squander her property upon lewd women and in saloons if she did not place it in such "condition or fix" that he could not get hold of it. In consequence of this impression, about this time or shortly thereafter, we find her taking away from him the land she had given him when a boy, with the understanding at the time that it was to be his; and upon which he had made valuable improvements and held for seventeen years. This was given to Mrs. Cline free from rent.

It further appears that prior to the execution of the will the testatrix had loaned Mrs. Cline three thousand dollars, and took an assignment of a mortgage on the brick building in Salem, belonging to Mrs. Cline as security. The will was executed on the twelfth day of October 1872, and on the twenty-fifth day of the same month, only thirteen days after-

wards, Mrs. Cline and husband executed a deed to the testatrix for this lot and building in consideration of three thousand dollars as expenses in the deed. And on the thirty-first day of the same month, in consideration of three thousand dollars, the testatrix conveyed the same property back to them. Both of these deeds were filed for record on the same day. This mortgage remained on the records uncanceled, in the name of the testatrix, up to within a day of her death, although paid off by the pretended life lease upon the premises as claimed by the Clines. According to their story this lease was executed about three years prior to the death of the testatrix, and not long after the loan of the three thousand dollars. Although it was claimed by the Clines to be in writing it was not produced at the trial, and no such paper appears on record, and its existence depends entirely upon the oral evidence of the Clines.

According to their evidence the testatrix was sick five or six months prior to her death, and they were expecting her to die two or three months before she did, and yet this mortgage was allowed to remain on the records uncanceled until the day before she died. A few days prior to her death Cline procured Lawson, the attorney of Mrs. Cline and on intimate terms with her, growing out of spiritualism, to draw a power of attorney, to be signed by the testatrix, authorizing him as her attorney in fact to cancel the mortgage, which was signed by her on her death-bed, only one day prior to her death. Now if the testatrix had agreed to accept this lease in payment and satisfaction of the amount due on the mortgage, why was it allowed to remain uncanceled until the testatrix was breathing her last? It is inconsistent with this theory, that Cline collected the rents notwithstanding the property had been leased for two or three years to the testatrix. It further appears that a few months prior to the death of the testatrix, Cline drew two thousand dollars of her money out of the bank, and afterwards tried to draw four thousand dollars more which the cashier of the bank refused to let him have on the ground that it was not due; but so great was the anxiety to obtain it that an offer was made to discount the interest. Cline swears that the testatrix delivered the two thousand dol-

lars to Mrs. Cline to be used by her in fighting to sustain the will. This donation was secured during the last sickness of the testatrix, and the attempt to secure the other four thousand dollars was made still later and while she was on her death-bed. The transaction occurred when no one was present but Mrs. Cline and her husband. It looks fraudulent upon its face, and is strong evidence of undue influence. It not only shows that the Clines exercised absolute dominion over the testatrix, but an anxiety on their part to get hold of her money while she was yet alive, that could result only from an apprehension that their scheme might be exposed and defeated. All of these transactions, as well as the execution of the will, were kept a profound secret from William and Eliza who were virtually excluded from the presence of the testatrix during her last sickness. Neither of them, it appears, were informed by the Clines that she was seriously ill, although they were expecting her to die two or three months before she did. Eliza was living in Umatilla county and heard nothing of it until after she was dead.

As in *Tyler v. Gardner*, it appears that the will was made under two false impressions, which go to the very root of its provisions; one of which is that Mrs. Cline had not received her portion of her father's estate, and the other that her son William was faithless and dishonest, and had received more than his proportion of that estate in settling it up, and that, if she gave him any of her property, he would squander it in saloons and in houses of prostitution.

These expressions in relation to William was nearly always made in the presence of the Clines and Newsoms. There is nothing in the testimony indicating that these charges were true. On the contrary, it appears that he is not a spendthrift, but in affluent circumstances, and that his property was acquired by his own industry; that he managed his mother's business with success for two years, gaining a profit to her of five thousand dollars.

The testimony of Dr. Richardson and the McCullys shows that the testatrix was laboring under the impression that it was necessary to make her will as she did in order to make

an equitable adjustment of the property between her children.

The evidence shows that this impression was not correct and Mrs. Cline knew it. The evidence fails to show that the testatrix had any such impression until after she took up her residence with the Newsoms and Clines. Mrs. Cline occupying a relation of special confidence towards the testatrix, equity and good conscience required her to disabuse her mind of such false impressions. But, instead thereof, we are led to infer, from the facts established in the case, that she and those acting in concert with her did everything they could to create these impressions. In fact, it appears from the testimony that she gave Mrs. Cline as an authority for them, for she replied to a witness that "Mary said so." The facts of this case and the relation of the parties, and circumstances surrounding the various transactions connected with the execution of the will, are very similar to those in the case of *Tyler v. Gardner* (35 N. Y. 559).

What the court said in that case is equally applicable in this case: "The studied privacy of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and grandson of her approach to death, are familiar and marked *indicia* of the exercise of undue influence under circumstances like those developed by the evidence." (*Crispell v. Dubois*, 21 Barb. 397; *Delafield v. Parish*, 25 N. Y. 41.) "The will was made by the testatrix under two false impressions, which went to the very root of its provisions; one, that the daughter was poor, and the other, that her son was faithless and dishonest, and that he had purchased his farm with her money."

The court further said: "It is true that the burden of establishing impositions and undue influence rests, in the first instance, upon the party by whom it is alleged. Fraud is never to be presumed from the mere concurrence of temptation and opportunity, or from the mere fact that the chief actor is the principal beneficiary. It must be established by affirmative evidence. It is thus established, however, when the facts are proved from which it results as an unavoidable inference. When such evidence is furnished, the burden of

repelling the presumption to which it leads is cast upon the party to whom the fraud is imputed. It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured. The purposes to be served are such as court privacy rather than publicity."

In the *Parish will case* the court, in commenting upon the circumstances raising a presumption of undue influence by the principal beneficiary, said: "Direct evidence of her control in these matters, of her actual exercise of undue influence in procuring her will to be executed by him, could hardly be expected. The means of keeping the influence out of sight were too many and too easy of application. But when such is the array of circumstances, when such a result is attained without any more substantial apparent cause, we are justified in saying, from the evidence, that the only cause to be inferred which is in the least degree adequate to produce the result, is a long-continued, persistent, overpowering influence, to which his condition rendered him peculiarly subject, and which she was as peculiarly in a position to exercise." (25 N. Y. 95.)

In the *Gardner will case,* the court, in summing up its conclusions, said: "In the present case all the controlling facts tend to one inevitable conclusion. When the antecedent and surrounding circumstances are grouped in their appropriate relations they carry to the conscience and the understanding the clear conviction, that when the mother affixed the signature she was executing her daughter's will. It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument and assented to all of its provisions. This was the precise purpose which the undue influence was employed to accomplish." (35 N. Y. 595.)

We adopt the above remarks of the court in that case as peculiarly applicable to this case. In this case, the facts from which fraud and undue influence may be inferred are

to be found not only in the will and the unusual circumstances attending its execution, but in the deeds which passed between Mrs. Cline and the testatrix; in the life lease and in the authority to cancel the mortgage against the property of the legatee; in the circumstances by which the two thousand dollars in money was obtained from the testatrix, and in the attempt to obtain four thousand dollars more remaining on deposit. In the unfounded "suspicions" and "apprehensions" with which the mind of the testatrix was filled respecting her son William and the safety of her property, and in the false impression under which she was laboring as to the supposed injustice that had been done Mrs. Cline in the distribution of her deceased husband's estate, and in the attempt to deceive the testatrix by means of pretended spiritual revelations. "The will, the deeds, the pretended lease, the power to cancel the mortgage, the drafts on the bank, were the different means for obtaining the property of the testatrix. They all had an object, and the relation between the parties were the same at the different dates of these transactions." Having thoroughly examined and considered the voluminous evidence produced in this case, we find that the testatrix had sufficient mental capacity to make a will if allowed to exercise her own judgment without any improper interference; but that she was old, in feeble health, and her mind weak and impaired to such an extent that she was easily persuaded and influenced in her conduct by any one possessing her special confidence, and that the will in question was the result of imposition and undue influence practiced upon her by the beneficiaries under it and others acting in their interest, and that it should be set aside and the property of the testatrix be distributed as the law directs where no will is made.

The judgment of the court below is reversed.

*GUSSEPPE MATASCE, Plaintiff and Respondent, v. GEO. H. HUGHES, Defendant and Appellant.

INSTRUCTIONS—EVIDENCE OF SETTLEMENT—PROMISSORY NOTE.—In an action to recover for work, the defendant having pleaded a settlement and the execution of a note for the amount found due thereon, his counsel asked the court to instruct the jury that this note was presumptive evidence of a settlement. The court refused this instruction, and instructed that the note was but slight evidence of a settlement: *Held*, that the refusal to give the instruction asked was not error; that without explanation such instruction might mislead the jury into the belief that the note raised a conclusive presumption of settlement: *Held, further*, that the instruction given was erroneous; that the note was sufficient evidence of a settlement unless overcome by other evidence.

APPEAL from Linn County.

This is an action to recover four hundred and forty-one dollars and fifty cents for labor performed. It is alleged that the respondent performed labor of the value of seven hundred and twenty dollars and fifty cents, upon which has been paid two hundred and seventy-nine dollars and no more.

The appellant admits the performance of labor by the respondent to the amount of five hundred and fourteen dollars and fifty cents, and no more, and then alleges payment as follows: "But says he (appellant) has paid plaintiff (respondent) in money, board, lodging, washing and other property, and care bestowed when plaintiff was sick, about the sum of eight hundred and fifty dollars."

For a separate answer the appellant alleges a settlement of the matters in question and the execution and subsequent payment of a promissory note for fifty-three dollars, in full satisfaction of the claim in question. The reply deems the payment, accounting and settlement alleged, but admits the execution of the note referred to. The cause was tried by a jury, and the respondent had judgment for three hundred and three dollars, from which this appeal is taken.

The proceedings and alleged errors relied upon in the appeal are stated in the opinion.

* See 33 Am. Rep. 696.

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The proceedings and alleged errors relied upon in the appeal are stated in the opinion.

* See 33 Am. Rep. 696.

Conley & Montanye, Humphrey & Hewitt, Bonham & Ramsey, for appellant.

Powell & Flynn and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

It is admitted in the pleadings that the respondent boarded with appellant during the time he worked for him, so there is no issue between the parties as to where he boarded during that time. The first question asked by the counsel of appellant as to where respondent boarded was therefore immaterial, as it tended to prove a fact which was admitted, and it was not error for the court to sustain the objection of respondent's counsel to their question.

The second question was as to the amount of washing that had been done by the appellant for the respondent. The materiality of the evidence sought by this question depends on whether or not the pleadings present an issue as to the amount of the washing. The respondent alleged in his complaint that appellant was to board and wash for him while he was not at work on the farm, and he was to do chores for such service. This is denied by the appellant. The appellant says in his answer that he paid the respondent an amount aggregating the sum of eight hundred and fifty dollars in money, board, lodging, washing and other property and care bestowed upon him when sick. All these allegations are denied by the replication. The value of each of these items is not set out, but their aggregate value is alleged. Though this pleading might have been subject to objection before issue joined, we think there is an issue on the pleadings as to the value of the washing. This question asks for information as to the amount of the washing. It was necessary to prove the amount in order to prove its value. We think the question was a proper one and inquired for testimony that was material, and that its rejection by the court was error. (41 N. Y. 349; 33 Id. 69; 43 Barb. 444; 12 Id. 520; 30 Cal. 173.)

The same may be said as to the ruling of the circuit court

on the question as to what care and attention had been bestowed on the respondent while sick; and it will not be necessary to farther discuss this part of the case. We will now consider the instruction of the circuit court as to the presumption of a settlement between the parties raised by the execution of the note of fifty-three dollars.

The court, in charging the jury, among other things said: "That the giving of the note referred to in the answer of defendant would be, in this case, slight evidence of a settlement between the parties of the business transactions had between them prior to that date." To which charge the appellant excepted. The counsel for the appellant then asked the court to instruct the jury "that the giving of the promissory note above referred to affords presumptive evidence of a settlement between the parties as claimed in the answer of defendant." Which instruction was refused, and such refusal is assigned as error.

These propositions will be considered together. The giving of a promissory note is *prima facie* evidence of an accounting and settlement between the parties of all demands between them up to the time of the execution of the note. The presumption is only *prima facie,* and is liable to be explained, but until explained it is to be taken as true, and affords sufficient evidence that, at its date, the maker owed the payee the amount named in the note. (2 Starkie Ev., 261; 6 N. Y. 461.) The counsel in this case asked the court to instruct the jury that this note was presumptive evidence of a settlement. Presumptive evidence being of two degrees, one conclusive and the other liable to be rebutted by evidence, without explanation by the court, the jury might not know whether the presumption asked for was conclusive or not, and we think the court might refuse the instruction for it might mislead the jury. The court said to the jury that this note was but slight evidence of a settlement. This statement of the court would convey to the jury the idea that the evidence was of little weight, not of convincing force, and, if not explained, sufficient to establish the fact of a settlement. We think this instruction erroneous. The court should have said to the jury that the

execution of the note was sufficient evidence of a settlement unless rebutted by other evidence in the case.

For the reasons above stated, we think there was error in this case, and that the judgment of the court below should be reversed and a new trial granted.

MARY JANE HUBBARD et al., Appellants, v. THOMAS H. HUBBARD, Respondent.

WILLS, PROOF OF—COUNTY COURTS—EXCLUSIVE JURISDICTION.—County courts are invested with exclusive jurisdiction in the first instance to take the proof of wills, and their judgments and decrees are conclusive until vacated either by proceeding on appeal or impeached by direct proceeding.

IDEM—WILL MUST BE RE-PROBATED WHEN DIRECTLY ATTACKED—ONUS PROBANDI.—Where a will has been probated in common form and the validity of the will is attacked by a direct proceeding, it lies upon the person seeking to maintain the validity of the will to re-probate the same by original proof in the same manner as if no probate thereof had been had except as to such matters as are admitted by the pleadings. In every such proceeding the *onus probandi* is upon the party propounding the will.

TESTAMENTARY CAPACITY.—Testamentary capacity implies that the testator fully understands what he is doing, and how he is doing it; he must know his property and how he wishes to dispose of it among those entitled to his bounty. If he can choose with understanding and reason between one disposition and another, it is sufficient.

CHARACTER OF WILL, NOT SUFFICIENT TO SET IT ASIDE.—While the character of the provisions contained in a will may be considered in connection with any other evidence tending to show undue influence, it can not of itself be considered evidence of such influence.

IDEM—OPPORTUNITY AND MOTIVE IN BENEFICIARY NOT ENOUGH.—To invalidate a will on the ground of undue influence, it is not sufficient to show that a party benefited by it had the motive and opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator to such an extent that the instrument is not his will.

WITNESS—ORDER OF COURT EXCLUDING FROM COURT-ROOM.—It is error to reject the testimony of a witness on the ground that he was present in the court-room, in violation of an order of the court excluding the witnesses during the trial, unless it appears that the party calling him was in complicity with him. The witness, however, may be punished for contempt for violation of such order.

APPEAL from Marion County. The facts are stated in the opinion.

Bonham & Ramsey, for appellants.

R. Mallory and Geo. H. Burnett, for respondent.

By the Court, PRIM, J.:

The proceeding was originally commenced in the county court of Marion county, for the purposes of contesting the validity of the will of Joseph B. Hubbard, deceased. It is based on the ground of want of testamentary capacity in the testator, and also of undue influence exercised over him by his brother, Thomas H. Hubbard.

The following facts are developed by the pleadings and evidence produced at the trial: On March 8, 1877, Joseph B. Hubbard died in Marion county possessed of personal property of about the value of three thousand dollars. Mary Jane Hubbard is his widow, and Bertha Helen his infant daughter, aged eleven months at the time of her father's death, are the only heirs of said decedent.

Respondent, who is the brother of said decedent, filed in the county court of said county, a document bearing date of October 16, 1876, purporting to be the last will and testament of said Joseph B. Hubbard, and asked to have the same probated as such. That on April 5, 1877, said will was admitted to probate by said court *ex parte* and without notice to appellants. The respondent was thereupon appointed executor of the same, and immediately qualified and entered upon the duties of his trust.

By the provisions of said will there were demised to said Mary Jane Hubbard her wearing apparel and one bed and bedding, and unto said Bertha only one fourth of said decedent's estate, to be paid to her on arriving at the age of eighteen years, and the remaining three fourths of said estate unto the said Thomas H. Hubbard. Said Thomas was nominated as the executor thereof, and exonerated from giving any bond as such. He was also nominated as guardian of said Bertha Helen, and exonerated from giving any bond for the faithful performance of that trust.

Under the English practice there were two modes of proving a will of personal property. The "common form" in

which the will was propounded by the executor and proved *ex parte,* and the "solemn form" in which the next of kin of the testator were cited to witness the proceeding, and in which the proof was taken *per testes* or "in form of law," as it was called. When probate in solemn form was had it was binding and conclusive upon all the next of kin duly cited, unless fraud or collusion could be shown. But a probate in common form could be called in by any of the next of kin, and the executor required to show cause why it should not be revoked. Both of these forms have been substantially adopted in most of the states by statute. In this state probate in common form is the only one which appears to have been adopted by any positive enactment of the legislature. (Code secs. 1051, 1052, 1060, 1061.)

It is provided in this state that county courts shall be invested with exclusive jurisdiction in the first instance to take the proof of wills. (Code, sec. 969.) And their judgments and decrees are held to be conclusive in collateral proceedings, and in every other instance until they are vacated by proceedings on appeal, or successfully impeached in some known and recognized legal method. (*Jones v. Dove,* 6 Or. 188.)

It is claimed by counsel for appellants that where a will has been probated "in common form" or by proceedings wholly *ex parte,* as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to reprobate the same *de novo,* by original proof, in the same manner as if no probate thereof had been had. This proposition, we think, is correct, if the allegations are sufficiently broad to question the validity of the will, and the competency of the proof as to its execution. In every such proceeding the *onus probandi* lies upon the party propounding the will; and he must prove every fact, which is not waived or admitted by the pleadings, necessary to authorize its probate in the county court. Whatever may be the form of the issue as to every essential and controverted fact he holds the affirmative. (1 Bradford's Surrogate 94; 1 B. Monroe, 394; 46 Mis. 147.)

By reference to the pleadings it will be seen that it is admitted: 1. That the will in question was executed in form as provided by law, which implies that it was reduced to writing and signed by the testator, in the presence of the attesting witnesses, who also signed it at his request and in his presence and in the presence of each other: 2. That it was admitted to probate upon the *ex parte* application of respondent, by calling the attesting witnesses before the county court and taking their written affidavits as to its execution: 3. That it was admitted to record upon such *ex parte* application.

But it is alleged by appellants that, at the time of making said will, Joseph B. Hubbard was not of sound and disposing mind or memory; and, further, the will was the result of and caused by the fraudulent acts, imposition, and undue influence and constraint exercised upon and over him by respondent.

Each of these allegations being specifically denied by the answer of respondent, constitute, in our opinion, the only material issues of fact in the case. If either of these facts should be fully established by the evidence, it may be well said it is in no respect the will of Joseph B. Hubbard.

Under our statute no one can dispose of his property by "last will" unless he is of sound mind at the time when he executes it. (Misc. Laws, 787.)

A sound mind, or "testamentary capacity implies, that the testator fully understands what he is doing and how he is doing it; he must know his property and how he wishes to dispose of it among those entitled to his bounty. If he understands in detail what he is doing, and chooses with understanding and reason between one disposition and another, it is sufficient." (*Daniel v. Daniel,* 39 Penn. State, 191.)

Testing the capacity of the testator by this standard we think it very clearly appears from the evidence that he was endowed with sufficient mental capacity to execute the will in question. In the opinion of all of his intimate acquaintances he was of sound mind and ordinary intelligence.

It is admitted by counsel for appellants in their brief that

they have not been able to show that decedent was *non compos mentis*, but claim that he was physically and mentally debilitated to such an extent as to render him susceptible to undue influence. They also admit that they have not shown, by direct or positive evidence, that respondent exercised undue influence over his brother in procuring the execution of said will; but that he has testified positively that he did not exercise such influence.

But it is urged on behalf of appellants, with great earnestness, that the document presented here as the last will and testament of Joseph B. Hubbard shows upon its face, by its unjust and unnatural disposition of the testator's property, that it could not have been the production of a rational mind unswerved by improper influences. While we agree with counsel that the provisions of this will when viewed from our standpoint appear to be unjust, it is not for us to judge of their justice, or the reasons which induced the testator to discriminate as he did in favor of his brother against his wife and infant child. While the character of those provisions may be considered in connection with any other evidence tending to show undue influence, it cannot of itself be considered evidence of such influence. (68 N. Y. 148.)

It appears from the evidence that Thomas H. Hubbard, the principal beneficiary under this will, was the brother of decedent, and that they were partners in business and on intimate terms; that about the time the will was executed, or shortly thereafter, decedent and his wife separated, and that he went to his brother's house and remained there until he went east of the mountains for his health. His brother also went east of the mountains with him, to take care of him—he being in very feeble health at that time. This will, however, was executed a few days prior to that time. It also appears that he and his wife did not live agreeably together; that several quarrels had taken place between them, and that the wife had commenced a suit for divorce.

But, "to invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient

to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it and so controlled the actions of the testator, either by importunities which he could not resist or by deception, fraud or other improper means, that the instrument is not really the will of the testator." (68 N. Y. 148.)

"It must be made to appear that it was obtained by means of influence amounting to moral coercion destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist." (*Brick v. Brick*, 66 N. Y. 144; 1 Jarman on Wills, 36, 39; Redfield on Wills, 529, 530.)

The evidence in this case fails to show that it comes within these rules. It is also claimed that the county court committed error in refusing to allow John Hamilton, a witness for appellants, to testify, on the ground that he was present in the court-room, in violation of the order of the court excluding the witnesses from the court-room during the trial. This was error in the court unless appellants were in complicity with the witness. The witness might have been punished for contempt in disobeying the order of the court, but an innocent party should not be deprived of the evidence on that account.

But we think it sufficiently appears that appellants were not injured by the ruling of the court. The evidence was in relation to a collateral matter and not material. The decree of the court below should be affirmed.

EUNICE A. REES, Respondent, v. GEORGE REES, Appellant.

DIVORCE—REAL ESTATE, HOW FAR CAN BE EFFECTED.—In a suit to dissolve a marriage contract, the court cannot decree that the party in whose favor the divorce is granted shall be entitled to more than an undivided one third of the real estate owned by the other.

APPEAL from Umatilla County.

This is an appeal from so much of a decree, granting a divorce between the parties, as awarded to the respondent all of the appellant's land.

Wm. Strong & Sons, for appellant.

Lucien Everts, for respondent.

By the Court, KELLY, C. J.:

The appellant does not wish to have the decree of the court below reversed so far as it dissolves the marriage contract between the parties, but asks this court to modify that decree which awards to the respondent the right to the land therein specified. It is therefore altogether unnecessary for us to examine the evidence in the case, as the disposition of the property the parties is simply a question of law.

If the land described in the decree belonged to the respondent it was unnecessary to say anything about it. If, however, it was the property of the appellant, then the court below had no right to decree that the whole of it should be given to the respondent. Section 495 of the Civil Code provides that "whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one third part in his or her individual right, in fee of the whole of the real estate owned by the other at the time of such decree."

The decree of the circuit court is therefore modified so as to give the respondent the undivided one third part, in her own individual right, to the whole of the land specified in the decree as against the appellant. It is further ordered that the appellant shall not recover any costs or disbursements in this court from the respondent.

Decree modified.

*SMITH BROTHERS, Respondents, v. WHEELER & SIMMONS, Appellants.

TENDER—AGREEMENT TO DELIVER MACHINERY.—Where the vendor of heavy machinery agrees to construct and deliver it on railroad cars to be furnished by the vendee at a specified time, and he is then able, ready and willing, and offers to deliver it, but the vendee fails to furnish the cars, and is not at the place of delivery to receive and pay for it as required by contract, it is not necessary for the vendor to remove it from his shop to the railroad depot in order to constitute a tender.

IDEM—VENDOR MAY RECOVER WITHOUT DELIVERY, WHEN.—In case of a contract for the construction of machinery according to order, where the maker has completed it as required by the contract, and tenders it to the vendee, and he refuses to receive and pay for it, the maker may maintain an action for the contract price without an actual delivery of the machinery.

APPEAL from Washington County. The facts are stated in the opinion.

T. B. Handley, for appellant.

Catlin, Killen & Nicholas, for respondents.

By the Court, KELLY, C. J.:

This was an action brought by respondents against appellants to recover the contract price of certain machinery for a steam saw-mill manufactured by them for the appellants.

Substantially, the complaint alleges that, on the twenty-first day of November, 1877, the parties entered into a contract by which respondents agreed to construct for appellants a steam-boiler engine and a quantity of other machinery specified in the contract. It was to be completed on the twenty-first day of January, 1878, and delivered on that day on the cars of the Oregon Central railroad, when and where appellants were to receive it and pay three thousand three hundred and eighty-five dollars and ninety cents on the delivery thereof. Respondents allege that they completed the machinery and had it ready for delivery before the twenty-first day of January, and requested appellants to furnish cars on which to receive it, which they neglected and refused to do. They also allege that, on the

*See 33 Am. Rep. 698 and Note.

twenty-first day of January, appellants notified them that they could not receive or pay for the machine on that day, and requested respondents not to deliver it at that time, and they then paid four hundred dollars on account. The respondents then aver that they were ready and willing to deliver the machinery, and have ever since been ready and willing to deliver it, according to the terms of their contract, but appellants have refused to receive and pay for the same. They then demand a judgment for the contract price, less the sum of four hundred dollars, paid thereon. Appellants, in their answer, deny that the machinery contracted for was completed and ready for delivery on the twenty-first day of January, or that respondents, at any time, requested them to furnish cars for transporting the same. They deny that, on the twenty-first of January or at any other time, they notified respondents that they could not receive and pay for the machinery, and deny that respondents were ready and willing to deliver it according to contract, and that there is anything due and owing them on account. The appellants, further answering, say that respondents did not notify them one week before the twenty-first of January that the machinery would be ready for delivery on the cars on that day. That, on the twenty-first of January, they went to respondents' shop and, believing their representations to be true that the machinery was completed, they paid four hundred dollars thereon and then requested respondents to defer the delivery of it for one week, in order to give them time to procure teams and cars for the transportation of it. That respondents agreed to this and, on the twenty-eighth of January, cars and teams were secured by them at great expense, and they were ready and willing to receive and pay for it on that day, but that the machinery was not then completed and ready for delivery. The replication denies all the new matter set up in the answer. Judgment was rendered on the verdict of the jury for the amount claimed by respondents.

Several exceptions were taken by appellants to the instructions of the court, but most of them are to sentences detached from the contest, and which cannot be fully understood

without considering them in connection with other portions of the charge. We will therefore consider them together instead of separately, as nearly all the assignments of error relate to but one question, that is, whether the respondents did all they were required to do in order to constitute a tender of the machinery to the appellants, so as to entitle them to recover in this action. On this point the court charged substantially, that if respondents were able, ready and willing to complete the contract by delivering the machinery on board the Oregon Central railroad on the twenty-first day of January, or any subsequent day agreed upon by the parties, if there was an extension of time for the delivery of it, and the appellants were not able, ready and willing to receive it on board the cars and pay for it on the twenty-first day of January or any subsequent day agreed on, then the respondents would be entitled to recover in this action although they did not remove the machinery from the shop, and take it to the railroad.

The facts, as they are admitted by the pleadings or as set forth in the bill of exceptions, are in substance these: The respondents agreed to construct the machinery and deliver it to appellants on board the railroad cars on the twenty-first day of January, 1878, when the appellants were to receive and pay the contract price, three thousand three hundred and eighty-five dollars and ninety cents. On that day appellants went to respondent's shop and were told that the machinery was done and ready for delivery. Being unable to receive it then they paid four hundred dollars on account and requested respondents to defer the delivery for one week, in order to give them time to obtain cars and teams to transport it. The appellants had not, at any time, the money on hand ready to pay or tender the balance of the price. This appears by the bill of exceptions. Nor did they either, on the twenty-first or twenty-eighth of January, have the cars at the place where the machinery was to be delivered at the railroad, nor were they there to receive or pay for it. The appellants claim that the court erred in its charge, and also in refusing to instruct the jury that "respondents were not entitled to demand payment until they de-

livered the machinery at the place designated in the contract." The court did not err, either in its charge or in refusing to give the instruction asked. The law, undoubtedly, is that where delivery of goods by a vendor at a particular place, and payment of the price by the vendee are concurrent acts, an actual delivery or tender of the goods at the place is necessary, in order to entitle the vendor to sue for the price, but there are exceptions to the rule, and this is one of them. The appellants did not have the necessary cars at the railroad depot upon which the machinery could be placed, and it was therefore impossible for respondents to deliver it on the cars or to tender it then. Nor would they have been justified under the circumstances in taking it to the railroad depot, and leaving it by the wayside where it would probably have been injured, or parts of it lost. The respondents undoubtedly knew that appellants had made no preparation whatever to receive it, and it would have been but an idle ceremony to haul the machinery to the depot, look around for the absent vendees to tender it to them, and then take it back to their shops. It is a legal maxim, that the law never requires any one to do a vain or useless act—*Lex neminem cogit ad vana seu inutilia.*

The appellants, however, insist that even if the respondents have a cause of action it can only be for damages for a breach of the contract, and that they are not entitled to recover the stipulated price because they still own the machinery, inasmuch as there has been no actual delivery of it. There is a diversity among the decisions of different courts upon this subject, where the property sold still remains in the possession of the vendor. Mr. Sedgwick, treating of it, says: "If the possession of the goods has not been changed it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them if he see fit, and charge the vendee with the difference because the contract price and that realized at the sale. But if the vendor does not pursue this course, and, without reselling the goods, sues

the vendee for his breach of contract, the question arises which we have already stated whether the vendor can recover the contract price or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full." (Sedgwick on Damages, 337, sixth edition.)

In the supreme court of Maine it is held that the manufacturer of an article for a customer who refuses to take any pay for it can not maintain an action for the contract price; that until delivery of the goods the title does not pass from the vendor. (*Moody v. Brown,* 34 Maine, 107.) In New York the rule is directly the reverse of this. In a recent case, Church, C. J., says: "Upon a valid sale of specific chattels, where nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passed to the vendee, at whose risk it is retained by the vendor. The same consequence as to title results from a valid tender upon an executory contract. Upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property and recover the difference, or he may sue for the difference between the contract and actual price, in which case he elects to retain the property as his own, or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to delier it whenever demanded, upon receiving payment of the price." (*Hayden v. Dements,* 53 N. Y. 426; *Dunton v. McAndrew,* 44 N. Y. 72.)

The ruling in Pennsylvania is the same. In a case where the manufacturer of an article made to order had completed it, and upon notice of its completion the buyer refused to pay for and take it away, it was held that the maker might sue for its value, and the measure of damages was the contract price. (*Ballentine v. Robinson,* 46 Penn. S. 177.) When a vendee refuses to receive and pay for ordinary goods, wares and merchandise which he has contracted to purchase, the measure of damages which the vendor is entitled to recover usually is the difference between the contract and the market price of the goods at the time when the contract

was broken. Yet where the subject of the sale is a specific article of property to be manufactured by the vendor for the vendee, and the former has completed the contract and performed all that he is required to do under it, there seems to be no good reason why he should not be entitled to recover the price agreed upon in the contract. Here it is not strictly in the case of a sale of merchandise. The respondents agreed to make certain machinery according to the directions of the appellants, and to furnish the necessary materials for it. When it was completed and ready for delivery the appellants either neglected or refused to furnish the cars upon which it was to be delivered, as they had agreed to do. Under these circumstances, we think the right of property was clearly in them. They alone were in default, and there is therefore no just reason why the respondents should be compelled to accept the machinery in part payment of their demand, and sue for the balance. Nor is there any reason why they should be subjected to the risk and trouble of a resale for the benefit of appellants. The just rule in such cases is that when the vendor of an article has manufactured it according to order, and offers to deliver it to the vendee in accordance with the agreement, who refuses to accept it, the vendor should be entitled to sue for and recover the contract price.

The judgment of the court below is affirmed.

THE STATE OF OREGON, Respondent, v. MOY LOOKE, Appellant.

UNWRITTEN FOREIGN LAWS, HOW PROVED—HISTORICAL WORKS NOT EVIDENCE.—Courts do not take judicial notice of the laws of a foreign country, but they must be proved as facts. The unwritten law of a foreign country must be shown by the oral testimony of witnesses skilled therein, and the published reports of the decisions of such country, and not by historical works, as provided for in section 748 of the code.

WRITTEN INSTRUMENT—COURT MUST CONSTRUE.—The construction and legal effect of a written agreement, when introduced in evidence, is a question of law for the court, and should not be left to the determination of the jury.

APPEAL from Multnomah County.

The appellant was charged with the crime of kidnapping. The allegations are that, on the fifteenth day of December, 1877, in Multnomah county, Oregon, the defendant unlawfully seized, with intent to imprison, against her will, one Wong Ho, a China woman, the wife of one Ah Back. The defendant was convicted, and takes this appeal from the judgment rendered against him. "Upon the trial, it became a material question whether or not the said Wong Ho, alleged in said indictment to have been kidnapped, was the wife of one Moy Mow, and whether a marriage had been consummated between the said Wong Ho and Moy Mow in the kingdom of China, evidence having been introduced tending to show that said defendant was, at the time of the alleged kidnapping, acting with the knowledge and consent, and on behalf of, Moy Mow, and there also having been evidence introduced tending to show that, prior to the alleged kidnapping, Wong Ho had been forcibly taken and detained from Moy Mow, who claimed to be her husband."

For the purpose of showing that there are no written laws in the Chinese Empire upon the subject of marriage, and to lay the proper foundation for introducing evidence of the customs of that empire upon the subject, the appellant offered in evidence certain specified pages of a book, entitled "History of the Middle Kingdom; a survey of the Geography, Government, Education, Social Life, etc., of the Chinese Empire and its Inhabitants, by J. Wells Williams."

The state objected that the evidence offered was irrelevant, immaterial and incompetent, and the court held that the evidence was incompetent and sustained the objection on that ground.

The appellant further offered certain pages from a book, entitled "A report of the Joint Special Committee to investigate Chinese Emigration," second session of the forty-fourth congress's report, No. 689, printed at the government printing office in Washington, the printing of which was directed by the congress of the United States.

To the introduction of the evidence above referred to the

state objected, and the court sustained the objection on the ground that the evidence was incompetent.

The appellant "offered evidence proving that in China marriage is consummated by an agreement in writing executed by the parents of the girl and delivered by them to the husband." This evidence was not contradicted or disputed.

The appellant then produced an agreement written in the Chinese langauge, and offered evidence to the effect that the agreement was executed by the parents of Wong Ho, and by them delivered to Moy Mow. The testimony was admitted and the agreement translated to the jury as follows:

"Hang Gee, eleven years second day of October, certify to the name is Wun Ho, in China betroth to Moi Sing Mow, the marriage prize was one hundred dollars, the parent were agree that Wun Ho shall be with Moi Sing Mow a hundred years old, both were agree and this was the proof:

"Hang Gèe eleven years sec. Oct.

"Parent, Wong Yang.

"Sign, LONG YOW."

The court instructed the jury "that as to what the laws and customs of China are upon the subject of marriage is a question of fact for the jury," and allowed the jury to find on that subject. This instruction was excepted to by the appellant. The court further instructed that it was the duty of the jury to construe the written agreement offered by the appellant as evidence of a marriage in China, and to this instruction also the appellant excepted.

Hill, Durham & Thompson, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the state.

By the Court, PRIM, J.:

The first ground of error assigned is that of excluding the evidence offered by the appellant. It is claimed that the excluded evidence was offered for the purpose of showing that the laws of the Chinese Empire relating to the subject

of marriage are unwritten laws, and for the further purpose of showing what those laws were. It is urged that this evidence should have been admitted under section 748 of the code, which provides that "historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest." The provisions of this section we do not regard as applicable to this class of facts, and especially when we take into consideration section 717 of the code, which provides that "the oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country."

Thus it will be seen that it is directly provided by this section, that the unwritten law of a foreign country must be shown by "oral testimony of witnesses skilled therein," or "by the published reports of the decisions of the courts" of that country. We think there was no error in excluding the evidence offered by appellant.

It is further claimed that there was error in the instructions of the court to the jury.

They were instructed as follows: "That as to what the laws and customs of China are upon the subject of marriage was a question of fact for the jury," and they were allowed to find upon that subject. The court also instructed the jury "that it was their duty to construe the said agreement in writing, purporting to be a marriage contract, and that it was only admitted as evidence on the ground that it was part of the transaction which was claimed to be a marriage between the said Moy Mow and the said Wong Ho."

The general rule is that courts do not take judicial notice of the laws of a foreign country, but they must be proved as facts. Mr. Story, in discussing the question whether they are to be proved as facts to the jury or to the court in trials at common law, says: "All matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied

to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country, and when the evidence is given of those laws, the courts are to judge of their applicability, when proved, to the case in hand. But when the evidence consists of parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. But when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone." (Story on Conflict of Laws, sec. 638; 99 Mass. 255.) Section 175 of the criminal code provides that "all questions of law, including the admissibility of testimony, the facts preliminary to such admission, and construction of statutes and other writings, * * * * * are to be decided by the court."

The construction and legal effect of the written agreement introduced in evidence by appellant was a question of law for the court, which should not have been left to the determination of the jury. And the last instruction of the court, which undertook to submit the construction and legal effect of that written agreement to the jury, was erroneous. The judgment of the court below should be reversed and a new trial awarded the appellant.

B. F. BURCH, Appellant, v. R. P. EARHART, Secretary of State, Respondent.

LEGISLATIVE APPROPRIATION—GENERAL BILL, WHAT MAY CONTAIN.—A specific appropriation to pay an existing deficiency may properly be embraced in a general appropriation bill within the meaning of section 7, article IX of the constitution.

DEFICIENCIES MAY BE PAID OUT OF GENERAL TAX.—Section 6 of article IX of the constitution does not require the legislative assembly to levy a special tax to pay deficiencies when there is an income from existing taxation, and other sources sufficient to pay such deficiencies, as well as the current expenses of the State.

IDEM—LEGISLATIVE DISCRETION.—It is for the legislative assembly, and it alone, to determine whether the receipts from existing taxation, with other sources of income, are sufficient without an additional tax to pay such deficiencies, as well as the current expenses of the state.

APPEAL from Marion County. The facts are stated in the opinion.

Bonham & Ramsey and Knight & Lord, for appellants.

By the first separate answer it is alleged that the appropriation was exhausted prior to the time this claim was presented, and by the second separate answer that said claim is an expense in excess of the income of the state for the fiscal year ending September 9, 1878, and that no law had been passed levying a tax to pay said deficiency.

The first defense is based on the ground that in the absence of an appropriation the secretary of state has no authority in law to draw his warrant for the payment of any claim or salary, and the second defense on section 5, article 9, page 91 of the constitution, which provides that "whenever the expenses of any fiscal year shall exceed the income, the legislative assembly shall provide for levying a tax for the ensuing fiscal year, sufficient with other sources of income, to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year.

If, however, the legislature has made an appropriation to pay the salary or claim specified in plaintiff's petition, the first defense is untenable in law, and if the expenses of the state for the fiscal year ending September 9, 1878, were not in excess of the income, the second defense is alike untenable. (Van Sanford Pl. 355 and 6.)

Waiving for the present the objection urged on the court below that both of these separate answers plead conclusions of law, we claim, preliminarily, that it is the duty of the secretary of state, as auditor of public accounts, to audit and allow claims — where the claims are proper ones and authorized by law—even where no appropriation has been made for their payment. His authority to allow claims and audit them, does not depend on the condition whether an appropriation has been made to pay them. But when the

secretary comes to draw his warrant for the payment of any claim, then his authority does depend on the condition that an appropriation has been made to pay it.

The question then arises, has the legislature made an appropriation for the payment of the salary specified in appellant's petition? The amount of claims in excess of the appropriation for the fiscal year ending September 9, 1878, on the penitentiary fund, in which appellant's salary is included is the sum of nine thousand five hundred and seventy-four dollars and ten cents. (Secretary of State's Report, 1878, p. 12.)

The legislature, at its last session, appropriated the sum of nine thousand five hundred and seventy-four dollars and ten cents, to pay the claims in excess of past appropriations. (Session Laws, 1878 p. 81 sec. 15.)

The supreme court of this state has decided that "the authority of the secretary of state to audit accounts and draw warrants depends on the condition that an appropriation has been made by the legislative assembly for their payment. (4 Or. 136.)

This disposes of the first separate answer and also the second, because it is not material that the expenses of the state for the past fiscal year exceed the income if the legislature has made an appropriation to pay such deficiency. But it is not a fact that the expenses of the state have exceeded its income for the present fiscal year, as alleged. The expenses simply exceeded the appropriation, as reference to the reports of the secretary of state and state treasurer will show.

Section 5 of article 9 of the constitution provides that "an accurate statement of the receipts and expenditures of the public money shall be published with the laws of each regular session of the legislative assembly."

The reports of the secretary of state and treasurer of the "receipts and expenditures" are as much a matter of judicial cognizance as the "laws of each regular session." The reports of these officers show that there was a balance in the treasury of the income of the state belonging to the past fiscal year; coin, eighteen thousand nine hundred and

twenty-two dollars and ninety-one cents; currency, eight thousand and ninety-two dollars and thirty-three cents, aggregating the sum of twenty-seven thousand dollars in cash.

It is thus apparent that while the expenses of the state for the two past fiscal years were in excess of the sum appropriated by the legislature, the income of the state for the same years exceeded the expense several thousand dollars. The argument thus far has proceeded on the theory that it is not necessary to resort to the revenue derived from the four-mill tax for current expenses (Session Laws, 1876, sec. 1, p. 28), to pay these claims in excess of the appropriation and included in the appropriation bill of 1878. The cash on hand in the treasury and to be derived from other sources of income is more than sufficient by several thousand dollars to pay all the claims included in this deficiency in excess of past appropriation. But it is asserted that the deficiencies included in section 15, page 88, Laws of 1878, are in conflict with section 6, article 9, of the constitution and void, for the reason that no tax was levied to pay such deficiency. Under that section of the constitution it is only necessary to levy a tax to pay a deficiency when the expenses of the state exceed the income.

The reports to which reference has been made conclusively show that the income of the state was greater than the expense for the two past fiscal years, and that these claims, for which provision has been made for payment by the last legislature, were only in excess of the appropriation and not of the income for the two past fiscal years. There was no deficiency in excess of income, but only of past appropriations, and the argument invoked under this section of the constitution can have no relevancy or right.

The amount of assessable property, as reported by the secretary of state, without any allowance for its increase for the two ensuing years derived from the four-mill tax to defray current expenses, will yield a revenue to the state, exclusive of the income derived from other sources, sufficient to meet the full amount appropriated by the last legislature, including the deficiencies in excess of past appropria-

tions, and leave a surplus in the treasury of more than ten thousand dollars. And although it is not necessary to the argument if the tax already levied—four-mill tax—is sufficient, with or without other sources of income, to pay this deficiency in excess of past appropriations, as well as the estimated expenses of the ensuing fiscal years, section 6 of article 9 of the constitution would not be infringed by applying the proceeds of that tax to pay that deficiency. The reasonable and proper construction of that section does not contemplate when the tax already levied is sufficient to pay the deficiency and estimated expenses, that further burdens shall be imposed on the people by levying an additional tax for such deficiency. That is only when the expenses exceed the income and the tax already levied, with other sources of income, are sufficient to pay the deficiency and estimated expenses, etc. But it may be claimed that to apply the four-mill tax to pay this deficiency in excess of past appropriations would violate section 3, article 9, of the constitution in this, that it would divert the tax from the object to which only it could be legally applied. This could hardly be a proper construction of that section, even if the expense exceeded the income, much less when it simply exceeded the appropriation, for the reason, such tax, in applying it to the payment of this deficiency, would not be diverted to objects dissimilar or inconsistent with the purposes for which it was levied or to be applied. But when a tax is levied and set apart for a specific object, as in the case of the soldiers' relief fund, it cannot be diverted to other purposes without coming in conflict with this section 3, except, perhaps, when the object for which the tax was levied has ceased to exist or been attained. In that event the legislature would undoubtedly have the authority to apply the surplus to any legitimate object of public expenditure. The view we have already taken, and the only questions raised by the answer of the defendant, render the further pursuit of this argument unnecessary. That the legislature did appropriate funds to pay this deficiency (Session Laws, 1878), and that the expense of the state did not exceed the income, are certainly beyond question. Besides, there are

funds already in the treasury belonging to the income of the past fiscal year sufficient to pay the full amount of this deficiency in excess of past appropriations, without the necessity of resorting to the revenue derived from the four-mill tax for the ensuing fiscal years. The object of this section of the constitution was to prevent riders from being engrafted on appropriation bills in which some job lie concealed, and to require all bills that appropriate the public money to stand on its merits. It is a rule adopted by the court, and too well settled to require citation, that it is with extreme hesitation that courts pronounce a law unconstitutional, and only then when the infraction is plain and palpable and free from all reasonable doubt. (5 Or. 245; Cooley's Const. Lim. 181.)

J. A. Stratton, for respondent.

In the argument below, stress was laid upon the asserted fact that there were funds derived from the excess of receipts between September 1, 1876, and September 1, 1878, sufficient to pay the claim on which this proceeding is based. If such be the fact, it should have been recited in the writ. The writ is the complaint (Civ. Code, 232, sec. 590), and the complaint "shall contain * * * a plain and concise statement of the facts constituting the cause of action. (Civ. Code, 118, sec. 65.)

It is contended that this is a fact of which the courts will take judicial notice under section 698 of the code. But that section provides, not a rule of pleading, but the manner of proving certain facts. Nor does it comprehend the class of facts to which plaintiff seeks to apply it. The court will not take judicial knowledge of the condition of the state finances. This must be proved like any other fact, except as provided in section 733, subd. 1, Civil Code.

Again, what is there to show that such alleged excess had not been drawn out by prior warrants upon such fund? Conceding that there was an excess on the first day of September, 1878, it does not follow that it remained on hand until the twenty-sixth of October, 1878. The secretary is authorized to draw warrants upon a particular fund only

to the amount of the appropriation therefor. (*Brown v. Fleischner*, 4 Or. 132.)

Defendant's answer shows that the appropriation of 1876 for payments of this class of claims is exhausted. So much of the general appropriation law of 1878 as attempts to provide for the payment of deficiencies, is unconstitutional: 1. Because this subject is not expressed in the title of the act. (Laws 1878, p. 77; Const., Art. IV, sec. 20.) 2. Appropriations for deficiencies cannot be coupled in the same act with appropriations for current expenses. (Const., Art. IX, sec. 7, Code, p. 91.) 3. No special tax has been levied to meet this liability. (Const., Art. IX, sec. 6; Id., sec. 2.) No part of the revenue of the state derived from taxation is applicable to the payment of this claim. (Laws of 1876, p. 98, secs. 1 and 2; Const., Art. IX, sec. 3.)

By the Court, KELLY, C. J.:

By an act, approved October 20, 1876, making appropriations for the expenses of the state government, the sum of forty thousand dollars was appropriated for the general expenses of the penitentiary. It seems to have been insufficient to defray the salaries and other expenses of that institution for the two years commencing on the second Monday of the year 1876, and that there was left a deficiency of nine thousand five hundred and seventy-four dollars and ten cents.

An act entitled "An act to provide for the ordinary expenses of the state government, and general and specific appropriations," was approved October 19, 1878, which appropriated funds for the ordinary expenses of the state government and also the following item: "Penitentiary fund: for deficiencies in excess of past appropriations, nine thousand five hundred and seventy-four dollars and ten cents."

The appellant was the superintendent of the penitentiary and, as such, became entitled to four hundred and fifty dollars, as a salary for the quarter ending August 31, 1878; but, owing to the deficiency before referred to, it was not paid when it became due. On the twenty-first day of Octo-

ber, 1878, he applied to the respondent as secretary of state, and requested that, as auditor of public accounts, he should audit the claim and issue a warrant on the state treasurer for the payment of the four hundred and fifty dollars above referred to. For the reasons heretofore stated, the respondent refused to do so. The appellant then applied to the judge of the circuit court for Marion county for a writ of mandamus commanding respondent to audit his claim and issue a warrant for the amount due, or show cause why he refused to do so.

The respondent answered the writ and gave reasons for refusing to audit and allow the claim, which are substantially as follows: That the appropriation of forty thousand dollars for the general expenses of the penitentiary, made by the act approved October 20, 1876, was exhausted before the time when appellant's claim was presented to him; that warrants had already been drawn upon that fund to the full amount of the forty thousand dollars; that appellant's claim is an expense in excess of the income of the state for the fiscal year ending September 9, 1878, and that no law was passed by the legislative assembly levying a tax to pay such deficiency. The appellant filed a general demurrer to the answer, which was overruled by the circuit court, and failing to further plead, the writ was dismissed. From this decision an appeal was taken. It is now urged by respondent that the writ of mandamus ought not to be made peremptory for the following reasons:

1. Because the appropriation for the deficiency of nine thousand five hundred and seventy-four dollars and ten cents in the penitentiary fund is not expressed in the title of the act approved October 19, 1878, and is therefore in contravention of article 4, section 20, of the constitution, which provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The title of the act referred to is as follows: "An act to provide for the ordinary expenses of the state government and general and specific appropriations."

The appropriation made in this act to pay the deficiency in the penitentiary fund is a specific appropriation for that purpose, and is as clearly expressed in the title as any other in the act. To specify the several appropriations more minutely would be to make the title of the act as long as the act itself, which surely was never contemplated by the framers of the constitution.

2. It is urged that appropriations for deficiencies can not be embraced in the same act with appropriations for the current expenses of the state. In support of this position, respondent refers to article 9, section 7, of the constitution: "Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject." And he claims that current expenses of the state mean expenses to be incurred in the ordinary administration of the state government after the passage of the appropriation bill, and that they do not include deficiency items. We think these words were not intended by the framers of the constitution to be taken in that restricted sense. If it had been so intended, they doubtless would have used the words "current expenses of the state during the biennial term," or some other apt words to express that meaning. Current expenses of the state mean the ordinary running liabilities incurred by the state in the administration of its offices from year to year. The object had in view by the insertion of that section in the constitution was to prevent the introduction of such matters of legislation into appropriation bills as were not germane, and thus make these bills the vehicle of carrying through matters of doubtful expediency, such as could not be passed upon their own merits.

3. The next and last reason urged by respondent why the writ ought not to be made peremptory, is, that no special tax was levied by the last legislative assembly, to pay the deficiencies of the last fiscal year as required by article IX, section 6 of the constitution. That section provides that: "Whenever the expenses of any fiscal year shall exceed the income, the legislative assembly shall provide for levying a tax for the ensuing fiscal year sufficient, with other sources

of income, to pay the deficiency, as well as the estimated expense of the ensuing fiscal year."

Respondent contends that the claim of appellant was an expense in excess of the income of the state for the last fiscal year, and that it can only be paid by the levy of a special tax for that purpose, even though the revenues arising from taxation and other sources of income shall be sufficient to pay that deficiency as well as the estimated expense for the fiscal year ending on the second Monday of September, 1880. We think that is not the proper construction to be placed on that section of the constitution. If it be conceded that the receipts from taxation with other sources of income are sufficient to defray all the expenses of the state administration, and pay, in addition, all the deficiencies of the past fiscal year, why should the burden of an additional tax be imposed upon the people merely to accumulate a fund in the state treasury, to lie there until it shall be appropriated by some future legislature? We think that neither the letter nor the spirit of the constitution requires that such a construction should be placed upon that instrument. On the contrary, we hold that the legislative assembly is required to levy an additional tax to pay deficiencies only when all other sources of income are insufficient to pay them, and the other appropriations for the current fiscal term of two years. And whether these sources of income were sufficient for that purpose or not was a question for the legislative assembly, and for it alone to determine. Owing to the increase of taxable property, and the probable decrease in the expenditures of the state administration, it doubtless concluded that no further taxation was required to meet all demands specified in the act making appropriation for the current fiscal term of two years; as the legislature failed to impose an additional tax to pay deficiencies, the fair presumption is that none was needed, and whenever an appropriation is made to pay any deficiency there is also a presumption that there are or will be funds in the treasury from existing sources of income, sufficient to pay that as well as all other appropriations made by the legislative assembly.

An appropriation having been made to pay the claim of

appellant we hold that it is the duty of respondent to audit that demand and draw his warrant on the treasurer for the amount found to be due.

The judgment is reversed and a peremptory mandamus ordered to be issued.

E. R. MERRIMAN, Appellant, v. JOSEPH S. MORGAN, Respondent.

HABEAS CORPUS — QUESTIONS FOR DECISION, HOW PRESENTED.—In a case of habeas corpus against an officer having the petitioner in custody, the matters properly triable arise on the return of the officer and the traverse thereto.

IDEM—IRREGULARITIES NOT INQUIRED INTO.—In cases of habeas corpus the court will not inquire into any irregularities of the committing magistrate which do not appear in the process on which the prisoner is held, unless it be the question of the jurisdiction of the committing magistrate over the case.

IDEM — MALICIOUS PROSECUTION — MATTERS COMPLAINED OF MUST BE ENDED.—In a case for a malicious prosecution, the plaintiff must allege in his complaint that the prosecution complained of has been terminated in his favor or abandoned by the defendant.

APPEAL from Multnomah County. The facts are stated in the opinion.

Dell & Reed, for appellant:

I. The first proposition is that where an action for a malicious prosecution is brought, it must appear on the face of the complaint that there was a want of probable cause for the prosecution.

II. This must appear by its being shown that the prosecution has been disposed of, is terminated or at an end in favor of the plaintiff in the action for malicious prosecution.

III. At first the tendency was to hold that there must be a final decision on the merits as *res judicata* in favor of defendant in that action—an acquittal technically.

IV. Some courts endeavored to limit that proposition to a decision in the first instance and before appeal. (4 Wend. 291; 63 Pa. St.)

V. But the current of authority now is the other way, and is settled that no final verdict is necessary, but that anything that terminates that particular proceeding is all that is necessary. As on a warrant before a committing magistrate, if defendant be discharged after a hearing (2 Johns, 293; 37 Ind. 550), or for want of appearance of prosecutor (36 N. Y. 11), or for defective affidavit (6 Hill, 349), or if it is process under which he can no longer be arrested (6 Hill N. Y. 347), or when bound over after "no bill" returned by the grand jury (6 Hill, N. Y. 347), or after indictment found and quashed by the court (6 Hill, N. Y. 347; 30 Ind. 437), or in case of a civil action after a voluntary dismissal (19 Wend. 417), or dismissal for defect in the proceedings (16 How. Pr. 562), or after a reversal by supreme court of a judgment, which practically ends the case (64 Pa. St. 295), even though a final order remained to be made, or if the order of arrest had been vacated. (16 How. Pr. 262.)

VI. A final discharge, without bail, on habeas corpus, comes fully within the rule under the Oregon statutes.

The provisions of sections 623 and 624 of Oregon Civil Code settle the principle that a final discharge under a writ of habeas corpus from a magistrate's commitment is an end of that proceeding, and that a subsequent arrest for the same offense is a different cause or proceeding. Admission to bail would not be a "final discharge," but a judgment, as in this case, that the defendant go without a day is a final discharge, he not being in jail and not on bond.

So the "probable cause" is *res judicata* by habeas corpus decision anyhow, because prosecutor was allowed to introduce new evidence, section 614, and failing to do so, presumed none to be had. (6 Hill, N. Y. 347.) The question in this case was whether in a criminal case on mesne process after a voluntary escape, the officer could retake the prisoner on that warrant. If he could not, the warrant had lost its force and the prosecution was at an end. If he could retake him under it, then the warrant remained in full force, and the prosecution not ended. It was held he could retake him under it, and therefore the prosecution not ended within

the reason of the rules. The case in 43 Illinois is based on the idea that there must be a technical verdict of acquittal, which we have shown is not the law.

VII. But it is claimed that under section 411 Oregon Criminal Code this warrant has to be returned to the court, and that the grand jury have to act upon it before it becomes *functus officio*, even though defendant has been discharged from the warrant. But section 54 only requires the district attorney to prepare and submit to the grand jury an indictment where defendant is held to answer. Not only so, but that warrant has lost its force by habeas corpus judgment, annulling its order or commitment, and is no more than waste paper.

VIII. But plaintiff also sets up that the warrant was void, and without the jurisdiction of the justice, and had been so declared by the habeas corpus court. In case the warrant was void, this action lies, even though no termination is shown. (37 Ind. 550; 16 How. Pr. 262; 1 Abb. Forms, note j, 586.)

IX. Plaintiffs also allege that defendants were guilty of an abuse of legal process, and in that case no termination need be shown. (64 Pa. St. 286; 2 Greenl. Ev., sec. 452, citing 4 Bing, n. c. 212; 3 Scott, 561, S. C., 11 Pa. St. 81; 13 N. Y. 478; 47 Pa. St. 194; 5 Duer, N. Y. 304; 3 Iowa, 539; Wright (Ohio), 725; 50 Me. 308; 39 Barb. 56.)

X. Where allegation is that it was abandoned, demurrer does not lie. (36 N. Y. 11; 6 Hill, 347.)

Dolph, Bronaugh, Dolph & Simon, for respondent:

It it well settled law that no action will lie for an alleged malicious prosecution, until such prosecution is ended. (1 Hil. on Torts, 518, chap. 16, sec. 26, p. 451; 2 Greenl. Ev., secs. 452, 453; *Munns v. Dupont*, 1 Am. Leading Cases, 227, p. 277; 4 Cush. 217.)

Having held the defendant to answer before the grand jury upon a criminal charge, it is by law the duty of the committing magistrate to return his proceedings in the matter to the county clerk's office. (Crim. Code, p. 393, sec. 411.) And it is the duty of the district attorney to submit

an indictment to the grand jury, and cause the evidence in support thereof to be brought before them in such case. (Crim. Code, p. 347, sec. 54.) And it is the duty of that body to act upon the case, and either to find or ignore the indictment; and until they return "not a true bill," the proceeding has not ended. (Crim. Code, p. 348, sec. 64.)

The court below was judicially advised by law, and by its records, that no term of that court had intervened, and no grand jury had been in session between the alleged date of the arrest of the plaintiff upon said charge and the date of the filing of his complaint—July 23, 1878—and that, therefore, it was legally impossible that said proceeding could have been ended at the time of the commencement of this action, and this court will take judicial knowledge of the same fact, the terms of courts being established by law. (Civ. Code, p. 250, sec. 698, subd. 2.)

Moreover, as we have seen, the complaint must allege not only that the proceeding has ended, but how it terminated, in order to entitle the plaintiff to maintain his action. The only claim that this prosecution or proceeding was at an end, when this action was begun, is, that the plaintiff had been discharged by the judge of the court below upon habeas corpus. But while the plaintiff might thereby have been released from imprisonment, such discharge did not have the effect to terminate the proceeding against him. He could not be again arrested upon the same charge by a committing magistrate, but it was none the less the duty of the justice, who had held him to answer, to return his proceedings to the circuit court; and the grand jury was equally still bound by law to investigate the charge; and if an indictment should be found, the plaintiff might again be arrested upon the same charge, and as a continuation of the original arrest and proceeding. (Civ. Code, p. 238, sec. 624, subd. 1; 1 Hil. on Torts, 523, 454; *Bacon v. Townsend,* 6 Barb. 426; *Walker v. Martin,* 43 Ill. 508, in point.)

It appears from the allegations of the complaints in this action that the ruling of the judge, who discharged plaintiff upon habeas corpus, was itself erroneous, and therefore

could in no manner affect the proceeding instituted before the justice. (Hil. on Torts, 340, 359.)

It is stated in the complaint that the ground upon which plaintiff was discharged on habeas corpus was, because the information, filed with the magistrate to procure the plaintiff's arrest, did not state facts sufficient to constitute a crime. But it is likewise alleged that an examination of the charge was had before the magistrate, who, upon such hearing, held plaintiff to answer to the grand jury.

We submit that the only office of such information is to authorize the magistrate to issue his warrant for the arrest of the accused. It cannot be read in evidence against him after he is arrested, for he is entitled to confront the witnesses; and the information is *functus officio* whenever the examination commences. To hold, therefore, that no matter what the evidence may be, nor however clearly it may establish the guilt of the prisoner, upon such examination, nevertheless after he has been, upon such hearing, committed to custody, he is entitled to be discharged if such information does not allege all the essential requisites of the specific offense, with the particularity required in an indictment is we insist clearly erroneous.

We suppose that if a prisoner were arrested upon a warrant issued against him based upon an information imperfectly charging him with the crime of burglary, and upon examination it should appear to the magistrate that he was not guilty of the crime charged, but was guilty of larceny, it would be none the less the duty of the officer to hold him to answer before the grand jury upon the latter charge. In such a case, the information might not at all refer to the real offense committed, yet can it be maintained that therefore the prisoner should be discharged on habeas corpus? His honor, the judge, who so discharged plaintiff, ruled that he had no authority to rehear or review the evidence given before the magistrate upon said examination, and in this view we think he was fully sustained by the law; and therefore we submit that this court will conclude that he refused to review said testimony. But, after so deciding, then to hold that the accused should be discharged from

the commitment, without regard to what the evidence may have established against him; because of the technical insufficiency of the information in not correctly including all the facts necessary to be proved in order to his conviction, we thought at the time, and still think, was an equally erroneous and much more dangerous precedent than a rehearing of the evidence would have established.

By the Court, BOISE, J.:

It appears that the appellant was arrested, brought before the committing magistrate, and held to answer the charge at the next term of the circuit court. Before the next term of that court, the appellant in this action was discharged from custody on a writ of habeas corpus, issued by the judge of the circuit court.

In order to maintain this action, it was necessary for the appellant to allege that the proceeding against him of which he complained was finally terminated by his discharge or acquittal of the offense charged against him, on which he had been arrested. The appellant claims that his discharge on the proceedings under the habeas corpus is sufficient to enable him to maintain this action. The questions which come before the court on a writ of habeas corpus arise in a case like this on the sufficiency of the writ or process by which the officer holds the prisoner.

The return to the writ does not show the proceedings before the committing magistrate any further than they are recited in the mittimus, for the officer does not have the record of the magistrate, and the only proper questions before the court are as to its regularity and sufficiency to authorize the officer to hold the prisoner in custody. If sufficient, the prisoner must be remanded; if not sufficient, he must be discharged. For the court hearing the habeas corpus case will not inquire into the regularity of the proceedings before the committing magistrate, further than relates to the jurisdiction of the magistrate. If, in this case, the magistrate had authority by law to commit the appellant for obtaining goods under false pretenses, of which authority the circuit court must have taken judicial

ABNER SMITH, by JOHN B. HINES, Guardian, Appellant, v. JOHN HARRIS, Respondent.

ASSAULT AND BATTERY—ACTION FOR DAMAGES—EVIDENCE OF GENERAL CONDUCT.—In an action for damages for assault and battery upon an infant, the general conduct of the defendant towards the infant is admissible, to show malice or to rebut evidence of malice.

APPEAL from Benton County.

This is an action of trespass for personal injuries. The complaint sets out nine separate causes of action, and claims damages in the aggregate sum of ten thousand dollars. It is alleged that in September, 1865, the appellant, then six years of age, was placed by his father in the care and control of the respondent, under an agreement by which he was to so remain. The assaults are alleged to have been committed in 1865 and 1866, while the respondent stood in the relation of *loco parentis* to the appellant. On the trial the appellant called witnesses to prove the various assaults alleged. He also called a Mrs. Stewart as a witness, who testified that she knew the appellant while he lived with the respondent, during a period of about one and one-half years; that "the child" (meaning the appellant) "could not stay with them" (meaning the respondent and his wife); that he had been whipped when he came to the house of witness "all over his back, and a hack on his head, as if done with a knife, gaped open." She also, over the objection of respondent's counsel, testified as follows: "We washed plaintiff and fixed up for him as good as we could, poor little boy;" that he was "all bruised;" that there were black spots and stripes on his back; that his arm had been broken, but was then nearly well; that it hurt him to lift anything and was "kind of stiff." Four other witnesses testified substantially the same as this witness as to the appearance of the appellant's back and arm. The appellant also offered evidence, which was admitted, tending to show that the general treatment of the appellant by the respondent was harsh and cruel; that the appellant was poorly clad, was overworked and otherwise abused. The purpose of this testimony was to show express malice.

For the purpose of disproving such malice, a witness, John Buchanan, was allowed to testify that he was at the house of the respondent during the winter of 1866, while the appellant was living there, and made his home there; that the appellant was well treated, as well as any child in the neighborhood—as well as though he had been respondent's own child. Several other witnesses also testified to the general good treatment of the appellant by respondent while the former was living with the respondent and during the time the trespasses were alleged to have been committed. This testimony was admitted under objection of appellant's counsel, as the other had been admitted under objection of counsel for respondent.

John Kelsay, for appellant.

John Burnett and R. S. Strahan, for respondent.

By the Court, BOISE, J.:

It is claimed by the appellant that the admission of evidence of general good treatment of appellant by respondent during the time appellant lived with respondent—the same being the time during which the assaults and batteries are alleged to have been committed—is error. In all cases of willful assaults and batteries exemplary damages may be given by the jury, and to increase these damages express malice may be shown by the plaintiff. Express malice may be shown, says Mr. Greenleaf, vol. 3. sec. 145, by evidence of a deliberately formed design to kill another, and the same rule applies to all malicious assaults; and such design may be shown by the circumstances attending the battery—by threats, lying in wait, previous quarrel or grudge. In a case like this it is competent for the appellant to show that the general conduct of the respondent towards this child was such as to show that he had a spite at the child, evincing a cruel disposition towards him and a desire to abuse him, and this was the tendency of the evidence adduced by appellant.

In reply to and to rebut the presumption of express malice, it was competent for the respondent to show that by his acts

he had evinced a kind disposition towards the appellant during the time that these continuing assaults were being committed. Such evidence would be very proper, in enabling the jury to come to a just conclusion in a case like the present one, where the truth of the evidence of the appellant must have been very seriously questioned, as in the case of the breaking of his arm, where he is contradicted by the physician who reduced the fracture, who says the appellant told him that he fell from the woodpile and broke it. (2 Greenl., sec. 144; Hil. on Remedies and Torts, sec. 15, p. 428, a; 14 Cal. 554.)

The respondent, it seems by the testimony, was standing in the position of *loco parentis*, and had the lawful right to control appellant by reason of corporeal punishment. Such punishment, even when necessary, might have been falsely represented, and the motives of the respondent misrepresented. To enlighten the jury on this subject, the general conduct of the respondent towards the appellant was properly shown to the jury by both parties, for such evidence was almost the only means of showing the motives and disposition which actuated the respondent in his conduct towards the appellant during the time of the alleged assaults and batteries. There being no error in the judgment of the court below it will be affirmed.

EUNICE A. REES, Respondent, v. GEORGE REES, Appellant.

SERVICE OF NOTICE—LEAVING NOTICE AT DWELLING.—When a notice of appeal was served by leaving a copy of the notice at the place of residence of the person to be served with a person of suitable age and discretion; but the return did not show that it was so left "between the hours of six in the morning and nine in the evening:" *Held*, that the proof of the service was not sufficient.

IDEM—WHEN MAY BE MADE ON ATTORNEY.—Service of notice can only be made upon the attorney of the party to be served when such attorney resides within the county.

APPEAL from Umatilla County. The facts are stated in the opinion.

Lucien Evarts, for the motion.

Wm. Strong & Sons, for the appeal.

By the Court, KELLY, C. J.:

The indorsement of the service of the notice of appeal is as follows: "I, A. H. Pierson, being duly sworn, depose and say: I am a citizen of the United States and over twenty-one years of age. That I served the annexed notice of appeal in the case of *Eunice A. Rees v. George Rees* on said Eunice A. Rees, by leaving a true copy of the same at her place of residence in Umatilla county, state of Oregon, with her son, Peter Wilson, who is over twenty-one years of age, and was then in charge of her residence on the twenty-ninth day of November, A. D. 1878, she being absent at that time and out of the state of Oregon." This return was subscribed and sworn to.

There is also an alleged service made upon Thomas H. Breuts, attorney for the said Eunice A. Rees, by delivering to him personally a true copy of said notice of appeal at his residence in the territory of Washington, in the city and county of Walla Walla, on the thirtieth day of November, 1878.

Providing for the service of notices, the code, page 215, section 517, subdivision 2, declares that it shall be as follows: "If upon a party, it may be made by leaving the copy at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion." The return of service made by A. H. Pierson does not state that it was made "between the hours of six in the morning and nine in the evening," and does not therefore comply with the requirements of the statute. In regard to the service or attempted service upon T. H. Breuts, the attorney of respondent, it has already been decided by this court that such service is not in accordance with the mode presented in section 521 of the code. Laying down certain rules in regard to the service of notices, the court says: "The service of notice of appeal may be made either upon the party or upon the attorney of

record residing within the county where the trial was had. Outside of the county the service can only be made upon the party." (*Lindley v. Wallis*, 2 Or. 204.) In that case the motion to dismiss was denied, and the counter motion to amend the return of service of notice was allowed.

The court now denies the motion of respondent to dismiss the appeal, and the appellant is allowed to amend the return of service of his notice of appeal.

STATE OF OREGON, Appellant, v. WILLIAM MUNDS, THOMAS J. BEALE and S. B. HENDRICKS, Respondents.

LIEN FOR COSTS IN CRIMINAL CASES—HOW ENFORCED.—The lien which the state has upon the property of persons convicted of felonies, for its costs in the criminal prosecution, may be enforced by execution issued on the judgment of conviction in any case where the convict has not disposed of his property between the date of the commission of the felony and the date of his conviction. Where he has so disposed of it, the lien must be enforced by suit in equity.

IDEM—ENTRY OF JUDGMENT IN LIEN DOCKET.—Upon a conviction for a felony, the judgment for costs, when no time is definitely fixed within which to tax costs and disbursements, must be entered in the judgment lien docket within a reasonable time; and where this is not done, a purchaser in good faith will take the property discharged from the lien. What would be a reasonable time may depend upon the circumstances of the case, but in no case would such entry be within a reasonable time if not made before the next ensuing term of the court.

APPEAL from Douglas county. The facts are stated in the opinion.

S. H. Hazard, District Attorney, for the state.

Wm. R. Willis, and L. F. Lane, for respondents.

By the Court, KELLY, C. J.:

This is a suit in equity, to foreclose a lien in behalf of the state of Oregon against the respondents, arising under section 763, page 455, of the criminal code, which provides that, "in all cases of the commission or attempt to commit a felony, the state has a lien, from the time of such commis-

sion or attempt, upon all the property of the defendant, for the purpose of satisfying any judgment which may be given against him for any fine on account thereof, and for the costs and disbursements in the proceeding against him for the crime."

The facts, as they appear in the pleadings, are substantially as follows: On August 23, 1874, William Munds, one of the respondents committed a felony, of which he was convicted on May 11, 1875, and sentenced to pay a fine of two hundred dollars and the costs and disbursements of the criminal action. The fine was paid about the time or soon after judgment was given. For some reason the costs were not taxed until October 27, 1877. At the time Munds committed the crime, he was the owner of a tract of land, which he sold and conveyed to respondent Beale on October 4, 1875, who also sold and conveyed it to respondent Hendricks, on May 9, 1876. It is now sought by this suit to subject the land in question to sale, in order to satisfy and pay the costs in the criminal proceeding against Munds.

The statute, section 763 of the criminal code, by its own force creates a lien on all the property of a criminal who commits or attempts to commit a crime punished as a felony, which lien continues from the time when the offense was committed until a judgment of conviction is had on the property of the criminal, whether it has been alienated or not. When a judgment is rendered imposing the payment of a fine and costs, that definitely fixes the amount of the liability and renders certain that which before was uncertain. It then becomes the duty of the clerk to enter the amount of the judgment, both of the fine and the costs, on the judgment-lien docket as in civil cases (sec. 211, Criminal Code), so that all persons desiring to purchase the land of the convict may have due notice of any incumbrance upon it.

But inasmuch as an execution issued upon a judgment to collect the fine and costs could only be levied on property which the defendant had at the time of conviction, it becomes necessary, as in the case under consideration, to resort to a suit in equity to enforce the statutory lien against

property which the convict may have sold before his conviction, and the judgment in the criminal action is then resorted to only to ascertain the amount of the liability or incumbrance with which it is sought to charge the property which has been sold.

After a decree the alienated property is to be held according to the rule laid down by this court in the case of *Knott v. Shaw* (5 Or. 482): "When such property has been sold it is chargeable with the incumbrance in the inverse order of its alienation—that is to say, the property last sold is to be first changed. The court, however, holds that where the convicted defendant his not disposed of any of his property between the time he committed the crime and his conviction of it, that it is unnecessary to resort to a suit in equity in order to subject the property to execution, because an execution can be issued as well on the judgment rendered in the criminal case and all the property of the defendant subject to the lien be sold to satisfy the fine imposed and the costs and disbursements incurred by the state on the trial of the defendant. If in this case the judgment had been docketed, as required by law, on the eleventh day of May, 1875, or within a reasonable time thereafter the payment of the fine and costs could have been enforced by execution without any difficulty, and it is altogether owing to the inexcusable neglect to tax the costs and disbursements within the proper time that a resort has been had to this suit in equity. As before stated, the Criminal Code, section 211, requires that a judgment in a criminal action, either for a fine or for costs and disbursements, must be docketed as a judgment in civil cases—that is, immediately after the entry of a judgment in any action the clerk shall docket the same in the judgment docket."

It may be said that in many cases it is inconvenient and almost impossible to tax the costs at the close of a term and before the final adjournment of the circuit court; and indeed the practice of the courts has been to leave a blank in the entry of a judgment and fill it when the costs are afterwards taxed. This practice seems to be allowable in

civil cases (Civil Code, sec. 546, p. 224), and doubtless would be in criminal cases also. But when no time is definitely fixed within which the costs and disbursements must be taxed and entered on the judgment docket, we hold that it must be done within a reasonable time. What would be a reasonable time may depend upon the circumstances of each particular case, but in no case would it be within a reasonable time to prolong the taxation beyond the commencement of the next ensuing term of the court. In the case under consideration the judgment of conviction was rendered on the eleventh day of May, 1875, when Munds was sentenced to pay a fine of two hundred dollars and the costs and disbursements of the criminal action.

The fine was paid without any delay, but the costs were not taxed and entered upon the judgment docket until the twenty-ninth day of October, 1877, nearly two and a half years afterwards. In the mean time the respondent Beale purchased the land on the fourth day of October, 1875, nearly five months after the conviction of his vendor. He had a right, then, to presume that the costs, as well as the fine, had been paid.

An examination of the judgment docket disclosed no lien for any sum whatever, either for a fine or for the costs and disbursements incurred by the state in the prosecution of Munds, and consequently no lien followed or afterwards attached to the land when he became the owner of it. As a matter of course his vendee, Hendricks, the other respondent, holds the land free from any lien of that judgment.

The decree of the circuit court is affirmed.

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*S. A. HEILNER, & CO., Appellants, v. UNION COUNTY, Respondent.

NOTICE OF DEFECT—ACTION FOR DAMAGES AGAINST COUNTY.—To maintain an action against a county for an injury to the goods of a person, resulting from the bad condition of its bridges, it must be alleged and proven that the county or its officers had notice of such condition of the bridges, or a state of facts must be shown from which notice may be implied.

* See 33, Am. Rep. 703.

IDEM — NEGLIGENCE, FACTS CONSTITUTING MUST BE PLEADED.—To aver that the bridge broke down with but one ordinary load of freight thereon, and that it was caused by the carelessness, negligence, and refusal of respondent to repair the same, is insufficient to charge respondent with negligence, but the facts constituting the negligence should be averred.

IDEM — ROAD SUPERVISORS, COUNTY LIABLE FOR NEGLIGENCE OF. — Although the counties are not liable for all the accidents that may occur in consequence of their roads and bridges being out of repair, yet their road supervisors are bound to keep vigilant watch over them, and whenever they know or might have known that they are out of repair, and fail to repair in a reasonable time, their counties become liable for injuries resulting therefrom.

APPEAL from Union County.

The complaint alleges in effect that, about October, 1876, the appellants shipped on freight trains a large amount of merchandise from Umatilla county, Oregon; that while the train which was hauling the merchandise was crossing the Grande Ronde river in Union county, over the county bridge at Oro Dell, with but one ordinary load of freight thereon, said bridge broke down and precipitated appellants' merchandise into the river; that such breaking of the bridge was caused by the carelessness, negligence and refusal of the county to keep the bridge in good repair. The complaint then alleges damages resulting from injury to the goods to the amount of eight hundred and seventy-eight dollars and fifty cents. The court below sustained a demurrer to the complaint, and the county had judgment for costs. From that judgment this appeal was taken.

L. O. Sternes, John J. Balleray and Bonham & Ramsey, for appellants.

Frank M. Ish, for respondent.

By the Court, PRIM, J.:

This is an action in which appellant seeks to recover damages for an injury to his goods, wares and merchandise, resulting from the breaking down of a certain bridge in Union county, whereby said goods were precipitated into the river and materially injured. A demurrer having been

sustained to the complaint, on the ground that it does not contain facts sufficient to constitute a cause of action, the court rendered judgment against appellant for costs, from which judgment this appeal is taken.

It is objected that the complaint is defective and insufficient, for the reason that it is not alleged therein that the county authorities of said county had notice that said bridge was out of repair and in an unsafe and dangerous condition at the time when the accident occurred.

In the case of *Mack v. The City of Salem* (6 Or. 275), it was held that in order to maintain an action of this character against a municipal corporation on account of its streets being defective and out of repair, it must be alleged and proved that the corporation, or its officers, had notice of such defect and want of repair, or at least a state of facts shown from which notice might be inferred.

This rule, we think, applies with equal force to complaints in actions against counties for injuries resulting from their roads and bridges being out of repair. The allegations of the complaint bearing upon this part of the case are as follows: "That while the team hauling said goods was crossing said river on said bridge, with but one ordinary load of freight thereon, said bridge broke down and precipitated said goods into the waters of Grand Ronde river; that the breaking down of said bridge, as herein stated, was caused by the carelessness, negligence and refusal of said defendant to keep said bridge in good repair, and which it was in duty bound to do, as aforesaid."

These allegations, we think, are insufficient to show negligence on the part of respondent or its officers. To charge the respondent with negligence it should not only have been averred that the bridge was defective and out of repair, and in what particular, but that the county authorities knew of it, or a state of facts averred from which they might have known it with reasonable diligence, and, with such means of knowledge within their possession, neglected and failed to repair within a reasonable time.

The breaking down of the bridge in question may have been caused by some latent defect which could not have

been seen with ordinary diligence, or it may have been the result of a sudden freshet in the river occurring only a short time prior to the alleged accident; in either of which events it could not be said that the respondent was chargeable with negligence. Although the counties can not be held liable for every accident that may occur in consequence of roads and bridges being out of repair, yet it is the duty of their road supervisors to keep vigilant watch over them, and when it comes to their knowledge that they are in an unsafe condition, they are bound to use reasonable diligence in repairing them; and if they fail to do so they are chargeable with negligence, and their counties are liable in damages to any one who may be injured either in person or property in consequence thereof. And although a road supervisor may have no actual knowledge that a road or bridge is out of repair, yet if the attending circumstances are such that he might have known it with ordinary diligence, he would be chargeable with notice.

But it was claimed, on the argument, that this complaint does not come within the rule laid down in the case of *Mack v. The City of Salem,* because there no negligence was alleged, while here it is claimed that it was. If a verdict had been taken in this case, the defective pleading might, probably, have been cured thereby; but it stands here upon demurrer with no intendments or presumptions in its favor, and under a familiar rule in pleading must be construed most strongly against the pleader.

To allege that the bridge broke down with but one ordinary load of freight thereon, and that it was caused by the carelessness, negligence, and refusal of said respondent to keep said bridge in repair, is insufficient on demurrer to show negligence; the facts constituting negligence should be averred.

Judgment affirmed.

ANN R. WILSON and MARY E. WAKEMAN, Plaintiffs, v. W. L. McEWAN et al., Defendants.

SEAL — IOWA STATUTES CONCERNING, ADOPTED IN OREGON TERRITORY.—The statute of Iowa Territory respecting seals, approved January 24, 1839, and adopted by the provisional government of Oregon on the twenty-fourth day of June, 1844, was valid, and continued in force until it was repealed by the legislative assembly of Oregon.

IDEM—WHAT CONSTITUTES.—By that statute any device or scrawl affixed to an instrument by way of seal was to have the same effect as if it were actually sealed.

DEEDS AND POWER OF ATTORNEY, HOW PROVED.—Deeds and powers of attorney executed and delivered in 1845 and 1846, and not acknowledged or proved during the time of the provisional government, may be proved under sections 17 and 18, page 517 of the general laws of Oregon so as to entitle the same to be recorded.

ADVERSE POSSESSION—OCCUPANCY OF TOWN LOT.—Where the purchaser of several lots and blocks of land in a town resides on one of the blocks so purchased, this occupancy does not extend his adverse possession to any lot or block unoccupied and unimproved by him as against one having a prior title thereto.

ESTOPPEL — COVENANTS OF GENERAL WARRANTY.—Where a deed contains covenants of general warranty as to title, the grantor and all persons in privity with him will be estopped from afterwards denying such title.

APPEAL from Clatsop County. The facts are stated in the opinion.

Dolph, Bronaugh, Dolph & Guion, for appellants:

The power of attorney by Welch and Shively authorizes the attorney in the name and behalf of James Welch to bargain, sell and dispose of in any manner he may see fit, any lot or lots owned by Welch and Shively jointly; and Welch agrees to ratify the same.

1. Did it authorize the attorney to convey?

2. Did it authorize him to convey the block in question, *i. e.*, was Block 11 owned by Welch and Shively jointly?

3. If said instrument empowered Shively to convey for Welch, did it authorize him to convey with covenants of warranty?

To aid in construing the provisions of this instrument, we state a few general propositions of law applicable to such construction. A power of attorney is subject to strict

interpretation. (*Withington v. Harring*, 5 Bing. 442; *Wood v. Goodrich*, 6 Cush. 117; *Ferreira v. Depew*, 17 How. Pr. 418; *Rossiter v. Rossiter*, 8 Wend. 495; *Treat v. DeCelis*, 41 Cal. 202.) When one is appointed by written instrument the attorney in fact of another, his power to bind his principal must be ascertained alone from the language of the instrument. (*Blum v. Robertson*, 54 Cal. 129; *Mech. Bank v. Bank of Columbia*, 5 Wheat. 326.)

The party dealing with such an agent is bound to know at his peril what the power of the agent is. (*Blum v. Robertson*, 24 Cal. 141; *Beals v. Allen*, 18 Johns. 363; *Hubbard v. Elmer*, 7 Wend. 446; *North River Bank v. Aymer*, 3 Hil. 263; *Stow v. Wise*, 7 Conn. 214.)

The authority to bargain and sell does not authorize the agent to convey where, by express terms or from the tenor of the whole instrument, it may be ascertained that the intent of the parties is that the sale is to be ratified by the principal. (*Hubbard v. Elmer*, 7 Wend. 447; *Valentine v. Piper*, 21 Pick. 92.) If the intent of the instrument in question is not that the principal, his heirs, etc., will execute conveyances for lands sold by the attorney, why the words: "And I do hereby bind myself, my heirs, executors and administrators to ratify the same?"

Upon the second proposition it seems too plain for argument that the power of attorney can have no reference to any lots not at the date of the power owned by Welch and Shively jointly. Thus, in *Johnson v. Sukely* (2 McLean, 565) it was held that a power of attorney "to sell and convey all and singular the lands whereof the principal was seised in the state of Ohio" had no reference to lands which had been sold, and only authorized the attorney to convey such lands as he should sell, and this construction is a necessary one, from the principle that a power of attorney is subject to strict construction. James Welch does not appear to have had any title to this block jointly with Shively or otherwise. According to the finding he jointly occupied and claimed the tract in which the block was situated, but Shively and wife obtained the title.

As to the proposition that an attorney authorized to con-

vey is not authorized to warrant, there is some conflict of authority sustaining the proposition we cite. (*Nixon v. Hyzerott*, 5 Johns. 58; *Gibson v. Hall*, 7 Id. 390.) But if this is not the law in an ordinary case, we respectfully insist it should be the rule applied to this case. It is a principle of law well established that a written instrument is to be construed by the light of all the surrounding circumstances. What was the condition of the subject-matter of this instrument and the circumstances surrounding this transaction? The parties were jointly claiming a tract of government land, and there was no law by which title could be acquired from the government.

Under these circumstances, the authority to covenant that if title should be obtained from the United States by the grantors they would make a further conveyance, the usual and appropriate covenant might possibly be held to be within the scope of attorneys' authority, but the unusual covenants of this deed for conveyance of such a title certainly can not be held to be within the authority of the agent.

If we are correct in the proposition that the power of attorney did not authorize the attorney to execute a deed with covenants of warranty, then the deed, if valid for any purpose, must be treated as a quitclaim deed, and only conveyed the then right of the grantors a possessory right and nothing more. (14 Johns. 193, 194; *Fields v. Squires*, 1 Deady, 379, 380; *Lownsdale v. Portland*, 1 Id. 15, 16; Van Rensselaer, 11 How. U. S. 297, 322; *Lownsdale v. Parrish*, 21 How. 293; 2 Or. 288; 18 Cal. 465; 30 Id. 344; *Bruce v. Luke*, 9 Kan. 201; 13 Wall. 240. The legal estate was therefore neither conveyed by the deed nor passed by the covenants.

Again, this deed was not sufficient to convey the legal title, it being unacknowledged. (1 Or. 202; 6 Wheat. 577; Laws of Oregon, 1843, 1852, p. 139, sec. 6, subd. 44, secs. 318, 43; 3 Wash. on R. P. 288; 13 Ohio, 269, 270; 26 Wis. 614; 1 Ham. 351; 5 Id. 190.) The deed being insufficient to convey any title, a covenant or warranty con-

tained in it would not estop the grantor. (*Patterson's Lessees v. Pease,* 5 Ham. 191, 192.)

If it shall be contended that the attempted proof of these instruments was sufficient to pass the legal title, then we answer that the statute of limitations had run long before the attempted proof, and the action is therefore barred. The covenant for further assurance, if it should be held to be within the authority of the attorney, would not, like the covenant of warranty, work a transfer of the title which came to Welch by estoppel, but only entitles the grantor to enforce a conveyance by suit. (2 Smith's Leading Cases, 735, 736; Rawle on Cov. for Title, 185, 202; *Lamb v. Burbank,* 1 *Sawyer,* 232; *Lamb v. Davenport,* 18 Wall. 313, 314.)

The deed was not under seal, and therefore did not pass the legal title. At common law a seal was a necessary requisite to every deed. If there was any statutory law affecting conveyances of land in force in 1845, it was the Iowa act, entitled "An act to regulate conveyances," approved February 16, 1843, and found on pages from 138 to 146 of the laws of Oregon, from 1843 to 1849; and an act of the legislative assembly of Iowa, passed at its first session, approved January 24, 1839, page 535 of the session laws, which provided "that any instrument to which the person making the same shall affix any device or scrawl by way of seal, shall be adjudged and held to be of the same force and obligation as if it was actually sealed."

If these acts were in force in Oregon, it was by virtue of an act of the legislative committee of Oregon, passed June 27, 1844, found on pages 98, 99 and 100 of the same volume of laws; section 1 of article 3 of which act was as follows:

Section 1. All the statute laws of Iowa territory passed at the first session of the legislative assembly of said territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government unless otherwise modified; and the common law of England and principles of equity not modified by the statutes of Iowa or of this government,

and not incompatible with its principles, shall constitute a part of the law of this land.

We respectfully insist in regard to these acts:

1. The legislative committee of 1844 had no legislative authority to make laws to bind the title to lands in the territory;

2. If such legislative power was vested in the committee, the committee could not, by the sweeping enactment above quoted, enact all the laws of another sovereignty. Whatever effect the courts of this state may have at any time given to these enactments in controversies concerning the possessory rights of settlers, they ought not to be held by such enactments as would bind the title to real property which was not subject at the time to private ownership.

But suppose that the act in question had such binding force, then let us inquire how must a deed have been executed under that act for lands in the territory of Oregon, when the deed was executed out of the territory. Section 40 provides:

"That all deeds and conveyances of lands, tenements or hereditaments situated, lying and being in this territory, which shall hereafter be made and executed in any other territory, state or country, whereby such lands, tenements or hereditaments shall be conveyed, etc., * * * may be acknowledged, proved and certified according to and in conformity with the laws and usages of the territory, state or country in which such deeds or conveyances were acknowledged or proved, or in which they shall be acknowledged or proved."

The court finds the conveyance in question to have been executed at some place outside the territory of Oregon, and there was no proof as to what was the law of that place regulating conveyances. It was incumbent upon the plaintiff, in offering the deed in question, to have shown by proof the laws of the place where the deed was executed. (Civ. Code, secs. 698, 715, 716.)

In this case, also, no device or scroll was affixed to the deed in question by the grantor; the bill of exceptions shows

that the device was a printed one, made by the printer at the time of printing the deed.

Upon the second proposition there is no controversy, but that the possession of Mrs. Shively, from the twenty-seventh day of September, A. D. 1850, until the eighteenth day of February, 1860, was actual and adverse. The theory of the plaintiffs is that, upon the conveyance of said block by Mrs. Shively and her husband to James Welch, on that date, John M. Wilson became invested at once with the legal title and, in law, with the constructive possession, by virtue of the covenants of warranty in the deed of the third of June, 1846; but admitting, for the sake of argument, the sufficiency of the deed in question to produce in law such results, still there can be no such constructive possession where there is adverse actual possession, and we submit that the findings show such adverse possession in James Welch and his heirs and legatees. (Angel on Limitations, p. 425, sec. 18; *Ewing's Lessee v. Burnett,* 11 Pet. 41; *Watkins v. Holman,* 16 Id. 54; *The People v. Van Rensselaer,* 9 N. Y. 291, 329, 343; *Jackson v. Richards,* 6 Cowen, 623; *Jackson v. Woodruff,* 1 Id. 276; *Jackson v. Vermilyea,* 6 Id. 679; *Draper v. Shoat,* 25 Mo. 197; *Fitch v. Gosser,* 54 Id. 270; *Powell v. Davis,* 54 Id. 315; *Miller v. Northrup,* 46 Mo. 397.

Indeed, the learned judge of the court below, in announcing the opinion in the case at bar, seemed to acknowledge the sufficiency of the possession of James Welch to bar the action but for another principle which he announced, to wit: That the possession of Welch was, under the law, the possession of Wilson; that is to say, that Welch as a grantor could not hold adversely to his grantee Wilson, and his honor, as will be seen by reference to the conclusions of law, based his decision upon the question of adverse possession of Welch upon this very proposition. But this proposition is clearly erroneous; and even if it is the law as applicable in an ordinary case, is erroneous as applied to the case at bar.

It must be borne in mind that the deed of June 3, 1846, was made out of the territory of Oregon by the attorney in

fact, and never was ratified by Welch, but, on the contrary, always repudiated by him. A grantor may hold adversely to his grantee. (*Hartman v. Reed*, 50 Cal. 485; *Franklin v. Dorland*, 28 Id. 179, 180; *Traip v. Traip*, 57 Me. 268.)

The foregoing is presented upon the findings alone, but if we look to the bill of exceptions upon this point of adverse possession the matter is placed beyond question under the authorities; we quote: "The defendants, among other things to maintain the issues upon their part, proved that James Welch, the grantor of said Jesse McEwan and ancestor of said James W. Welch *et al.*, had resided continuously upon block 17, as shown upon said exhibit 'G' (the map of Shively's Astoria attached to the bill of exceptions) since prior to A. D. 1850, to the time of his death, and from the date of the deed from J. M. Shively and wife to him, dated February 18, 1860, had claimed all the property conveyed by said deed and exercised the same ownership over said block 11, as shown on exhibit 'G,' as over the other unimproved property conveyed by said deed and owned by him in Astoria."

By comparing the map, exhibit "G," with the deed of February 18, 1860, it will be found that blocks 17 and 11 are connected by other blocks conveyed by said deed, the blocks owned by Welch cornering and touching each other at the corners. It is believed no authority can be found holding that such possession is not actual possession.

Sidney Dell and J. Q. A. Bowlby, for respondents:

Objection to power of attorney. (a) It was properly executed and proved. One witness was sufficient as the law then was (2 Bl. 307, 8; 4 Kent. 458); conveyance good if made according to law of force when made (Code, sec. 36, p. 520), and proved according to law of force when recorded. (Code, p. 520, secs. 17, 36.) It was so proved. (Code, sec. 18, p. 517.) (b) It was material, because the evidence showed Shively and Welch were jointly occupying and claiming the land embraced in the deed. (c) It is no objection that it contained no power to make covenants, for a deed, without covenants, passes after acquired title. (*Taggart v. Risley*, 4

Or. 235, 237.) But it does contain such power in its general and all-embracing terms (1 Or. 117), covenant of warranty usual under such power of attorney. (3 Pet. 372.) (d) It authorizes a joint warranty. (2 Pars. Cont. 533.) "Grant, bargain and sell" are express covenants of title at common law. (Dunlap's Abr. 65.) Joint covenant binds each vendor for the whole if title came to him. (*Field v. Squires*, Deady R. 366; 2 Pars. Cont. 533; 1 Bl. U. S. 309; 13 Wall. 291.)

Objections to Wilson's deed: (a) It was properly executed. The printed seal was sufficient "device" ("any instrument to which the person making the same shall affix any device or scrawl by way of seal," etc.) (Blue Book, p. 435, secs. 1, 2, Iowa Laws of 1839, adopted here 1844. 1. It is not a seal, but a "device, by way of seal." (See Webster's Dictionary, "device" as emblem.) 2. It is not required to be by pen nor ink, but here it is by ink. 3. It need not be affixed by the person signing the deed, but only adopted, as it is here, by the attesting clause, calling it a seal, for almost always the device or scrawl is made by the attorney and adopted by the signer. Holding otherwise would void half the deeds in the country. The printer can also make it by a parity of reasoning, because it is the act of adoption that makes it the act of the signer. 4. But section 2 of Blue Book implies that if "seal" be mentioned in body of instrument it would be good without a statute. Indeed, this device is used in common law forms. (See 2 Bl. Com. App; 2 Bl. Com. 305-6.) (b) It is proved according to statute of force at time of proof and record. (Or. Code, pp. 516-17, secs. 11, 17.) (c) The deed corresponds with the description (in the complaint) of the land sued for, and which defendants admit they are in possession of. It was therefore admissible, subject to defendant's right to show that some of its descriptions did not correspond with the description of the block. It was not essential for plaintiff to introduce the map if the deed corresponded with the complaint and the *locus in quo*, as it did here *prima facie*. So there was no error in admitting the deed. (d) But plaintiffs introduced, without objection,

the original plat also, and it showed a disagreement only as to names of streets. That is a false call which will be rejected, the original plat being incorporated indeed by reference. (2 Black. U. S. 499; 3 Otto, 514; 34 Cal. 334; 27 Id. 57, *Reed v. Spicer*, 24 Id. 435; 44 Id. 182.) (e) This plat, and not the lithographed copy, a copy of a copy, is the one referred to in the deed; for a deed is construed most strongly against the grantor if there is any uncertainty or ambiguity in its terms, (*Dodge v. Walley*, 22 Cal. 224; 41 Id. 595); and all doubts as to the meaning of a deed must be solved in favor of the grantee (36 Cal. 606), and it must be presumed that the lithograph was a true copy of the original. (f) But if the lithograph copy was the one referred to it was introduced after proof of loss by showing its contents, which were found to be same as original except as to names of streets, which latter were false and impossible, and evidence could be introduced to show that fact. "A deed called for a lot designated on a town plat as No. 183, bounded by a street and a river: *Held*, that if the jury were satisfied that the call for a river was a mistake it might be rejected." (*Barclay v. Howell's Lessee*, 6 Peters, 498, X 202.) "Grant of an island by name excludes courses and distances." (*Lodge's Lessee v. Lee*, 6 Cranch, 237; II. 385.) See 8 How. U. S. 289; see also 4 Cranch, 176, "liberality in upholding early titles.") Boundaries shown in court of law as well as of equity. (5 Or. 132; 4 Id. 177, 225; 5 Id. 35; Code, secs. 682-67, 690, 845.) So there was no error in the admission of evidence on the deed, and this position applies to all the objections to White's and Shively's evidence.

Did the after acquired title of Welch inure to benefit of Wilson? This is settled in Oregon, whether the deed be with or without warranty. (*Taggart v. Risley*, 4 Or. 235, 237; *Barr v. Gratz's Heirs*, 4 Wh. 222.)

Possession not adverse for twenty years, because plaintiff's right only commenced in 1860, seventeen years prior to action. Neither does defendant's adverse possession commence till then. (*Carter v. Chapman*, 2 Or. 95.)

The facts found by the court do not constitute adverse pos-

session. It must be a possession open, notorious, uninterrupted and exclusive, and under caiml of title. (4 N. Y. 577.) Here the block was entirely vacant. No possession was had. Taxes were paid by defendants most of the time, while two other persons were also paying taxes, and sometimes intruders were warned off. These acts only go to the question of claim of title, and the notoriety of the claim (11 Pet. 41) as a substitute for the notoriety of actual inclosure, implying notice. (44 Cal. 508.) They do not constitute possession itself. It does not appear when warning off intruders commenced, and it is presumable that it only commenced after February 18, 1860, when his title commenced. Inchoate title and seisin (4 Wheat. 213; 1 Wend. 341), possession of grantor not hostile to grantee. (Tyler on E. and Adv. Poss. 868.)

A residence on Block 17 does not constitute a residence on Block 11, though owner of 17 was owner of alternate blocks up to 11. The deed specifies each block as a separate tract.

By the Court, KELLY, C. J.:

This was an action of ejectment brought by respondents against the appellants, W. G. McEwan and Jessie McEwan, his wife, to recover the possession of block number 11 in Shively's Astoria. The respondent, Ann R. Wilson, claimed to be the owner of a life-estate in said block, and respondent, Mary E. Wakeman, claimed to be the owner in fee of the same property, subject to the said life-estate. McEwan and his wife answered that they were in possession of block 11, claiming lot 7 as the property of Jessie McEwan, and holding as tenants of A. J. Welch for the lots in said block, and as tenant of James Welch's heirs for the remaining lot. The landlords were admitted to defend, and all the defendants denied title in respondents. Nancy Welch, the widow of James Welch, deceased, claimed dower in lot 1. The defendants further set up twenty years adverse possession by themselves and their grantors.

The case having been submitted to the court for trial without a jury the following facts were found by the court.

1. That on and prior to the eighteenth day of April, 1845, James Welch and John M. Shively were jointly occupying and claiming a tract of land in the Territory of Oregon, and in what is now Clatsop County, Oregon.

2. That before said eighteenth day of April, 1845, John M. Shively had laid out the larger portion of said tract on paper, and partly laid out and surveyed on the ground a town, leaving blocks subdivided into lots, along with streets and alleys, and called by him Shively's Astoria.

3. That on the eighteenth of April, 1845, said James Welch executed an instrument of writing, by signing with his own hand and sealing the same with a pen scroll, having only one subscribing witness, and not acknowledged, whereby and wherein he authorized, constituted and appointed John M. Shively his true and lawful attorney, for him and in his name and behalf, to bargain, sell or dispose of, in any way he, said attorney, may see fit, to any person whatever any lot or lots owned by him and said Welch jointly in the town of Astoria, as fully and effectually as said Welch might or could do if personally present; and binding himself, his heirs, executors and administrators, to ratify the same, which said power of attorney was delivered to said Shively by said Welch.

4. That said Shively afterwards having said power of attorney, and the same being unrevoked, and having such force and effect as it had, if any, on its delivery, afterwards, to wit, on the third day of June, 1846, at some place outside of the Territory of Oregon, but where does not appear, executed an instrument of writing, in his own name and in the name of James Welch, and as attorney in fact for said Welch, whereby the said John M. Shively and James Welch, as grantors, according to the terms of said instrument, for the "consideration of five hundred dollars, have granted, bargained, sold, and by these presents do convey," unto General John Wilson, of the town of Fayette, Howard County, State of Missouri, land described thus: The following described tracts or parcels of land, in the town of Astoria, in the said Territory of Oregon, being part of the settlement right of the

his heirs and residuary devisees have likewise exercised acts of ownership over and claimed said block.

12. That in 1856 said block was assessed to John Wilson by the assessor of Clatsop county, and in 1857 was sold for such taxes by the auditor of said county, and bid off by one Munson; but whatever interest said Munson acquired was, about the date of the commencement of this action, released to plaintiffs; but the proceedings upon said sale were irregular, and said Munson had no valid deed from the public officers by whom the alleged sale was made, and acquired no title by said sale and proceedings; and, except in the year 1856, said block does not at all appear to have been assessed to John Wilson, nor does he appear at all to have paid any taxes thereon; and neither said John Wilson nor the plaintiffs have been in actual possession of said block 11 or any part of it, except such seisin or possession as may have been acquired by deed aforesaid of June, 1846.

13. That said block 11, since 1856, has been variously assessed to Munson, to James Welch and to J. M. Shively, and several times doubly assessed, James Welch, during the greater portion of the time, having paid taxes on the same.

14. That on the nineteenth day of May, 1875, James Welch, for a valuable consideration, conveyed by deed in due form and duly executed and acknowledged, and recorded to the defendant Jessie McEwan, wife of W. G. McEwan, lot 7 in said block 11; and James Welch having died on the —— day of ——, 1877, his heirs and widow, the defendants herein, duly conveyed by their deed, dated the eighth day of June, 1877, duly executed, and acknowledged all of said block 11, except lots 1 and 7, to the defendant A. J. Welch.

15. That the deed of Shively and Welch to John Wilson, of date third of June, 1846, was upon proof thereof, duly recorded in the record of deeds of Clatsop county on the twenty-ninth day of December, 1875. The power of attorney aforesaid of James Welch to John M. Shively, of date eighteenth April, 1845, was, upon proof thereof, duly recorded in said records on the fourteenth day of August, 1877. The

deed of John M. Shively and wife to James Welch, of date eighteenth February, 1860, was duly recorded in said records on the fifth day of March, 1860. The deed of James Welch and wife to Jessie McEwan, of date nineteenth May, 1875, was duly recorded in said records on the twenty-second day of June, 1876. The deed of the heirs and widow of James Welch to A. J. Welch was duly recorded August 16, 1877.

16. That said Jessie McEwan had no actual notice herself prior to the execution of her said deed, of the deed to or of any claim by said John Wilson to or upon said block 11 or any part of it, but the purchase was made for her and the deed obtained by her husband, W. G. McEwan, who was therein her agent; and the said W. G. McEwan was put upon inquiry and notified, and had reasonable cause to believe and know, that said Wilson had the deed under which he claims and did claim said block; and said A. J. Welch, before the said deed to him was executed, had beside such notice as may have been imparted by the record of the deed from Shively and Welch aforesaid to said Wilson, recorded as aforesaid December 29, 1875, information concerning the said deed to said Wilson, and notice thereof sufficient to put him upon inquiry, and he had reasonable cause to believe that such deed had been made; and it does not appear from any evidence in the case, except the recital in his deed, that said A. J. Welch paid any consideration for said block.

17. That said John Wilson died February 2, 1877, leaving a will, which has been duly proven and recorded in Clatsop county aforesaid, and the plaintiff, Ann R. Wilson, is his widow, and the plaintiff, Mary E. Wakeman, is his devisee, entitled to all the interest or estate of said John Wilson in said block 11, subject to the dower of the widow.

18. That when the deed to said John Wilson above described was made there was before the parties to said deed and the witnesses a lithographed copy of what was then and there represented by J. M. Shively as the plat of the town of Astoria, as it was laid out and surveyed by him, from which said Wilson selected said block 11, and the original

plat was not there, nor any plat that was in all respects a copy of the said original, and the only plat referred to by the plaintiffs in this case and offered in evidence is a record in Book of Deeds of Clatsop county, which record was made in the year 1854, which purports to be a true copy of the original plan of the town of Astoria, as laid out by John M. Shively, and the lithographed copy referred to in Wilson's deed is lost, and, for that reason, cannot be exhibited. The streets around said block 11, as set forth in said deed, are not found on the original plat made by said Shively, nor in the copy found in the Book of Deeds aforesaid, and in so far as the streets named in the deed go to make up the description of the property, the said description is erroneous and impossible. (But the location and representation of block 11, in all particulars except as to streets, was and is the same on the lithograph as on the plat laid out and surveyed by John M. Shively.)

19. That said James Welch having knowledge of the said deed to John Wilson and possession, as is above in these findings described, during his life-time invariably denied and disclaimed orally the title of said Wilson set up in this action.

And as conclusions of law from the facts so found the court finds:

"1. That James Welch had no estate or interest in the land in controversy until the eighteenth day of February, 1860, when the same was conveyed to him by Susan M. Shively and her husband, and on that day and by virtue of said conveyance from Susan M. Shively he (said James Welch) took and had a fee-simple estate in said land.

"2. That by virtue of the deed of June 3, 1846, by Shively and Welch aforesaid to John Wilson, the title acquired by ames Welch on said eighteenth day of February, 1860, inured to the benefit of and invested in his guarantee, said John Wilson.

"3. That as between said James Welch and his heirs and devisees, the possession of said James Welch found above, of said block 11, was not and is not adverse to John Wilson, and

his representatives are not barred by the statute of limitations.

"4. That the deed of James Welch to Jessie McEwan for lot 7 in said block, and the deed of Welch's heirs and widow to A. J. Welch, are each, as against the plaintiffs, void and without effect.

"5. That by reason of the deed by James Welch of June 3, 1846, to John Wilson, and the inuring of title to said Wilson as aforesaid, said Nancy Welch had and has no estate for life in said lot 1 in said block or in any part of said block as against the plaintiffs.

"6. That the plaintiffs are entitled to the possession of the property described in the complaint, and the plaintiff, Ann R. Wilson, has therein an estate for life (during her own life); and the defendant, Mary Elizabeth Wakeman, has therein an estate in fee in remainder after the expenditure of said estate for life.

"7. That the plaintiffs are not entitled to any damages for detention."

Many exceptions were taken by the appellants to the rulings of the court in the admission of testimony, and to the findings of law by the court, but most of them have not been argued by counsel and are therefore considered as abandoned by the appellants.

At the trial respondent offered in evidence a power of attorney from James Welch to J. M. Shively, dated April 18, 1845, of which the following is a copy:

"Know all men by these presents, that I, James Welch, have, and by these presents do authorize, constitute, and appoint J. M. Shively my true and lawful attorney for me, and in my name and behalf, to bargain, sell, or dispose of, in any way he may see fit, to any person or persons whatsoever, any lot or lots owned by him and me jointly in the town of Astoria; as fully and as effectually as I might or could do were I personally present, and I do hereby bind myself, my heirs, executors and administrators, to ratify the same.

"Signed and sealed this the eighteenth day of April, in

the year of our Lord one thousand eight hundred and forty-five. JAMES WELCH. [L. S.]

"In the presence of N. Smith, Witness."

On the twenty-fourth day of April, 1877, before Hon. R. P. Boise, a judge of the circuit court of the state of Oregon, the signature of Noyes Smith, the subscribing witness to the above power of attorney, was duly proven by two witnesses, who also proved that said witness was dead. And on the fourteenth day of August, 1877, before Hon. E. D. Shattuck, one of the judges of the circuit court of the state of Oregon, the signature of James Welch to the said power of attorney was duly proven by two witnesses, who also proved that said James Welch was dead.

Objection was made by appellants to the admission of this power of attorney for the following reasons:

1. That it was not under seal;

2. It was not properly acknowledged or proved;

3. It did not authorize the attorney to convey block 11. It did not authorize him to convey with covenants of warranty.

The provisional government of Oregon on the twenty-seventh day of June, 1844, adopted the statute laws of Iowa Territory passed at the first session of its legislative assembly (except those of a local character) as the laws of the provisional government; and the validity of these laws was afterwards recognized by congress in the fourteenth section of the act of August 14, 1848, establishing the territorial government of Oregon. One of the Iowa statutes so adopted and in force when this power of attorney was executed is as follows: "That any instrument, to which the person making the same shall affix any device or scrawl, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed." The power of attorney was proved according to the provisions of section 18, page 517 of the general laws of Oregon. We think the instrument was sealed and proved according to law.

J. M. Shively and James Welch in 1845 were jointly occupying and claiming a tract of land which, prior to April 18 of that year, had been partially laid out into lots and

blocks, streets and alleys, and called Shively's Astoria; and the power of attorney authorized Shively to sell any lots so jointly owned by them. Of course it was well known to every one that the United States owned this land, and the power of attorney must be construed as the parties themselves understood it at the time; that is, that Welch authorized Shively to sell or dispose of any possessory interest which they jointly had in the town lots. But it is objected that the power of attorney did not authorize Shively to execute a deed with covenants of warranty. Welch empowered him to bargain and sell, or dispose of in any manner he might see fit, any lot as fully and effectually as he could do if personally present. The power is certainly comprehensive in its terms, and we think fully authorized Shively to make the deed in question with its covenants of warranty. (Rawle on Covenants for Title, 570; *Le Roy v. Beard*, 8 How. 451; *Bronson v. Coffin*, 118 Mass. 156; *Coleman v. Stark*, 1 Or. 115.) The respondents offered in evidence a deed, of which the following is a copy:

"This indenture, made and executed this third day of June, 1846, between John M. Shively and James Welch, by John M. Shively, his attorney in fact, of the town of Astoria, in the territory of Oregon, of the first part, and General John Wilson, of the town of Fayette, Howard county, and State of Missouri, of the second part, witnesseth: That for and in consideration of five hundred dollars in hand, paid by the party of the second part, the receipt whereof is hereby acknowledged, the parties of the first part have this day granted, bargained and sold, and by these presents do convey to the said party of the second part, the following described tracts or parcels of land in the town of Astoria, in the said territory of Oregon, being part of the settlement right of the said John M. Shively on which he has laid out and surveyed the said town of Astoria, viz.: Lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, forming block No. 11, which block is bounded north by Water street, east by Spruce street, south by West First street and west by Pine street, which lots are each fifty feet front and one hundred and forty-two and one-half feet back; bounded on an alley of fifteen feet wide,

which runs through the centre of the said block nearly east and west, which will more fully appear by reference to the plat of said town of Astoria so laid out, as aforesaid, which said plat has been lithographed by E. & J. Hutaway, of St. Louis, Missouri, to which reference is here made; and the said parties of the first part covenant to have the same plat properly recorded as soon as there shall be an office provided by law for that purpose.

"To have and to hold to the said party of the second part, his heirs, executors and assigns, in fee-simple title forever, with all its appurtenances.

"And the said parties of the first part hereby covenant and agree to, and, with the party of the second part, his heirs, executors and assigns, to warrant and forever defend the fee-simple title to above-described premises free from the claims of all persons whatsoever; and the parties of the first part also agree for themselves, their heirs and executors, that they will, at the expense of the party of the second part, his heirs or assigns, make a new and further deed, if the same shall be required, to vest as aforesaid a fee-simple title whenever they or either of them shall demand the same; and the said parties of the first part covenants that the said above-described and conveyed land is free from incumbrances.

"Given under our hands and seals the day and year first above written.

"J. M. SHIVELY. [L. S.]
"JAMES WELCH. [L. S.]
"By his attorney in fact, J. M. SHIVELY.

"Signed, sealed and delivered in the presence of, the words 'themselves their' interlined before signed.

"ELIJAH WHITE,
"C. E. GALPIN,
"GEORGE SMIZER."

The objection that this deed was not sealed is untenable. Under the Iowa statute adopted by the provisional government, already referred to, we think the grantor in a deed

could either make or adopt a scroll or device as his seal. The deed was duly proved in San Francisco by Elijah White, a subscribing witness, on the twenty-eighth day of March, 1876, before J. H. Blood, a commissioner of deeds for this state, in conformity with section 17 of the general laws of Oregon. Another objection made is, that the instrument was no deed because it was not acknowledged or proved in accordance with subdivision 4 of section 6 of the Iowa statute of February 16, 1843. It is sufficient to say that this statute was not in force in Oregon until it was adopted by the legislative assembly of Oregon territory on the twenty-ninth day of September, 1849. (General and Special Laws of Oregon, p. 108.) We think the deed was sufficient to convey, and did convey, to John Wilson all the interest of John M. Shively and James Welch in and to block 11 in Shively's Astoria, with full covenants of warranty as to title. The only remaining question to be considered is that of adverse possession for twenty years by appellants and their grantors. The court found as matters of fact that Shively's Astoria was laid off into lots and blocks, streets and alleys; that James Welch claimed to own block 11 since February 18, 1860, and exercised acts of ownership over it by warning off trespassers and paying taxes, but the block remained open, unimproved and unoccupied until some time in 1875. We think the court did not err in deciding that these acts did not constitute an adverse possession on the part of Welch. It appears, by the bill of exceptions, that his residence was on block 17, several blocks removed from the one in controversy, and separated from it by several intervening streets and by lots and blocks owned by other persons. Blocks 11 and 17 were separate parcels or tracts of land having no connection to each other, and the adverse notorious possession of block 17 by Welch had no relation whatever to or connection with block 11. To constitute an adverse possession, there must be an actual possession of the premises; the exercise of some visible notorious act, such as inclosing, cultivating or otherwise improving the land. No such occupancy of this was had. No such acts as these were performed on block 11 by James

Welch during his life-time, and we hold that there was no adverse possession for twenty years by the appellants or their grantors.

The appellants are moreover estopped by the covenants of warranty in the deed of James Welch and John M. Shively to John Wilson, from asserting any title in themselves. That point was expressly decided by this court in the case of *Taggert v. Risley* (4 Or. 235). The judgment of the court below is affirmed with costs.

JOSEPH E. BENTLEY and SARAH BENTLEY v. REBECCA F. JONES and JOHN C. ELDER.

PLEADINGS—ALLEGATION OF RIGHT OF POSSESSION.—Under subdivision 1 of section 539 of the civil code, a party in an action who obtains judgment is entitled to costs when a claim of right to the possession of real property arises upon the pleadings. In this case the right of possession was a material question. The complaint alleged ownership and possession. These allegations being denied, it was *held*, that a claim to the right of possession was presented by the pleadings, and that the party recovering the judgment was entitled to full costs.

APPEAL from Linn County.

The complaint alleges that the appellants are husband and wife, and that appellant Sarah Bentley is the owner in fee of the real property described in the complaint and alleged to have been impaired by a nuisance erected by said respondents, and that the appellants were in possession of said real property at the time of the alleged erection and maintenance of the nuisance described as aforesaid.

The answer of the respondents denies that Sarah Bentley was at any time the owner in fee of said real property, or that appellants were in possession of the same.

That upon the trial a verdict was rendered by the jury in favor of the appellants, the sum of one dollar, for damages, and the court below thereupon rendered a judgment in favor of said appellants for one dollar for damages and one dollar for costs, and refused to render judgment in favor of said appellants for their costs and disbursements.

The questions presented by this appeal in this action are the following:

1. Did a claim of title or interest in real property or right of possession thereof, arise upon the pleadings in this action?

2. Did the court below err in refusing to render judgment in favor of appellants for their full costs and disbursements in said action?

Bonham & Ramsey, S. A. Johns and T. P. Hackleman, for appellants.

J. K. Weatherford, for respondent.

By the Court, BOISE, J.:

The determination of this case depends upon the construction to be given to section 539 of the code, page 222. The first subdivision of that section provides that costs shall be allowed to the plaintiff upon a judgment in his favor: "In an action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof arises upon the pleadings."

This being an action for a nuisance affecting the use of the real property, the appellants, in order to recover, must prove that they were in the rightful possession of the premises described in the complaint, which were alleged to be affected by the nuisance. The question of ownership of the premises was not a necessary issue but a right of possession was, and as appellants alleged both ownership and possession of the premises, and the respondents denied these allegations, the right to possession was an issue in the case, and brings the case within the last clause of the statute above quoted, where the right to the possession of the premises arises upon the pleadings.

Reference has been made to some New York cases, to show that the appellants are not entitled to costs, but on examination of the statute of that state it is found that the last clause of the section of our statute is not in the New York statute, and the cases cited do not apply.

We think the appellants were entitled to full costs, and the judgment of the circuit court will be reversed so far as the question of costs is concerned, and the court below be directed to allow full costs to them.

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*H. L. STEEPLES, Respondent, v. ELIAS NEWTON, Appellant.

FAILURE TO COMPLY WITH CONTRACT FOR WORK, DOES NOT PRECLUDE RECOVERY FOR REASONABLE VALUE OF SERVICES, WHEN.—Where one performs service for another on a special contract, and for any reason except a voluntary abandonment fails to fully comply with his contract, and such compliance becomes impracticable and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value, deducting therefrom any damages which the party for whom the service was rendered has sustained by reason of such failure.

IMPEACHING WITNESS — EVIDENCE OF PARTICULAR FACTS. — Where a party calls witnesses to impeach a witness of the other party by showing that his general reputation for truth is bad, and the other party on cross-examination calls out particular facts tending to show that such witness is not worthy of belief, such facts can be considered by the jury as affecting the credibility of the witness attempted to be impeached.

APPEAL from Washington County. The facts are stated in the opinion.

T. H. Tongue, for appellant.

T. B. Handley, for respondent.

By the Court, BOISE, J.:

The respondent in this case alleges in his complaint that he performed labor for appellant in ditching, and alleges his labor to be of the value of seventy-three dollars and eighty cents, and claims a balance to be due him of sixty-two dollars and interest, for which he demands judgment.

The appellant answered, and in his answer alleges that whatever labor the plaintiff performed for him was performed under and in pursuance of a written contract between the parties, which contract is set out in the answer. The appellant alleges that the respondent has not completed said con-

* See 33, Am. Rep. 705.

tract; that he has not dug the said ditches mentioned in the contract or any part thereof according to the terms of the contract, and that all said ditches were at the commencement of this action and at the date of the answer uncompleted and unfinished, without appellant's fault. In said answer appellant further alleges that he has been damaged by reason of the plaintiff's failure to comply with said contract, in this—that he was unable to have the ditches completed, and lost the use of his land to his damage in the sum of one hundred dollars.

The respondent, in his reply, denies the damages, and alleges as a reason for not completing the ditches that the appellant changed the stakes locating the same, which he says were fixed at the time the contract was signed, and located the said ditches on ground where it would be more expensive to dig them; that he offered to dig the ditches on the ground where the same were located at the time of the signing of the contract, and where he agreed to construct them, but appellant forbade him. On the issues raised by these pleadings the parties tried the case, and the jury found a general verdict for the plaintiff for thirty-four dollars and thirty-three cents.

From the bill of exceptions it appears that the respondent offered evidence by himself as a witness tending to show that at the time the contract was signed the ditches were marked out with stakes; that he commenced work and dug a part of the ditches, and after working a while he found that the stakes on one of the ditches had been moved to ground where it would be harder to dig; that the appellant acknowledged that he had moved the stakes, but claimed a right to do so under the contract, and told the respondent to dig where he had moved them or not at all, and that respondent, in consequence, abandoned the work.

The appellant offered evidence to show that when they were negotiating about the making of the contract, appellant and respondent went over the ground and drove some stakes indicating the course of the ditches, but it was understood that the appellant was to locate them and had the right to do so. Appellant also offered evidence tending to show that he did

not acknowledge that he moved the stakes and that he did not move the stakes; also, that appellant staked the ditches which respondent dug after the contract was signed and that the respondent requested him to do so, and that the appellant never consented or requested the abandonment of the work by the respondent.

The respondent offered several witnesses to impeach the general character of the appellant (who was a witness in his own behalf) for truth, and on examination said witnesses stated that the defendant had had trouble with his neighbors and frequent disagreements about dealings and contracts. It appears from the bill of exceptions that there was a conflict of testimony on the issues presented to the jury about the time of locating the ditches. The respondent claimed in his case that it was the understanding that they were located when the contract, was signed, which appellant denied. The language of the contract on that subject is as follows: "All ditching above specified to be performed in lines plainly staked and defined by the parties of the second part," meaning the appellant. This language is equivocal, and may refer to lines that are already staked and defined. Parol evidence was properly admitted to show whether or not the parties referred to lines already fixed at the date of the contract, so that the circuit court properly instructed the jury that "if the parties did not substantially understand the provisions of the contract in regard to the staking of the ditch; then, so far there has been no contract, and the plaintiff is entitled to the nominal value of his labor;" that is to say, if the parties did not understand each other as to the lines of the ditches, then their minds never met and assented to the same proposition, and did not contract on that subject, and whether they did understand alike was a question for the jury. The second instruction objected to is as follows: "If the plaintiff abandoned his contract without cause he is entitled to recover the reasonable value of his labor, subject to the offset by the damages sustained by defendant by reason of plaintiff's nonperformance of his contract."

The determination of the propriety of this instruction pre-

sents a vexed question, on which the authorities are not uniform. The circuit court seems to have followed the rule laid down in the text in Parsons on Contracts, vol 2, 523, which is supported by the authority of the case of *Britton v. Turner* (6 N. H. 481), where it was held that where one party, without the fault of the other, fails to perform his contract for labor in such a manner as to enable him to sue upon it, still, if the party for whom the labor is performed has derived a benefit from the part performed, the party so failing may recover the reasonable value of such labor. That was a case of *indebitatus assumpsit* for work and labor. "The defendant offered evidence to prove that the work was done under a contract to work for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent and without good cause." The learned judge instructed the jury that although all the points should be made out, yet the plaintiff was entitled to recover under his *quantum meruit* as much as the labor performed was reasonably worth, and this instruction was held correct. This case seems not to have been followed in other states. It is quoted and discussed in the case of *Olmstead v. Beal* (19 Pick. 529), where the court say that they have no hesitancy in adhering to the rule before established in Massachusetts, which is supported by a long series of adjudications. It was held in the case of *Fenton v. Clark* (11 Vt.), where the plaintiff contracted with the defendant to labor for four months, at ten dollars per month, and not to receive any pay until he had worked the four months, and before the time was out became disabled and unable to perform the work; that his sickness, being the act of God, the contract was discharged, and he could recover the reasonable value of his labor, and the same was held in the case of *Leaver v. Morse* (20 Vt. 620). The same rule is also held in Massachusetts. (*Fuller v. Brown*, 11 Mass. 440, and *Olmstead v. Beal*, 19 Pick. 529, above cited.) The latter rule is as it was announced by this court at this term, in the case of *Tuboa & McPhee v. J. M. Strowbridge*, where the decision of the question was not necessary to a determination of the case and was consequently *obiter*. "That where one per-

forms services for another on a special contract, and for any reason except a voluntary abandonment, fails to fully comply with his contract and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value, after deducting therefrom any damages the party for whom the service was performed has sustained by reason of such failure."

Since deciding that case, we have more fully considered this very important subject, and think the rule here laid down to be just and reasonable, and it is supported by most of the modern authorities. To adopt the rule that in all cases a party shall be held to a literal compliance with his special contract before he can recover any thing for labor, is too harsh and would often be unjust; and, on the other hand, to hold to the rule as stated in the case of *Britton v. Turner* (6 N. H. 481), that a person may voluntarily abandon his special contract and lose nothing thereby, would have a tendency to encourage bad faith and lessen the sacredness of solemn obligations, which it is the duty of the courts to uphold and enforce so far as the same can be done without doing manifest injustice. It would be unjust to require a total performance in cases where the party in default has bestowed his labor for the benefit of his employer and fails fully to comply with the terms of his contract from some accident or misfortune which does not involve willful neglect or abandonment on his part. We think, therefore, that this instruction of the circuit court was incorrect and might have influenced the verdict of the jury to the damage of the appellant.

It is also claimed as error that the court said to the jury that they could consider the evidence in the case tending to show that the defenadnt had had misunderstandings with many of his neighbors in his dealings with them, as affecting his credibility as a witness. This evidence was brought out by the examination of witnesses called by the respondent to impeach the character of the appellant for truth; and although the respondent, who offered these witnesses, could

not have proven these facts to impeach the credibility of the appellant, if the appellant called out circumstances having that tendency, such evidence was properly before the jury and could be considered by them, and the instruction was not erroneous.

We think there was error in the second instruction, and the judgment of the circuit court will be reversed and a new trial ordered.

S. HANNAH and FRED. NODINE, Appellants, v. J. Q. SHIRLEY, Respondent.

PAROL PROOF—WRITTEN CONTRACT.—Where it is apparent upon the face of a written contract that something was contemplated and agreed upon by the parties, which they have not distinctly defined, or expressed with sufficient clearness, parol proof connecting the instrument with its subject matter is admissible to show what the parties intended.

APPEAL from Union County. The facts are stated in the opinion.

Knight & Lord and Sterns & Balleray, for appellants:

Parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulation of a deed or other written contract. (15 Mass. 85.) Such evidence is admissible to show an agreement subsequent to a written agreement and engrafting on it new provisions. (13 Pick. 446; 9 Id. 298.)

It is competent to prove by parol a distinct subsequent agreement waiving, abandoning or modifying the terms of the writing, or to prove an additional suppletory agreement by which something is supplied that is not in the written contract. (37 Md. 410; 44 Md. 396; 1 Greenl. Ev., sec. 304.)

In the contract between appellants and respondents, Shirley "is to pay the interest on the twenty dollars spoken of in the plaintiff's contract, etc., and the plaintiffs Nodine and Hannah "are to give satisfactory security to the First National Bank at Portland for the twenty dollars spoken of in the said Iliff contract." It is plain that something was

here intended by the parties, which they have not expressed with sufficient clearness, and in such case, "parol evidence is admissible, or any extrinsic circumstances tending to show what person or persons, or what things were intended by the party, or to ascertain his meaning in any other respect." (1 Greenl. Ev., sec. 288, and notes.)

Its effect would not be to vary or contradict the contract, or add any new terms or conditions, but would simply explain more fully and definitely an intent apparent on the face of the contract, viz., to identify the subject-matter upon which Shirley "is to pay the interest," and Nodine and Hannah "to give satisfactory security at the First National Bank at Portland." "Where it is apparent on the face of the instrument that something is contemplated and agreed upon by the parties which they have not distinctly defined, or expressed with sufficient clearness, parol proof connecting the instrument with its subject-matter is always allowable to show what the parties intended and meant." (2 Hilton, 197.)

The same rule prevails in Maryland, where it is thus ably and clearly stated by the court: "It is equally a certain and indisputable rule that such evidence (parol) is admissible to ascertain and make certain the parties and subject-matter of an agreement; to apply the contract to its subject; to prove any collateral, independent fact about which the written agreement is silent; to remove what are termed (and often inaccurately) latent ambiguities, and as this court said in 5 G. & J., 157, etc., though an ambiguity apparent on the face of a written instrument can not be explained by extrinsic evidence, yet when a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held that proof of independent facts collateral to the instrument, may be properly admitted." In Massachusetts, the rule is much more liberal, and carried to an extent beyond what is claimed in the present case. In that state, parol evidence is admitted to prove a subsequent oral agreement enlarging the time of performance of a simple contract, or varying its terms, or to show a waiver or discharge, although the original con-

tract was required by the statute of frauds to be in writing. (9 Cush. 31; 3 Met. 486; 37 Ark. 510; 36 Md. 154.)

The decisions in Maine have a bearing in the same direction. (25 Me. 450; 15 Id. 61.) In Pennsylvania the rule is still more liberally construed. (67 Penn. 462; 35 Id. 215; 31 Id. 252, 270.) In New Hampshire it has been held that parties to a written contract, after it has been made, may fix by a further agreement a place for carrying it into effect and appoint an agent to receive the money payable on such contract, and such agreement may be shown by parol evidence and is binding upon them. (19 N. H. 569.) And that evidence tending to prove a change in the terms of a contract was agreed to by the parties after the same was reduced to writing and not before, is competent. (7 Foster, 360.)

In a memorandum of sale in which many articles were enumerated, and which concluded with the words "meaning all the farming tools, etc., now owned by him on said farm," it was held that parol evidence was admissible for the purpose of ascertaining to what specific property these words applied. The court said "a doubt or ambiguity exists then as to the meaning or application of these words, or rather an uncertainty as to the articles intended to be conveyed. Whenever this is the case parol evidence of extrinsic circumstances and facts is admissible, for the purpose of ascertaining to what specific property the words used apply or were intended to apply. As expressed in one of the cases in which this subject is discussed the evidence is admissible as explaining the object on which the parties intended the contract should operate and be rendered effectual." (40 Vt. 144.)

Applying the principle thus stated, the inquiry naturally suggests itself what was meant and intended by the words "Shirley is to pay the interest on the twenty thousand dollars spoken of in said Iliff contract, etc.," and the said Nodine and Hannah "are to give satisfactory security at the First National Bank at Portland for the twenty thousand dollars spoken of in the said Iliff contract."

It is apparent on the face of the agreement that some-

thing was contemplated and agreed upon by the parties which they had not defined with sufficient clearness and precision, and that a doubt or ambiguity exists as to the meaning and application of these words and as to what they were intended to apply. In such case parol evidence of extrinsic facts and circumstances is admissible for the purpose of ascertaining the intention of the parties and the meaning and application of the words employed, or "to explain the object on which the parties intended the contract should operate and be effectual." It would not add anything to the contract or alter or vary its terms, but would simply aid in interpreting it and define more fully and explicitly the intention of the parties to the contract. It would do no more than make certain what might be considered vague on the face of the instrument and make the contract conform to the intention and objects for which it was made. It is competent to prove an additional suppletory agreement by parol, by which something is supplied that is not in the written contract. (1 Greenl. Ev., sec. 304.)

If the fact be that after the making of this contract the parties discovered that some of its provisions were vague and indefinite, or that something was omitted, it was their clear legal right to make an additional suppletory agreement to supply that omission and render their contract operative and effectual. By the Maryland court of appeals the rule is broadly stated that "it is competent to prove by parol a distinct subsequent agreement waiving, abandoning or modifying the terms of the writing, or to prove an additional suppletory agreement by which something is supplied that is not in the written contract." (37 Md. 410; 44 Id. 396.)

Under the rule thus announced the testimony excluded ought to have been admitted. It was only proposed to show that Shirley, subsequently to the making of the written contract, had agreed to place twenty thousand dollars in the First National Bank at Portland to the credit of appellants on the twentieth day of March, 1876, for which the appellants were to give satisfactory security, etc.

This was simply engrafting a suppletory agreement on the

contract to supply an omission, or, as the court states, is something that is not in the written agreement. In effect it only defines more clearly the intention of the parties and the purport and purpose of the words employed in the written contract. It violates no rule of evidence nor imports any new terms or conditions by which any alteration is made in the contract. It could have been proven as well without such suppletory agreement as with it. It was resorted to, no doubt, to make more certain what was thought to be vague and indefinite, or to supply what the parties omitted to include in their written agreement, so that its provisions should be free from doubt.

It is submitted that without the aid of such suppletory agreement, or parol evidence of extrinsic facts to explain or interpret what was meant and intended by the words used in certain provisions already referred to, that the contract is inoperative, and these provisions meaningless and absurd. This doctrine is not of late origin, or any infringement of the rule as to the admissibility of parol evidence. The courts of Massachusetts have long held, that parol evidence is admissible to show an agreement subsequent to a written agreement and engrafting on it new provisions. This is carrying the rule to an extent that is not necessary to the present purpose, nor claimed in the case at bar.

The testimony of Hannah which was excluded by the court below, was intended to show the purpose or object for which "satisfactory security" was to be given at the First National Bank at Portland. The agreement subsequently made has no further or greater effect. It would not have varied or contradicted the contract, but merely supplied an omission, without which in case of a misunderstanding of the parties, it would have been ambiguous, or difficult of explanation without the aid of extraneous facts to render more definite the meaning for which that security was to be given. In the note to 1 Johns. Cas. 22, numerous authorities are cited, illustrative of the principle and qualifications of the rule of the admissibility of parol testimony in respect to written agreements.

Dolph, Bronaugh, Dolph & Simon, for respondent:

If the contract testified to by Hannah was oral and provided that respondent should deposit the twenty thousand dollars on the twentieth of March, 1878, then it was a contract not to be performed within a year, and was void under our statute, and the court did right in refusing to allow evidence of such an agreement to go to the jury. (Civ. Code, sec. 775, p. 264.)

If the alleged oral contract was entered into on March 6th, 1876, and by its terms defendant was to deposit twenty thousand dollars in the bank on March 20, 1876, then we submit that if this testimony was offered to subjoin this as one of the terms, and as a part of the written contract of that date, the evidence was inadmissible as tending to vary the writing, and also for the reason that an agreement can not be partly in writing and partly in parol. (*Lane v. Sharp,* 3 Scam. 567; *Scott v. Bennett,* 3 Gilm. 243; *Winneshiek Ins. Co. v. Holzgrafe,* 53 Ill. 516; *Wolf v. Myers,* 3 Sandf. 7; *Erwin v. Saunders,* 1 Cow. 249; *Thompson v. Ketcham,* 8 John. 189; *Patterson v. Hall,* 9 Cow. 747; *Woodall v. Greater,* 51 Ind. 539; 29 Ark. 544; *Johnson v. Openheim,* 55 N. Y. 292, 293; Civ. Code, 248, sec. 682; 1 Greenl. Ev., sec. 275.)

But if the design was to prove a subsequent and distinct contract orally agreed upon between the parties, then no consideration was alleged or offered to be proved for such contract; beside that, the subsequent contract would have to be shown to be complete within itself, without reference to the written agreement, or else the rule last above invoked would be infringed. It is evident, however, from what appears, that the design was to add to this written contract a provision not contained in it, and not to prove a subsequent and substituted agreement complete within itself. Such claimed subsequent parol contract must be complete within itself and upon a distinct consideration. (1 Greenl. Ev., sec. 303; *Merkle v. Wehrhum,* 32 Ill. 534; *Pratt v. Marrow,* 45 Mo. 404; *Brigham v. Rogers,* 17 Mass. 573; *Bunce v. Beck,* 43 Mo. 266, 281; *Field v. Mann,* 42 Vt. 61; *Hume v. Taylor,* 63 Ill. 45, 46.)

There is no further consideration than that expressed in the principal contract to sustain a suppletory agreement, and this for the reason that the two parts constitute but one entire contract, while a supplemental agreement, though it may have reference to the subject-matter of the original contract, is yet a separate and distinct agreement, and therefore requires an independent consideration for its support. "Suppletory" is defined by Webster as meaning "supplying deficiencies," and involves the idea of filling up an evident vacuity in a something precedent, while "supplemental" means "additional," and implies the subjoining of something further than is contemplated in the primary writing. A suppletory agreement is accordingly spoken of in the authorities as one by the stipulations whereof omissions apparent upon the face of a written contract, incomplete within itself, are supplied. In order, therefore, to allow parol proof of such verbal agreement as being suppletory, the writing must be to a greater or less degree a skeleton, for, as said by Lord Ellenborough in one of the earliest cases on this subject, "the writing is conclusive as far as it goes." And the writing in that case was an excellent illustration of such a contract—"six weeks at two guineas—Wm. Walton, junr." (2 Par. on Con. 553, note *h*.) Here Lord Ellenborough treated the contract as incomplete on its face, and therefore allowed proof that the defendant, at the time of the hiring, agreed to be responsible for all accidents, but said, "I shall not allow any evidence to be given by the plaintiff in contradiction of the terms of the writing, which is conclusive as far as it goes." (3 Cowen & Hill's notes to Phil. on Ev. 1472.)

Another fair illustration of the principle is found in the case of *Knapp v. Harden* (6 Car. & Payne, 745), which was this: "A. sent to B.'s agent a list of prices at which he would do work. B. wrote a letter to his agent, stating that he would agree to the prices if A. would consent to be paid at stated periods, the first payment to be 'in November.' The agent showed this letter to A. and said to him that he might consider the one hundred pounds to be payable on the 'first of November.' A. afterwards did the work for B.

It was left to the jury to say whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself."

Here the expression "in November" was indefinite and the writing incomplete in that respect, and evidence by parol that by verbal agreement the time in the month when the payment should be made was subsequently fixed did not tend to vary, alter or contradict the writing. So in *Goodrich v. McClary* (3 Neb. 128), the contract in writing was as follows: "Agreement made this eighth day of April, 1872, between Orson Goodrich and J. S. McClary. That Orson Goodrich delivers his cutting of wool to J. S. McClary by June 5, 1872, at Norfolk, Nebraska, at thirty-eight and a half cents per pound, the understanding that on delivery of wool at Norfolk to advance one hundred dollars and the balance as soon as gets return from said wool."

This the court denominated "a very brief and crude memorandum of the contract," and held parol evidence admissible to show "the number and kind of sheep which Goodrich owned at the date of this contract," saying: "It does not change the contract but supplies an omission, without which, in case of disagreement of the parties, it would be ambiguous and wholly inexplicable." These instances, we think, sufficiently illustrate the rule as to the admissibility of parol testimony to supply terms agreed upon subsequently and verbally to fill up the gaps or omissions apparent upon the face of a written contract. (See also *Deshon v. Merch. Ins. Co.*, 11 Met. 199; *Rollins v. Claybrook*, 22 Mo. 405; *Mott v. Richtmyer*, 57 N. Y. 58, 59.)

According to our understanding of the written contract of March 6, 1876, between these parties in the case at bar, that agreement is complete within itself, and the testimony offered by Hannah was not to supply an omission apparent in the writing, but was an attempt to "import into it" a stipulation directly at variance with its terms and intended to materially change and affect the rights of the parties under it. As the writing reads, Nodine and Hannah under-

took "to give satisfactory security to the First National Bank of Portland, Oregon, for the twenty thousand dollars spoken of in said Iliff contract." In the contract between Iliff and Shirley of February 11, 1876, Iliff agreed to deposit in the First National Bank of Boise City, Idaho, on or before March 20, 1876, the sum of twenty thousand dollars to Shirley's credit, "to be paid him on the delivery of said cattle mentioned in these articles of agreement," and again it is said in this writing that Iliff agrees to pay to Shirley "the several sums of money each per head, according to the value herein above mentioned upon the delivery of the said cattle, as herein above stated." Plainly, therefore, Shirley could draw out nothing of the twenty thousand dollars except as he delivered cattle on Iliff's ranch in Colorado equal in value to the amount drawn for.

We therefore understand from the contract of March 6, 1876, that Nodine and Hannah undertook to guaranty to Shirley the performance by Iliff of his contract as to the deposit of the twenty thousand dollars in the Idaho bank, by giving satisfactory security to the Portland Bank "for the twenty thousand dollars spoken of in said Iliff contract," and that this guaranty and the services they were to render in purchasing cattle was the consideration upon which Shirley agreed to assign to them, Nodine and Hannah, a half interest in the Iliff contract and to furnish the two four-mule teams and wagons and the twenty saddle horses, property presumptively worth five or six thousand dollars, beside which Shirley agrees to pay the interest on the twenty thousand dollars individually. But if Hannah's testimony is to be received, then so far from Nodine and Hannah guaranteeing to Shirley the deposit of the twenty thousand dollars mentioned in the Iliff contract Shirley agreed to deposit that amount in the Portland Bank on March 20, the same day on which Iliff was to make the deposit in the Idaho bank, and thereby Shirley was to guaranty to Nodine & Hannah the deposit by Iliff, which precisely reverses and contradicts the writing as to the matter of said guaranty, and moreover imposes on Shirley what would seem to be a hard and very unequal bargain.

And now we ask is it safe for this court to trench upon the well-established rule of law as to the admissibility of parol testimony to vary and contradict a writing, by allowing such proof as was offered by Hannah, under the claim of establishing suppletory terms of the written agreement? Moreover, is it at all probable that when the precise provision of the Iliff contract requiring the deposit in bank of the twenty thousand dollars was in the mind of the parties to the Nodine, Hannah and Shirley agreement, while it was being drafted and signed, that if so important an item as claimed in Hannah's testimony was intended as a part of this latter contract it would have been omitted? or if so, and the omission being discovered immediately after and on the same day, that the writing would have been left intact and unaltered? But if the matter sworn to by Hannah was not intended as part of the original contract, then it is not suppletory of that contract, but was an independent and supplemental agreement and required a new and additional consideration for its support.

We think that the provision in the Iliff contract that Shirley should pay Iliff at the rate of one per cent. per month for money on said contract over and above twenty-five per cent. of the contract price for the cattle, was intended to mean that while the twenty thousand dollars remained on deposit in the bank of Idaho to Shirley's credit each party should lose or pay the interest about equally between them. The whole of the cattle would cost forty-four thousand three hundred and twenty-five dollars, and Shirley was to have eleven thousand and eighty-one dollars, free of interest, and Iliff was to lose the interest on eight thousand nine hundred and nineteen dollars of the twenty thousand dollars. For as the money was only to be paid to Shirley "on delivery of the cattle," we can not see how interest on any portion of the entire purchase-price except the twenty thousand dollars to be deposited in the bank of Idaho could have been contemplated by the parties when framing said interest clause in the Iliff contract.

Be that as it may, the agreement between Iliff and Shirley is not now before this court for construction further than it

may affect the question as to whether there is in the Nodine, Hannah and Shirley contract, an evident omission, which might be supplied by parol proof of a stipulation similar to that set up in Hannah's evidence, and this we submit does not appear.

By the Court, KELLY, C. J.:

On the eleventh day of February, 1876, J. Q. Shirley and J. W. Iliff entered into a written contract, which is as follows:

"These articles of agreement, made and entered this eleventh day of February, A. D. 1876, by and between J. Q. Shirley, of Kelton, Utah, of the first part, and John W. Iliff, of Denver, Colorado, of the second part, witnesseth: The party of the first part, for and in consideration of the sum of one dollar, to him in hand paid, and the promises and agreements hereinafter mentioned to be performed by him, do hereby promise to deliver to the party of the second part or his agent, at his ranch on Cow Creek, Wild county, Colorado, the following number of cattle, known as Oregon-American steers, to wit: Four hundred and twenty-five four-year-old steers, of the value of twenty-five dollars per head; seven hundred and twenty-five three-year-old steers, of the value of twenty dollars per head; seven hundred and twenty-five two-year-old steers, of the value of seventeen dollars per head; and six hundred and twenty-five one-year-old steers, of the value of eleven dollars per head, the above number being two thousand five hundred head in all. In consideration whereof the party of the second part promises to pay to the party of the first part the several sums of money each per head, according to the value herein above mentioned, upon the delivery of the said cattle, as herein above stated. The above number of cattle are to be delivered on or before the tenth day of September A. D. 1876, to the said Iliff or his agent, at the time and place above stated. The party of the second part hereby agrees to place on deposit, on or before the twentieth day of March, A. D. 1876, in the First National Bank of Boise City, Idaho, or some other bank in good

commercial standing that may be designated by the said Shirley, to the credit of J. Q. Shirley, party of the first part, the sum of twenty thousand dollars, to be paid to him on the delivery of said cattle mentioned in these articles of agreement; this sum to be deducted from the gross sum to be paid on the delivery of said cattle. It is further understood that the said Iliff may reject any poor, lame or injured cattle offered in delivery under this contract; and it is also understood that the party of the second part will receive and pay, in like manner, for any additional number of cattle, not exceeding five hundred head, that may be offered by the party of the first part, provided, the said Shirley notifies the said Iliff on or before May 1, 1876; and the said party of the first part agrees to pay the said party of the second part the rate of one per cent. per month for money on this contract over and above twenty-five per centum of the contract price for said cattle. In consideration above the parties have set their hands this fourteenth day of February, A. D. 1876.

"J. Q. SHIRLEY,
"J. W. ILIFF."

On the sixth of March, 1876, Shirley, who is the respondent, made the following assignment of one half of his interest in the contract to the appellants: "I do hereby, on the sixth day of March, 1876, sign over to F. Nodine and S. Hannah, both of Union, Oregon, one half my interest in the within contract."

On the same day Shirley entered into the following contract with Nodine and Hannah: "An agreement entered into this, the sixth day of March, 1876, between J. Q. Shirley, of Kelton, Utah, and S. Hannah and F. Nodine, both of Union, Oregon: J. Q. Shirley hereby agrees to sign over to Hannah and Nodine one half of his interest of his contract with J. W. Iliff for the following consideration: Hannah and Nodine to buy three thousand steers, according to the agreement in the Iliff contract, and one thousand head of those kind of cattle that can be bought at the best advantage, J. Q. Shirley to pay the interest on the twenty thousand dollars spoken of in the Iliff contract individually. He also agrees to furnish, at Look-

out Mountain, two four-mule teams, two wagons and twenty saddle horses; these to be credited to him on the company books of Nodine, Shirley & Co. This property, then, to become company property; Nodine and Hannah to give satisfactory security to the First National Bank of Portland, Oregon, for the twenty thousand dollars spoken of in the said Iliff contract. All expenses of buying and driving said cattle to be charged on the company books. All horses, if their value can not be determined on by all the parties to this contract, all to be appraised and put on the company books at their appraised value. F. Nodine, of this contract, J. Q. Shirley, of this contract, S. Hannah, of this contract, all agree to form a copartnership under the name of Nodine, Shirley & Co., for the fulfillment of this and the Iliff contract, J. Q. Shirley to have one half interest and also to bear one half of the expenses, the other parties to represent the other half.

"J. Q. SHIRLEY,
"FREDERICK NODINE,
"S. HANNAH.

"Witnesses: G. B. Grow, J. B. Eaton, Jr."

The appellants brought this action for a breach of the foregoing contract, and alleged in their complaint that in addition to the contracts above set forth, and in fulfillment thereof the respondent agreed with them to place on deposit in the First National Bank of Portland, Oregon, on or before the twentieth day of March, 1876, the twenty thousand dollars referred to in the Iliff contract and the contract of March 6, 1876; that respondent failed and refused to deposit that or any other sum of money in the said First National Bank of Portland on the twentieth day of March, 1876, or at any other time, and that in consequence of such failure and refusal they were unable to deliver cattle which they had purchased, to fulfill the contract on their part, and that they sustained damage by such failure.

The respondent in his answer to the complaint denies all the allegations in it except as to the deposit of twenty thousand dollars in the First National Bank of Portland. He admits that he did not deposit that sum in the bank on the

twentieth day of March, 1876, but avers that the sum was deposited in said bank on the twenty-first day of March, 1876.

The case being on trial, S. Hannah, one of the appellants, was called as a witness, and testified as follows: "That defendant agreed to place twenty thousand dollars in the First National Bank of Portland, to the credit of plaintiff, on the twentieth day of March, 1876, upon plaintiffs furnishing security at said bank for said twenty thousand dollars, in pursuance of a contract entered into between the parties hereto, dated March 6, 1876. That plaintiffs and defendants were to deliver three thousand head of cattle, in quality to correspond with the terms of the Iliff contract, mentioned in the complaint; that he went to the bank on that day with Mr. Shirley to get the money."

Counsel for the defense inquired of the witness if the contract, about which he was testifying, was in writing, and on receiving a negative reply moved the court to strike out all the evidence heretofore stated by said witness. The court sustained said motion and withdrew said testimony from the consideration of the jury.

To this ruling of the court exception was taken, and it now comes here as an assignment of error.

It is now urged by the respondent's counsel in support of this ruling of the court, that oral evidence was inadmissible to show that the written contract was varied by a parol agreement made at the same time; and also that a subsequent parol agreement to change the terms of the written contract must be founded upon a good and sufficient consideration. These are undoubtedly correct principles of law, and the only question is whether they are applicable to this case. While it is true that parol evidence can not be admitted to change the terms of a written contract, it may, nevertheless, be received to explain some ambiguity in it consistently with the written instrument. Thus where it is apparent upon the face of the contract that something is contemplated and agreed upon by the parties which they have not distinctly defined, or expressed with sufficient clearness, parol proof connecting the instrument with its

subject-matter is always allowable to show what the parties intended and meant.

In regard to the contract between Shirley and Iliff, the respondent claims that the twenty thousand dollars to be deposited in the First National Bank of Boise City or other good bank was merely a deposit of that sum to secure a faithful performance of the contract by Iliff, and that it was not to belong to Shirley until he should deliver the cattle.

We think that is not the correct construction of this agreement. It is true it says that Iliff is to deposit "the sum of twenty-thousand dollars, to be paid to him (Shirley) on the delivery of said cattle mentioned in these articles of agreement." But the next sentence is as follows: "This sum to be deducted from the gross sum to be paid on the delivery of said cattle," clearly implying that the balance of the purchase price was to be paid on delivery, and the twenty thousand dollars was to be accounted for as having been paid at that time by deducting it from the final payment of the balance due. This view is strengthened by a further provision, which required Shirley to pay interest on this sum, less one fourth of the contract price of the cattle. The contract price being forty-four thousand three hundred and twenty-five dollars, Shirley agreed to pay interest on all the twenty thousand dollars, less eleven thousand and eighty-one dollars, that being twenty-five per centum of the contract price for the cattle. Why would he pay interest on that sum of money unless it belonged to him or he could use it? In short, we regard the contract of Shirley and Iliff to be substantially this: Shirley agreed to purchase and deliver to Iliff, in Colorado, on or before September 10, 1876, two thousand five hundred head of cattle, of the aggregate value of forty-four thousand three hundred and twenty-five dollars, in consideration of which Iliff agreed to deposit twenty thousand dollars in the First National Bank of Boise City "or some other bank in good commercial standing that may be designated by the said Shirley, to the credit of J. Q. Shirley." He (Shirley) was to use it in the purchase of the cattle and pay interest on the twenty-thousand dollars placed to his credit, less eleven

thousand and eighty-one dollars, that being twenty-five per cent. of the contract price of the cattle. Half of this contract was assigned on the sixth of March, 1876, by the respondent Shirley, to the appellants, Nodine and Hannah. They were to buy the cattle and give security to the First National Bank of Portland, Oregon, for the twenty-thousand dollars which Iliff was to advance, which sum was to be used by them in paying for the cattle they should buy. Respondent was to pay the interest on the twenty thousand dollars, less eleven thousand and eighty-one dollars, and with him rested the right to designate in what bank the twenty thousand dollars to be advanced by Iliff should be deposited on or before the twentieth day of March, 1876. He had a right to direct Iliff to deposit the money in the First National Bank of Boise City or the First National Bank of Portland. Which did he select? In what bank did he agree with appellants that the twenty thousand dollars should be placed to their credit? This could only be ascertained by evidence outside of the written contract, and this the testimony of S. Hannah tended to show. We think that evidence was proper to go to the jury, not to contradict or vary the terms of the written instrument, but to show what place was agreed upon for the performance of an act which the written contract itself left open for future designation. Parol evidence was admissible for this purpose, and the testimony of Hannah should not have been withdrawn from the consideration of the jury. (1 Greenl. Ev., secs. 282, 304.)

The judgment is reversed and a new trial ordered.

PETER RUNEY, Respondent, v. GEORGE W. REA, Appellant.

DESCRIPTION OF PROPERTY IN LIEN NOTICE.—In the notice of mechanics' lien filed in the county clerk's office, the description of the property sought to be charged ought to be as certain and definite as the description of property in a deed or mortgage where the property was described as a dwelling-house, situated on the south end of lot 6, "to which the said R. has a leasehold interest," and it turned out that R.'s leasehold interest was to the north one hundred

feet of the lot; that R.'s dwelling was in the center of the lot, and that another person owned a dwelling on the south end of lot 6: *Held*, that the notice was not sufficient and that no lien attached.

APPEAL from Clatsop County. The facts are stated in the opinion.

F. D. Winton and Geo. W. Rea, for appellant.

Robb & Fulton, for respondent.

By the Court, KELLY, C. J.:

The facts of this case are substantially as follows: Peter Runey, by virtue of a contract with Geo. W. Rea, furnished the materials and lathed and plastered Rea's dwelling-house, on lot 6 of block 16, in Shively's Astoria, and completed it on the third day of February, 1877, when a settlement was had, and there was found due Runey for the same the sum of seventy-six dollars and sixty-five cents, for which sum Rea then executed his note to Runey, payable "one day after date," which note was, by mistake, dated "January 3, 1877." The said lot is one hundred and fifty feet north and south, by fifty feet in width, and Rea had a lease for the north one hundred feet.

On the twentieth day of March, 1877, Runey filed in the office of the county clerk the required statement and description of the property, describing it as the dwelling-house of George W. Rea, situated on the south end of lot 6, of block 16, Shively's Astoria, and as property "to which said Rea has a leasehold interest." At the August term, 1877, of the circuit court for Clatsop county, Runey instituted suit to foreclose his said lien, and in his complaint alleged in substance the foregoing.

The answer of the appellant, after denying all the material allegations of the complaint, alleges in substance that the materials and work were of an inferior quality; that the property did not belong to him, but to "one Maggie Rea, the wife of appellant," and that the house is situated on the north end of the lot. The reply denies the allegations of the answer. At the January term, 1878, said court ren-

dered a decree as prayed for by the respondent, and from this decree Rea appeals to this court.

The only point in this case which we deem it necessary to consider is the sufficiency of the description in the notice, filed by the respondent in the clerk's office, to create a lien on appellant's dwelling-house. It is there described as "situated on the south end of lot 6 in block 16, Shively's Astoria." The court below sent the case to a referee, who found that appellant had a leasehold interest in the north one hundred feet of lot 6 in block 16 in Shively Astoria, and that the dwelling-house erected on this one hundred feet, and upon which the respondent claims a lien, is situated exactly in the centre of lot 6 in block 16. The evidence in the case also shows that one Cottle has a lease of fifty feet off the south end of lot 6 in block 16 in Shively's Astoria, and that he has a dwelling-house upon it.

Section 18 of the act, approved October 28, 1874, in relation to mechanics' liens, provides that "Every sub-contractor * * * who shall acquire any lien under the provisions of this act shall within thirty days after the completion or repair of any such building * * * file in the office of the county clerk a just and true account of the demand due to him, after deducting all proper credits and offsets, and shall verify the same by his own oath, and shall also file at the same time a description of the property to be charged by said lien, and in default thereof shall lose his lien.

"The original contractor having a lien shall file such verified account and description within sixty days after the completion or repairs of such building, * * * otherwise the benefit of such lien, so far as he is concerned, shall be lost."

This being a statutory lien, any one desiring to avail himself of it must strictly comply with the requirements of the law, otherwise no lien will exist. In this case we regard the description of the property in the notice filed by the respondent as radically defective, for uncertainty. It describes the dwelling-house as situated on the south end of lot 6 in block 16. The evidence shows that it is not on the south end but in the centre of that lot; and that the dwell-

ing-house of Mr. Cottle is on the south end of it. In a suit to foreclose a mechanics' lien the decree must direct the property to be sold which is described in the notice filed in the clerk's office, and none other. And if properly entered in this case the decree of the court would authorize the sale of what interest the appellant had in Cottle's dwelling-house. In the case of the *City of Crawfordsville v. Irwin et al.*, 46 Ind. 437, the property was described in the notice as "Part of lot No. 110 in the original plat of the city of Crawfordsville." And the supreme court of that state says: "We regard the notice of the lien as radically defective for uncertainty in the description of the property. 'A part of lot No. 110' is descriptive of no particular property. What part of the lot or how much of it can not be determined. Under this description what would the sheriff sell or the purchaser buy?"

The description of the property in a notice of a mechanics' lien filed in the office of the county clerk, ought to be as certain and definite as the description of property in a deed or mortgage.

The decree of the circuit court is reversed and the complaint dismissed.

SAMUEL RICH, Appellant, v. P. P. PALMER, Respondent.

TAX SALE—HOLDER OF TITLE-BOND TO DONATION CLAIM MAY REDEEM.—A person holding title-bonds to lands which are held as a donation claim under the act of Congress of September 27, 1850, the title being in the United States, has such an estate as entitles him to redeem when the lands are sold for delinquent taxes.

IDEM—NOTICE OF INTENTION TO REDEEM.—Where land is sold for delinquent taxes and a redemption is sought, no notice of the intention to redeem is necessary. It is sufficient if the redemption makes the payments provided for in the statute within the prescribed time.

IDEM—PAYMENTS TO SHERIFF.—The sheriff, and not the holder of the tax-sale certificate, is the one to whom the redemption money must be paid.

APPEAL from Douglas County.

This is a suit in equity to set aside a deed made by the

sheriff of Douglas County to the respondent, for land sold by the sheriff to the respondent for delinquent taxes.

The complaint alleges that the appellant, Rich, was the equitable owner of a large portion of the donation land claim of William Sloan; that on the eighteenth of July, 1874, the sheriff of Douglas county sold the premises for taxes to the respondent Palmer, for the sum of one hundred dollars; that the appellant, having given the respondent due notice of his intention so to do, redeemed the property on the twenty-ninth of September, 1875; that the respondent, on the eighteenth of July, 1876, wrongfully and fraudulently obtained from the sheriff a tax deed of said premises and caused the same to be recorded, and annexes a copy of the deed to the complaint; that said deed is fraudulent and void and a cloud upon his title, etc., and asks a decree that said deed is void and that it be canceled.

The answer denies that the appellant is the equitable owner of a large portion of said premises or that he has any interest, legal or equitable in any part thereof except what might arise from certain bonds for deeds executed in his favor by William Sloan, August 4, 1852, embracing certain lots containing about one acre, or that he gave notice of his intention to redeem, or that he had a right to redeem the same, or that he did redeem the same, or that he wrongfully or fraudulently obtained a tax deed, but alleges that said deed was obtained lawfully and in accordance with the certificate of sale of said premises; denies that said deed is fraudulent or void, or a cloud upon any interest of appellant in or to said premises except what might be deemed to arise upon the lots above described, and asks that the bill be dismissed. The reply alleges that more than ten years before the tax the appellant had purchased the lots mentioned in the answer, and paid eight hundred dollars for the same; that he is now entitled to a deed in fee-simple for said estate.

The court, after hearing the evidence and argument of counsel on both sides, rendered a decree setting the deed aside as to the lots mentioned in the pleadings and against the re-

spondent for costs and disbursements. From this decision appellant appeals to this court.

L. F. Moshier and John Kelsay, for appellant.

W. R. Willis, for respondent.

By the Court, BOISE, J.:

To establish his interest in the premises and show to the court that he had such an interest in the land as entitled him to redeem from the tax sale, the appellant offered in evidence eight title-bonds for certain lots in the town of Scottsburg, which bonds are sufficient in form to invest the appellant with an equitable estate in the lands described in them, provided the maker of them, William Sloan, had any estate to convey by them. The only question made by the respondent as to their sufficiency for that purpose is, that it appears that the title was in the United States; but it also appears that said Sloan was holding said land as a donation under the act of congress of September 27, 1850, known as the donation law, and such bonds have been held sufficient to convey a good equitable title. We think they are sufficient in this case to give to the appellant such an estate in the land as entitled him to redeem the same when sold for delinquent taxes.

The respondent claims that no sufficient notice was given to the sheriff by Rich of his intention to redeem. The notice which was served on the sheriff notified him that Rich would apply to him to redeem these premises on the fifteenth day of September, 1875; and it appears from the evidence that the redemption money was paid to the sheriff on the twenty-ninth day of September, 1875. It does not appear that there was any attempt to redeem on the fifteenth, the day named in the notice. This notice is not sufficient, and if notice to redeem was necessary, then there could have been no redemption under this notice. We will next consider the question as to whether it is necessary to give a formal notice in order to redeem in cases of sales for delinquent taxes, the same as in cases where redemption is sought after sales on executions issuing out of judgments of courts.

The statute, sec. 87, page 767, provides as follows: "Redemption of any land sold for state, county, school or military taxes, may be made at any time within one year from the date of the certificate of sale by paying the purchase-money and twenty per centum thereon, and all taxes which the purchasers may have paid thereon, in current gold coin * * *."

This statute gives the right to redeem, and requires the payment of the purchase-money and twenty per cent., and taxes which the purchaser has paid, and limits the time when this shall be done. If the redemptioner does all the statute requires he can have the benefit of it; and as the statute does not require any notice to be given none is necessary.

It is admitted that the money required by the statute was paid to the sheriff and within the time required, but it is claimed by the respondent that the sheriff was not the proper party to receive it; that it should have been paid to the purchaser, Mr. Palmer, and that therefore the payment is not effectual to redeem the land. Section 90, page 767 of the statute, provides that "After the expiration of two years from the date of such certificate" (of sale) "if no redemption shall have been made, the sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance, reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied; that the tax was levied; that the tax was unpaid at the time of the sale, and that no redemption has been made."

We think that the provision in the statute that the sheriff shall recite in the deed to the purchasers that no redemption has been made clearly indicates that it was the intention of the legislature that the sheriff should receive the redemption money; if not, how would he be officially informed of the redemption. Such, we think, is the proper construction of the statute.

There is but one other question presented in this case, and that is, should the sheriff's deed be set aside and canceled altogether or only so far as the same affects the title of the appellant? It will be seen from what has already

been said that Rich had done all that was required of him to redeem this land, and consequently, that the sheriff ought not to have executed said deed to Palmer after such redemption had been made, and that his recital in said deed that no redemption had been made was false, and a fraud on the appellant, as it was necessary that the appellant, Rich, should redeem the whole premises to secure and save his own property. Such redemption operated for the benefit of other owners in the land, on whom Rich might call to contribute, in proportion to their interest in the land, their share of the redemption money. We think he has a right to have the entire deed canceled.

1. For the reason that having a right to bring this suit, in which others are interested with him, he can protect their interest in the property.

2. Because in the complaint in this suit, which has before been held good by this court (6 Oregon, 339,) there is no definite description of the land owned by him.

I refer to that case as fully settling the question as to the right of the plaintiff to have this deed set aside as to the whole premises.

The decree of the court will be that the deed be entirely canceled and that the appellant recover costs.

THE STATE OF OREGON, Respondent, v. P. J. ZINGSEM et al., Appellants.

APPEAL IN CRIMINAL CASE—SERVICE OF NOTICE OF.—Under the "Justice Code" an appeal in a criminal action is taken in the same manner as in a civil action, except as to service of the notice thereof, which must be upon the district attorney or private prosecutor.

IDEM—EFFECT OF FAILURE TO FILE NOTICE AND TRANSCRIPT.—Where a party against whom a judgment has been rendered for a fine and costs in a justice's court in a criminal action, causes a notice of appeal to be served upon the district attorney and private prosecutor, but thereafter fails to file the original thereof, with proof of service indorsed thereon, with the justice, and no appeal is allowed by the justice nor transcript of the judgment filed with the clerk of the circuit court, the circuit court acquires no jurisdiction of the case to render judgment against defendant and his sureties upon his undertaking on appeal, notwithstanding one may have been executed and accepted.

APPEAL from Clackamas County.

The appellant, on July 17, 1878, was convicted in the justice's court for Oregon city precinct, in Clackamas county, of the crime of selling liquor to a minor, and sentenced to pay a fine of one hundred dollars and costs, from which he appealed to the circuit court of said county, and on the same day filed his undertaking on appeal with Jacob Madder, W. W. Myers and Nicholas Webber, as sureties.

There was no allowance of the appeal by the justice. On the twentieth of the same month the appellant filed his notice of appeal in the circuit court, but failed to file any transcript. On the first day of October, 1878, the appeal was dismissed on motion of the district attorney, and a judgment rendered against the appellant and against Madder, Myers and Webber, sureties in the undertaking, for the costs and disbursements in the justice's court taxed at forty-three dollars, and also for the costs and disbursements in the circuit court, taxed at fourteen dollars.

From that judgment this appeal is taken.

Johnson, McCown & Macrum, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the state.

By the Court, PRIM, J.:

The only material question arising in this case is one of jurisdiction. The only theory upon which the judgment of the circuit court could be upheld is that Zingsem had taken and perfected an appeal from the judgment which had been rendered against him in the justice's court. If it were a mere attempt on his part to appeal, which was never perfected, the circuit court acquired no jurisdiction thereby to render a judgment either for or against Zingsem or his sureties in his undertaking of bail.

From the transcript and papers sent up here we find that on July 17, 1878, a notice of appeal was served upon the district attorney and upon the private prosecutor, and on July 20, 1878, the original thereof was filed with the clerk of the circuit court, but these records fail to show that it was ever

filed with the justice who rendered the judgment, or that any appeal was allowed by him. Nor does it appear therefrom that a transcript of the justice docket or any of the original papers relative to the cause or the appeal, except the notice thereof (heretofore referred to), were ever filed with the clerk of the circuit court. The judgment of the circuit court, however, contains the following recital:

"And it being further made to appear to the satisfaction of the court, by competent and legal testimony, that on the said seventeenth day of July, 1878, the said P. J. Zingsem duly filed in the said justice's court an undertaking for appeal from said judgment and order of the said justice's court to this court, duly executed, as provided by law, with Jacob Madder, W. W. Myers and Nicholas Webber, sureties, conditioned that the said P. J. Zingsem shall in all respects abide and perform the orders and judgment of the appellate court upon the appeal, or if the said P. J. Zingsem fail so to do in any particular, that they, the said sureties, will pay to the state of Oregon the sum of two hundred and fifty dollars, which undertaking was duly accepted by said justice of the peace, and that the proceedings in said justice's court were thereupon stayed in said behalf."

The undertaking above referred to, as we understand it, was not sent to the clerk of the circuit court by the appellant, Zingsem, but was procured from the justice by the district attorney, and filed by the clerk of said court at his request, in order that he might obtain a judgment against said Zingsem and his sureties upon said undertaking.

By section 110 of the Justices' Code an appeal in a criminal action is taken in the same manner and in the same time as an appeal in a civil action, except the notice thereof must be served upon the district attorney or upon the private prosecutor.

By section 67 an appeal in a civil action is taken by serving a notice thereof on the adverse party and filing the original, with the proof of service indorsed thereon, with the justice.

By section 72: "When an appeal is taken, the justice

must allow the same, and make an entry thereof in his docket."

By section 112: "If defendant is in custody at the time the appeal is allowed the justice must make the proper transcript and deliver it to the clerk of the circuit court by the first day of the next term thereof," or transmit it by mail or other safe conveyance by such time. If the defendant should not be in custody, we apprehend it would devolve upon him to file the transcript with the clerk himself, as in civil cases.

By section 114: "From the filing of the transcript with the clerk of the circuit court the appeal is perfected, and the action is to be deemed pending therein for trial."

By section 115, sections 77, 78 and 79 are made to "apply to and govern the proceedings in the appellate court upon an appeal in a criminal action."

By section 77: "The appellate court, on motion of the respondent, may, at any time before the action is called for trial, dismiss the appeal, if it satisfactorily appear that the transcript and original papers annexed are incomplete in any material particular; unless upon the cross-motion of the appellant it makes a rule upon the justice to supply such omission."

Under this section it will be seen that an appeal can be dismissed only where an appeal has been taken and perfected and the transcript and original papers thereto annexed have been filed, but where it appears that they are incomplete in some material particular.

By section 78: "Where an appeal is dismissed the appellate court must give judgment as it was given in the court below." And when judgment is given in the appellate court against the appellant it must also be given against the sureties in his undertaking. But in this case, it appearing that the attempted appeal of the defendant Zingsem never having been perfected by him, the circuit court acquired no jurisdiction over the case either to dismiss the appeal under section 77 or to render judgment against Zingsem or his sureties on his said undertaking under section 78.

The attempted appeal never having been perfected, the judgment rendered in the justice's court remained absolute and could have been enforced at any time by execution.

The judgment of the court below is reversed, with costs.

THE STATE OF OREGON, Appellant, v. LAWRENCE O'NEIL et al., Respondents.

LIEN FOR COSTS — CONVICTION FOR FELONY.—N., a homestead settler, committed the crime of bigamy in 1873. In 1875 he received a patent for the homestead land. On the twenty-first of October he was indicted for the crime of bigamy, and was thereafter convicted and a judgment rendered against him for the costs of prosecution: *Held*, that the statute which gives the state a lien for costs upon the property of persons convicted of felonies from the time of the commission of the crime did not create a lien against this homestead at the time the felony was committed, the title thereto being at that time in the general government.

APPEAL from Douglas County. The facts are stated in the opinion.

S. H. Hazard, for the state.

L. F. Moshier and John Kelsay, for respondents.

By the Court, KELLY, C. J.:

The facts as they appear in the record of this case are substantially as follows: On the first day of November, 1873, the defendant, Lawrence O'Neil, committed the crime of bigamy, for which he was indicted on the twenty-first day of October, 1876, and convicted at the May term, 1877, when the costs and disbursements of the trial incurred by the state were taxed at two hundred and thirty-seven dollars and forty cents, and entered on the judgment docket, in order to make the same a lien on his real estate. On the sixth day of January, 1875, the United States issued a patent to the defendant, Lawrence O'Neil, for a tract of land described in the complaint, which was taken by him as a homestead, under the act of congress of May 20, 1862, known as the homestead law. The defendant, Lawrence O'Neil, conveyed this homestead to his wife, Bridget O'Neil, on October 21, 1876.

The appellant claims that it has a lien on this land from the first day of November, 1873, for the costs and disbursements incurred in the proceedings against Lawrence O'Neil, by virtue of section 763 of the criminal code, which is as follows: "In all cases of the commission or attempt to commit a felony, the State has a lien, from the time of such commission or attempt, upon all the property of the defendant, for the purpose of satisfying any judgment which may be given against him for any fine on account thereof, and for the costs and disbursements in the proceedings against him for such crime."

This suit in equity is now brought to foreclose the lien which the state has under this section of the criminal code; and to subject the land above described to sale upon execution, to satisfy the judgment for costs and disbursements incurred in the trial and conviction of O'Neil. We think it is clear that the appellant could not have a lien upon the homestead claim of Lawrence O'Neil at the time he committed the crime of bigamy, for the land still belonged to the United States and not to him. The object of the homestead act of congress was to give homes to those who settled upon and cultivated the public lands, and to prevent as far as possible these homesteads from being sold upon execution to satisfy debts contracted prior to the granting of the patent for the same.

Section 2296 of the revised statutes of the United States provides that "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The words "debts contracted" do not necessarily mean debts or obligations incurred by an agreement of parties. The word contract has a more extensive signification than to make an agreement. Debts contracted in the ordinary acceptation of the term will include liabilities incurred. If, for a trespass committed by a homestead claimant, a judgment for damages should be recovered against him before the issuing of a patent for the land, we hold that the homestead could not lawfully be sold on an execution issued upon the judgment after the date of the patent. The object congress had in view,

by the enactment of that law, was to secure permanent homes to settlers on the public domain, and in no event to allow them to be sold upon execution to discharge any liability incurred by the homestead claimants before the patent should issue.

We do not decide what was the effect of the judgment rendered for costs and disbursements against Lawrence O'Neil, upon the land after the issuance of the patent. That is a matter not before us, and we express no opinion upon it. All we are called upon to decide in this suit is whether section 763 of the criminal code created a statutory lien upon the homestead of O'Neil from November 1, 1873, when he committed the crime of which he was afterwards convicted. And we hold that no such lien existed upon the land. Taking this view of the case it is unnecessary to decide whether the deed of Lawrence O'Neil to his wife Bridget operated as an equitable conveyance of the homestead to her or not. The statutory lien never attached to the land, and it was equally free from that incumbrance, whether it belonged to the husband or the wife.

Land patented to an actual settler under the homestead act of congress does not become liable for a debt of the patentee contracted prior to the issuance of the patent, if conveyed by the patentee to another person. (*Russell v. Lowth*, 21 Minn. 167; *Miller v. Little*, 47 Cal. 348.)

The decree of the court below is affirmed.

DOSCHER et al., Appellants, v. BLACKISTON et al., Respondents.

FIXTURES — ERECTIONS UNDER ADVERSE CLAIM. — Where one person enters on the land of another with an intention to hold an adverse possession as against the true owner and erects a building thereon, to be occupied in connection with his adverse possession, he has no right to such building as against the rightful owner of the land, although the same is of wood resting on posts or blocks and kept in place only by its own weight. Such building is not personal property, but is a part of the realty.

APPEAL from Multnomah County. The facts are stated in the opinion.

Sidney Deel, for appellants.

Northup & Gilbert, for respondents.

By the Court, KELLY, C. J.:

This was an action brought by the appellants to recover the value of two houses alleged to have been converted to their own use by Clara Hight, formerly Clara Blackiston, and Charles A. Blackiston, two of the respondents. The land upon which the houses were built was then and is now owned by the respondents, Clara and Charles, but was then claimed adversely by the appellants. The largest house was forty-four feet long and twenty-two feet wide, and rested on cedar posts imbedded in the ground, but was not fastened or affixed to the posts, except by its own weight. The posts were four or five feet long and were boarded up underneath the house, so as to make a perfect inclosure. The smaller house rested on blocks by its own weight, but was not otherwise attached to them. These buildings were erected on the land of respondents and against their protest. They ordered appellants to desist, and threatened them with legal proceedings in case they would not. No attention was paid to these remonstrances, but appellants continued their work and completed the buildings, and when finished rented the larger one to a tenant, who occupied it as a wash-house and dwelling. The respondents commenced an action of ejectment and recovered possession of the land on which these buildings were erected, and were adjudged to be owners in fee-simple of the premises. An execution was issued on the judgment, and by virtue thereof respondents were placed in possession by the sheriff of Multnomah county. After being ejected the appellants demanded the houses from respondents, and claimed the right to remove them because they were personal property, and not attached to the land. That claim was refused, and this action was brought to recover the value of the buildings. On the trial

the court charged the jury as follows: "If the jury find from the evidence that the plaintiffs at the time they commenced constructing the larger of the two houses in controversy had actual notice of the adverse claim of the Blackiston heirs (two of the defendants) to the land on which the house was placed, and were forbidden to construct the house either by the guardian of the heirs or by the minor, Charles A. Blackiston, and notwithstanding such notice and caution, the plaintiffs proceeded to build the house and placed it on wooden blocks or posts that were set six inches or a foot into the ground; then the plaintiffs were to be deemed wrong-doers in the construction of the house, and the plaintiffs are not entitled to recover and the verdict should be for the defendants. The plaintiffs, however, might lawfully construct the house on the land of the defendant by the consent of the guardian of the defendants, Charles and Clara, and if the jury find from the evidence that the guardian of Charles consented to the erection being made by the plaintiffs and demanded a ground rent from plaintiffs, and plaintiffs acknowledged the right of the guardian and his wards, and built the house under the license and consent of the guardian, and not under a claim of right in themselves adverse to the wards Clara and Charles, then the house was the property of plaintiffs, and the conversion of it by the defendants was wrongful and the plaintiffs may recover the value. But if the plaintiffs at the time of commencing the construction of the house claimed a right in themselves to the land, adverse to Clara and Charles, and by virtue of such claim built and occupied the house, and then denied and resisted the claim of Clara and Charles, they can not in such case avail themselves of any license or consent by the guardian or his wards—the benefit of the license was lost if the plaintiffs denied the right of the licensor." To which instruction the appellants excepted. They then asked the court to instruct the jury as follows: "If the jury believe from the evidence that the plaintiffs built the house in question under a *bona fide* claim of title to the land, and put it on blocks or posts without fastening it to the blocks or posts, but simply let it rest thereon by its own weight, then the

building remained personalty, and was not a part of the realty to which the defendants had any right by virtue of their ownership of the land and their recovery in the action for possession described in the answer, and the verdict should be for the plaintiffs."

Which instruction the court refused to give, and this refusal is assigned as error. The only point in the case is, whether the buildings in controversy became part of the land by being erected thereon without the consent of the owners, or whether they were personal property belonging to appellants and could lawfully be removed by them, as such, after the possession was delivered to respondents by the sheriff. The appellants insist that they were not fixtures, inasmuch as they were not attached to the land, but rested by their own weight upon posts set in the ground.

We think this view of the law is untenable. The notion that any such attachment by bolts or nails, or by being imbedded in brick or stone, and mortar, to constitute a fixture which once prevailed, has been almost entirely abandoned in many of the states. The true rule now for determining whether a thing is to be regarded as a fixture or not, is said to be to consider the character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act. (*Meigs' appeal*, 62 Pa. St. 28; 29 Wis. 655; 34 Ill. 522; 25 Id. 551.) As between a landlord and tenant, the rule of the common law that all things attached to the realty shall be considered a part of it, has been greatly relaxed in favor of the tenant, and machinery erected by him for the purpose of carrying on his trade, though affixed to the soil, has notwithstanding been considered personal property, which may be removed by the tenant at the expiration of his lease. So, on the other hand, as between vendor and vendee, or between mortgagor and mortgagee, buildings erected on land with the intention of using them in connection with the land, are now considered as part of the realty and pass with it, although resting on posts or blocks and kept in place only by the forces of gravitation. The law is still more stringent against any

supposed right of a mere trespasser to remove a structure erected by him on the land of another. In no case which has been called to our attention, or which we have been able to discover, has it been held that one person, entering upon the land of another, under a claim of right adverse to the true owner, and erecting a building thereon, had a right to remove it as against the owner of the land. In the case referred to in 29 Wis. 655, the defendant as tenant under one who claimed to own a lot under a tax title, erected thereon a small one-story wooden structure upon posts set upon planks laid on the surface of the ground. The owner brought an action of ejectment, recovered a judgment against the defendant for the lot on which the building stood, and the sheriff demanded possession of the premises by virtue of an execution issued on the judgment. The defendant removed the building in the night-time, after it had been formally delivered by the sheriff to the plaintiff. The plaintiff then brought an action of replevin to recover the house, and it was held that he was entitled to recover it. The court held that as to the true owner such a building was a fixture, notwithstanding an intention on the part of the trespasser to remove it at some future time, and that it made no difference in such trespasser's right to the building as against the lawful owner; that he entered in good faith under a lease from one who claimed to have a tax title to the land. So in the case of *Ogden v. Stock*, 34 Ill. 522, where the purchaser of a city lot, holding it under a contract of purchase, with clauses of forfeiture, erected a house thereon placed upon blocks lying on the ground, and having failed to make the payments on his contract, sold the house to a person, who removed it from the lot. The vendor of the lot then replevied the house, and it was held that the vendee, while occupying the premises under his contract, had no right to erect a building thereon with intent to remove it; that such intent would be in fraud of his vendor's rights; that the purchaser stood in no better position, and when he severed the house from the freehold the owner of the freehold could maintain replevin so long as the house could be identified and was

not permanently affixed to other realty. (*Dooley v. Crist*, 25 Ill. 551.) In New York, where a building was erected upon lands of another, with no agreement that the same was to be held and regarded as personal property, it became part of the realty and passed with it upon the conveyance of the lands to another. In this case the house was fifteen by sixteen feet, and stood on a foundation of loose stones with a back chimney on it. (42 N. Y. 349.) The only case in apparent conflict with this doctrine which has been brought to our attention is that of *Pennybecker v. McDougal*, 48 Cal. 160. That case was no doubt decided with reference to the statute laws of California. An act of March 30, 1868 (Statutes, 1867-8, p. 708), provided that "Any inhabitant of this state who has put or placed improvements upon any lands belonging to this state or the United States * * * shall have the right to remove such improvements from such land at any time within six months after such lands shall have become the private property, by purchase or otherwise, of any person or persons, firm or corporation, or company, either within or without this state."

The action was brought to recover a small frame building set upon blocks resting on the ground, and some fencing material which the defendant in that case had placed on the public lands of the United States in 1864. The plaintiff obtained a patent for this land, including a larger tract, in 1872, whereupon the defendant removed the house from it. In this case it was held by the supreme court that the defendant had a right to remove the house or cabin, because not being annexed to the soil it was not a part of the realty. The decision was made in 1874, when the civil code of March 21, 1872, was in force. Sections 658, 659, and 660 of that code, define what is real and what personal property, and what shall be deemed fixtures; and the decision is clearly made in conformity with the provisions of the civil code, and the act of March 30, 1868. In the case under consideration the entry upon the land was made by the appellants, with an assertion of title in themselves, and with an intention to hold an adverse possession as against the true owners. In pursuance of such entry and assertion of title and with such intention the houses

were erected, to be used with the land as a part of it. In such case, it seems clear that no proof of previous intention on the part of the wrong-doers to remove the houses from the freehold, should be admitted for the purpose of changing their character from real to that of personal property, as between them and the actual owners of the soil. We think there was no error in the proceedings of the court, and that the judgment should be affirmed.

ANDERSON EDWARDS, Appellant, v. RICHARD S. PERKINS, Respondent.

APPEAL—VOLUNTARY PAYMENT OF JUDGMENT.—A party is not precluded from taking and maintaining an appeal by the fact that he has voluntarily paid the judgment appealed from.

A LEASE NOT A CONVEYANCE—IMPLIED COVENANTS.—A lease is not a conveyance within the meaning of Title 1 of Chapter 6 of the Miscellaneous Laws. Under the laws of this state, as at common law, a lease for a term of years is a chattel-interest, and there is an implied covenant in such leases that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease.

IDEM—GROWING CROPS.—A lease with the right of immediate possession and enjoyment of issues and profits carries with it the emblements, unless the same are reserved in the lease, and words in a lease to the effect that the lessee is to have and own all crops growing on the premises add nothing to the lessee's rights.

APPEAL from Washington County.

This action is brought to recover damages for alleged breaches of implied covenants in an instrument executed under seal. The complaint alleges that on the sixth day of March, 1876, W. N. McCoy was the owner of a farm in Yamhill county subject to a mortgage owned by J. S. Giltner, then due; that on said day Giltner commenced suit to foreclose said mortgage; that on the twenty-first day of November, 1876, McCoy conveyed by deed the mortgaged premises to defendant; that on the tenth day of January, 1877, before decree of foreclosure, the respondent and appellant entered into the contract or lease mentioned; that at the time the agreement

was made the appellant gave respondent a note for five hundred dollars, due first November, 1877, and paid same at maturity; that in March, 1877, a decree of foreclosure was rendered against McCoy, directing sale of the premises to satisfy the sum of one thousand nine hundred and ninety-two dollars and sixty-nine cents; that execution was issued April 24, 1877. The premises were sold to Giltner May 26, 1877, and were not redeemed; that appellant raised wheat of the value of one thousand three hundred and seventy-nine dollars on the premises.

It is alleged that by reason of the foreclosure and sale before the wheat could be harvested respondent's title wholly failed, and appellant was evicted and was compelled to and did pay upon demand the rents, being one third of the grain raised of the value of four hundred and fifty-nine dollars and eighty cents, to Giltner, who, on the first of July, 1877, demanded possession of said premises; that respondent had due notice of the premises and neglected to protect appellant in the possession. Judgment is demanded, etc.

To this complaint respondent interposed a demurrer, on the ground that it does not state facts sufficient to constitute a cause of action. Judgment was rendered in the court below for the respondent for costs. The appellant paid the judgment in full, voluntarily, before he took any appeal.

McCain & Fenton and T. B. Handley, for appellant:

At common law the words "demise and lease," and every mutual contract of leasing, implied covenants of seisin and for quiet enjoyment. (Rawle on Covenants for Title, 476, 487; 8 Cowen, 36; 11 Paige, 569; 4 Cush. 14, 351; 26 Mo. 115; 1 Chitty on Pleadings, 117; 1 Wash. on Real Prop. 397; 42 N. Y. 167, 171; 3 Kernan, N. Y. 160; 33 Pa. St. 453.)

This doctrine still obtains, unless abrogated by our statute, which says: "No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special

covenants or not." (Misc. Laws, p. 516, sec. 6.) This provision does not apply to leases, a lease not being a conveyance, within the meaning of that section. The Code of New York is the same as ours in this respect, and it has been repeatedly construed not to cover leases for years, they being chattel interests and not real estate. Also, it is a rule of statutory construction, that all statutes in derogation of the common law must be strictly construed, and that when one state adopts a statute of another state it is presumed to have adopted the construction placed upon that enactment by the courts of that state at the time of its adoption. (3 Kent. 401; 2 Bouvier's Dictionary, 422, 423; 1 Sharswood's Blackstone, p. 14 and note, chaps. 2, 7 (book second); Williams on Real Property, 40; 34 Miss. 64; 1 Wash. 389, 407, 410; 5 Mass. 419; 15 Id. 445; 9 Bush. 556; 64 Barb. 558; 9 Bos. 57; 42 N. Y. 167; 13 Id. 151; Smith on Statutory Construction, sec. 634; Revised Stat. N. Y. sec. 140; 11 Paige, 566; 8 Id. 597.)

The statutory definition of conveyance relied upon by respondent has exclusive reference to fraudulent conveyances, and does not relate to the section abrogating the doctrine of implied covenants in conveyances of real estate. The sections are parts of two different acts relating to different subjects, and for entirely different purposes. (Misc. Laws, p. 523, sec. 57; Session Laws of 1854.)

Our statute, as well as that of New York, recognizes the distinction between a lease and a conveyance in two ways—by a provision for acknowledgment and record of conveyances of real estate and by omitting such provision in the case of leases. And by the statute of frauds a leasehold estate for one year is good, even though founded in parol, but as a conveyance of real estate it would be void. (Misc. Laws, p. 515, sec. 1; Civ. Code, 265, sub. 6, sec. 775.)

The covenants implied are that the landlord has power to lease and that the tenant shall quietly enjoy for the term demised; and it makes no difference who disturbs the tenant—it may be the landlord himself or a stranger—the rule is the same, and if the tenant is evicted the covenant for quiet en-

joyment is broken. (Rawle on Covenants, 476; 13 N. Y. 151-60.) The breach of this covenant is made by an eviction by paramount title. (Rawle on Covenants, 241; 4 Hill, 645; 11 H. H. 83; 9 Cowen, 157; 17 Mass. 590; 4 Id. 349; 18 Me. 244.)

The eviction may be actual or constructive, and the tenant may attorn to the holder of the paramount title, although at his peril. (Rawle on Covenants, 241, 260, 271; 5 Clarke, Iowa, 86; 2 Smith's Leading Cases, 604; 4 Com. 275; 2 Am. 456; 4 Hill, 345; 10 Met. 194; 44 N. Y. 382; 9 Bos. 57.) The complaint alleges notice to Perkins, the landlord, and an eviction by actual disturbance, and under the facts pleaded, Giltner, the purchaser at the sale, was entitled to the exclusive possession of the lands demised from the date of his certificate of purchase until redemption. (Civ. Code, p. 172, sec. 304.)

Giltner's assertion of a hostile demand, he being the rightful holder of paramount title until redemption, and Edward's attornment to him, completed an actual eviction. (Rawle on Covenants, 288, 502; 5 Clarke, Iowa, 89, 297; Rawle on Covenants, 216.) The question of record notice of the incumbrance by which the tenant of Perkins was finally evicted can not effect the recovery upon the lease in question. Parties are conclusively presumed to have contracted with direct reference to the facts at the time, and the tenant—even if bound to take notice of the defect or cloud upon his landlord's title—had a right to rely upon the covenant for quiet enjoyment. Perkins, when he leased to his tenant, held an estate liable to be destroyed by incumbrances of record and even before his purchase the suit to foreclose was pending, and he was bound to take notice of *lis pendens*, as affecting the estate he purchased and the estate he leased. (4 Or. 354; 1 Johns. Ch. 565; 2 Id. 441.)

Thos. H. Tongue and Yocum & Clarno, for respondent:

By a voluntary payment of the judgment appellant acquiesced and consented to its entry as fully as if it had been a judgment by confession. He waived and abandoned his

right of appeal. (10 La. Amer. 643; 5 Id. 598; 13 Id. 59; 10 Bosw. N. Y. 337.)

Under section 6, page 516, of our statutes, the contract between the parties is a conveyance of real estate. The instrument is executed with all the formalities of a deed except the acknowledgment. The above provision of our statute was copied from the New York code, and up to January 13, 1854, when the act was passed in our state, the New York courts held leases to be within its provisions. (14 Wendell, 38; 2 Duer, 401.)

The Mayor of New York v. Maier, 13 N. Y. 151, was decided in 1855, and then only upon a definition of terms given by the New York statutes in a subsequent chapter. The only definition given by our statute to the terms "conveyance" and "real estate" are broad enough to include leases, and differs widely from the New York definition. The New York cases were decided in actions for rent, and when the eviction was by the lessor himself. The law makes a wide distinction between an eviction by the lessor and a stranger. (1 Wash. Real Prop, 325, 326, 343; 4 Cush. 24; 11 N. Y. 218.)

The case cited by plaintiff in 42 N. Y. is not sustained by the authorities cited. If plaintiff's view is right, a lease of a thousand years would not be within our statute. (4 Kent, 93.) When the common law implies a convenant for quiet enjoyment, the only penalty for a breach is a discharge from the payment of rent. (1 Wash. Real. Prop. 325, 326.)

There is no breach of covenants until eviction even to defeat an action for rent. (1 Wash. 343, 345; 31 N. Y. 515, 516; 13 Mich. 179; 20 N. Y. 284, 285; 3 Or. 501; Rawle on Cov. 192, 210, 243, 245, 490, 504; 1 Wash. 361, and cases cited.)

Giltner made a naked demand which was not yielded to. This is not an eviction. (15 N. Y. 328, 332, 333.) The case in 12 Mass., 43 to 46, is a parallel case with the one at bar. The appellant claims that he attorned to Giltner, but it does not appear when. He could not voluntarily attorn to a stranger. (1 Wash. 360, 361, and cases cited.) He should have notified the respondent to defend. (12 Mass. 45, 46.) Had

Giltner evicted appellant, it must have been under lawful authority. (1 Wash. 326, 344.) No authority was given under our statutes. This is a clear case of collusion between appellant and Giltner.

The appellant claims that the words "lease and demise" imply covenants, but there is no term leased or demised.

Under this instrument plaintiff is estopped from denying that he held for the term. (15 N. Y. 329, and cases cited; 12 Mass. 46, 47; 1 Wash. 357, 358.) The contract was entire, and plaintiff knows that he paid more for the crops that had been put in than he did for the use of the land. It is impossible for this court to say what the measure of damages is, if the plaintiff has sustained any loss; but the fact is, he did not.

By the Court, BOISE, J.:

It is claimed, in this case, by the respondent, that this cause should be dismissed for this reason, that there is no judgment in the circuit court from which an appeal will lie. It appears from the amended transcript that on the twenty-eighth day of May, 1878, the judgment appealed from was rendered against the appellant for twenty-four dollars and eighty-five cents, costs and disbursements, and that afterwards, on the same day, the appellant paid the same, and on the twenty-third day of July, 1878, appellant caused a notice of appeal to be served on the respondent. The question is, can a party to a judgment against himself appeal after he has voluntarily paid the judgment? When an appeal is taken, an undertaking must be given by appellant and filed with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings unless the undertaking further provides to the following effect: "If the judgment or decree appealed from be for the recovery of money or personal property, or the value thereof, that if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed." So in this case, if the appellant had not paid the judgment, the respondent could have had an execution issued on the judgment

and compelled him to pay it notwithstanding the appeal. We think he is in no worse position from having paid the judgment voluntarily than if he had settled the execution with costs. There is nothing in this point.

We will now consider the point made in the argument that the lease named in the complaint being in writing and under seal, conveyed an interest in the land such as is described in title 1, of chapter VI, of the code, and that the lease is a conveyance of an interest in the land to which there could be no implied covenants, as provided in section 6 of said title. (Stat. 516.)

At common law a lease of land for a term of years was a chattel interest and did not descend to the heir, but went to the administrator, and such is the case still unless this rule has been changed by our statute.

The statute provides for the conveyance of land by deed, and we think embraces only such conveyances as purport to convey a freehold estate such as may descend to heirs, or is for the life of the grantee, and does not include leases which are classed by the statute as personal property. (Stat. p. 550, sec. 14.) In this section of the statute the terms real estate and personal property are clearly defined in these words: "The term real property includes all lands, tenements, and hereditaments and rights thereto, and all interests therein, whether in fee-simple or for the life of another. The term personal property includes all goods, chattels, moneys, credits and effects of whatever nature not included in the term real property." It will be seen by these definitions that the word real property is more comprehensive than the word land, and the definition here given of real property is certainly more comprehensive than the word land as used in title 1, of chapter VI, of the code, on which respondents rely, and yet it excludes leases. We think it is very evident from these statutes regulating the conveyance and descent of real property, that leases are not embraced in the words "conveyance of land," as used in title 1, of chapter VI, and that the provision in section 6, of said title, that "no covenant shall be implied in any conveyance of real estate," does not apply to leases.

As to leases, we think there is an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease. (Rawle on Covenants, 215, 476, 477.)

If the tenant is evicted by a person having a paramount title, he can have an action against his landlord for damages.

There is one other question presented in this case, and that is, that the contract of leasing is entire, and that the lessee, when he took the lease and entered on the land, purchased of the lessor some grain that was sown on the premises.

The lease of the premises, with the right of immediate possession and entire enjoyment of the issues and profits, would carry with it the emblements, unless the same were reserved in the lease. So the words in this lease, "and the said Edwards is to have and own all crops that are now put in or growing on said premises," add nothing to the rights of Edwards under the lease.

We think the complaint does state facts sufficient to constitute a cause of action, and that the circuit court erred in sustaining the defendant's demurrer.

The judgment of the circuit court will be reversed, with costs, and a new trial ordered.

TRIBOU & McPHEE, Respondents, v. J. M. STROWBRIDGE, Appellant.

REFERRING CASE — IN LAW ACTION.—In actions at law, the court has power to refer causes which involve the examination of long accounts, whether the parties assent or not.

FAILURE TO COMPLY WITH CONTRACT—VALUE OF SERVICE MAY BE RECOVERED.—Where one performs service for another, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and such compliance becomes impracticable and the service has been of value to him for whom it was rendered, the laborer may recover for such service its reasonable value.

APPEAL from Multnomah County.

This was an action to recover four thousand one hundred dollars upon a contract to perform the carpenter's work and furnish the materials therefor, upon a certain building. The appellant deemed that the work was completed according to the terms of the contract, and alleged failures on respondent's part to his damage, etc. It is admitted that there were departures from the contract specifications, but it is claimed that these were assented to by the architect, and that the work was done to his satisfaction. The contract provided that the work was to be completed to the satisfaction of the architect, and that his certificate, report or decision, was to be "binding and conclusive on all matters of dispute or misunderstanding between the parties."

The cause was referred to a referee to report findings upon the issues of law and fact between the parties. The appellant objected to the reference. The referee found that the appellant was bound by the acts of the architect; that respondents were not in default and that they were entitled to recover three thousand eight hundred and ninety-five dollars with interest.

The circuit court confirmed the report, and the respondents had judgment, from which this appeal is taken.

Sidney Dell, for appellant.

M. C. George, for respondents.

By the Court, BOISE, J.:

The first question to be considered is, had the circuit court the authority to refer the issues in this case to a referee, without the consent of the appellant? From the record it appears that after the referee was appointed appellant moved to have the trial of the issues withdrawn from the referee. The counsel for the appellant now insists that the circuit court had no authority to refer this case to a referee, it being an action at law; that although the trial of the case would involve the examination of long accounts between the parties, the question whether the respondents had completed the work under their

contract being an issue in the case that could only be tried by a jury, unless such a mode of trial was waived. The statute of this state providing for the appointment of referees is as follows: "All or any of the issues in an action, whether of fact or law, or both, may be referred upon the written consent of the parties." (Sec. 218.)

Section 219: "When they do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: 1. When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein."

In this case, in order to determine the question whether or not the respondents had performed their contract, it became necessary to examine and determine the items charged in the appellant's counter-claim, which was an account set out in the answer, in which it was claimed that the appellant had been damaged in various sums by the failure of the respondents to do certain specified portions of the work according to the contract. And, in fact, to determine any of the material issues in the case, involved the examination of accounts either of the respondents or appellant. The case, therefore, comes within the purview of the statute above referred to. It is claimed by the appellant that if this proceeding is authorized by the statute, it impairs the right of trial by jury in civil cases in actions at law, and that the statute is void from being in conflict with section 17, of article 1, of the constitution of this state, which provides that, "In civil cases the right of trial by jury shall remain involved." This language of the constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. (20 Wis. 210; 17 Id. 189; *Mead v. Walker,* 24 Wend. 337.) So that, in order to ascertain whether such right exists in this case, we must look into

the history of our laws and jurisprudence, at and before the adoption of the state constitution.

The statute in question was passed by the legislature of the late territory of Oregon in 1854, and has been copied into the present code; so that this statute has been in force since that time, and was the law of the territory at the time the constitution was adopted, and, therefore, does not abridge the right of trial by jury as it existed when we became a state. Under this statute, cases like this have been referred and tried by a referee, without question as to the authority of the court to order the reference, for a quarter of a century; and was there doubt as to the constitutionality of this statute, it would, under the circumstances and the sanction of long usage, have to be solved in favor of the statute. (Cooley's Constitutional Limitations, 74; 6 Cranch, 128; 10 Wharton, 53; 3 Peters, 433.)

We think there is no doubt of the validity of the statute, and that its provisions are wise, and aid in enabling the courts to arrive at just conclusions in cases of this nature, which can not be intelligently tried by a jury.

The other ground of error urged by the appellant is that as the respondents have sued on a special contract, to do work for a fixed price named in the contract, they must show that they have in all respects fulfilled the contract on their part in order to recover. And that having failed, in some respects, to do the work according to the specifications in the contract, they cannot recover on the contract, or on the *quantum meruit* for the value of their work which has been received by the appellant, and is of value to him.

Issue was made between the parties as to the completion of the work by the respondents, and the referee finds on this issue as follows: Second finding. "That in pursuance of said contract, the respondents did the carpenter work and furnished the necessary materials thereto, under the direction of, and to the satisfaction of C. B. Talbot." Said Talbot was the architect who had charge of the work, and by the terms of the contract, was empowered by the appellant to pass upon the quality of the work and materials.

The contract between the parties also expressly provides

that "The certificate, report, or decisions of the architect, are to be binding and conclusive on all matters of dispute or misunderstanding between the parties hereto." We think that by this contract the architect had authority to judge of the quality of the work and materials, and to determine when the work was finished; and the completion of it to his satisfaction, was a compliance with the contract on the part of the respondents. If some work was omitted and some added by his direction or advice, such omissions and deductions for the same would not be a violation of the contract by the respondents.

When they had completed this work "to the satisfaction of the architect," they were entitled to their pay for the work, although some parts had been omitted by consent of the architect, who was the agent, in that behalf, of the appellant.

This finding of the referee was adopted by the circuit court, and in that court was entitled to the same consideration as the verdict of a jury. (Statute, p. 151, sec. 226.) Unless it was clearly against the evidence, the court should have given judgment on the report. We think, in this case, that we are not warranted in going behind this report to determine from the evidence the correctness of the findings of facts by the referee, but that these findings should be taken as true, unless the same are manifestly erroneous, which does not appear in this case.

We think, therefore, that, from the facts as found, the respondents did perform their contract, and that all the questions presented by counsel for the appellant as to the right of a party to recover for the value of his services on a special contract, when the same has not been fully completed but such services have been of value to the party for whom they were performed, become immaterial in the determination of this case.

We think the rule in this state is, that where one performs service for another on a special contract, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value.

We think what has been said disposes of all the material questions raised in the argument, and that the judgment of the circuit court should be affirmed with costs.

JAMES D. WALKER and HENRY HEWETT, Respondents, v. B. GOLDSMITH AND WIFE and JOSEPH TEAL AND WIFE, Appellants.

SURETY—EXTENSION OF TIME TO PRINCIPAL.—G. borrowed one hundred thousand dollars of W., for which he gave his note. T. entered into an agreement by which he became surety for G. to the extent of his interest in certain lands owned by himself and G., which lands they conveyed in trust to H. to pay G.'s note, in case of default. At the maturity of the note a further agreement, signed by the three parties and by H. was made for an extension of time on the note for two years. In the last agreement it was stipulated that if there was default in the monthly payment of interest the entire debt should thereupon become due, and the land held in trust should be sold to pay the note. G. made default in the monthly payment of interest in January of what T. had no notice until in May: *Held*, that the neglect to sell the property held in trust upon such default, as provided in the last agreement, discharged the property of T. from all liability as security for G.'s debt.

MORTGAGED PREMISES—LIABILITY OF PURCHASER.—When a mortgagor sells the mortgaged premises, subject to the lien of the mortgage, the purchaser does not become personally liable to pay the debt of the mortgagee unless he assumed the payment thereof at the time of the purchase.

FORBEARANCE WILL DISCHARGE SURETY.—Forebearance or neglect by a creditor to sell property pledged as security for the payment of a debt will discharge the surety from liability when the contract requires diligence and promptitude in the sale of the property so pledged.

APPEAL from Marion County. The facts are stated in the opinion of the court.

Hill, Durham & Thompson and W. H. Effinger, for appellant:

By the contract of August 19, 1874, Teal agreed that his property so mortgaged should be liable for the debt—with certain restrictions and qualifications hereafter to be more

particularly noticed—but it was not his debt, nor the debt of his property. It was the debt of Goldsmith, and Teal's property stood in equity chargeable, not as the principal fund, but as a secondary fund chargeable with a debt for which Teal had received no consideration, and for which Goldsmith's mortgaged property and Goldsmith himself were chargeable primarily and as principal. This liability of Teal's property, in the nature of a suretyship for Goldsmith's debt, gave Teal all the rights of a surety with respect to the enforcement of the contract or the discharge of the property from liability. (*Gahn v. Niemciewies,* 11 Wend. 312; *Vertie v. Underwood,* 18 Barb. 561; *Van Horn v. Everson,* 13 Id. 526; *Bank of Albion v. Burns,* 46 N. Y. 170.)

And having the right of a surety, with respect to his property so mortgaged, he had the right to have his property discharged from liability unless the terms of the contract were strictly followed. Whatever method was agreed upon by the contract for enforcing collection; whatever obligations the other parties took upon themselves by the contract, with respect to the subjecting of his property to this debt, they were bound to pursue in all substantial respects; that is, they were bound to perform all the duties they owed him, or his property was discharged. (*Miller v. Stewart,* 9 Wheat. 681; *United States v. Cheeseman,* 3 Saw. 424; *Supervisors v. Otis,* 62 N. Y. 88.)

The time of performance by Teal could not be changed. "If an obligee does an act to change the time of performance by a surety, without his consent, he will be discharged." (*Rathbone et al. v. Warren,* 10 Johns. 586; *Ludlow v. Simond,* 2 American Decisions, 291; 2 Caines' Cases, 1.)

And this leads to the next question: What were the duties and obligations of plaintiffs, Walker and Hewitt, toward defendant Teal under the contracts? The words duty and obligation are used in the books and the courts as exactly synonymous, so far as concerns the question of the discharge of a surety by departure of the principal creditor from the terms of the contract; that is, whatever duty the creditor owes, by

the express or legal implication of the contract, to one standing in the relation of surety, whether as indorser, guarantor, or any other of the various relations embraced under the generic term surety, he is under obligation to perform on pain of discharging the surety, or the property which gives rise to *quasi* suretyship, as in this case, from all liability. Such is the obvious import of the decisions above cited.

By the terms of the contract of August 19, 1874, it was expressly stipulated that in case the debt should be thirty days over due, Hewitt, the agent and trustee of Walker, should proceed, "may and shall proceed," to advertise and sell the mortgaged properly in a manner provided by the contract, which sale should be on thirty days' notice. And when did this debt fall due? By the contract of August 19, 1874, it was to be due absolutely and at all events two years from that date, and it might, at the option of Walker, be due and demandable at any time on twenty days' default by Goldsmith in the payment of the interest, which was to be payable monthly.

By the contract of October 18, 1876, the time when the debt was to fall due at all events was extended for a period of one year from that date, in case the interest should be paid monthly and every month, but making the whole debt absolutely due upon failure of Goldsmith to pay the interest promptly at the end of the month. By this contract it was no longer left with Walker, or Hewitt, to consider the debt due or not due, upon failure to pay the interest punctually. That option given by the previous contract was taken away by the later one, and a single default in payment of a month's interest, rendered the entire debt due at once. That was no longer at the option of any of the parties. It was fixed by the contract. And by the same contract it was provided, as we have stated before, that the provisions of the previous contract were not abrogated, except so far as the two were in conflict. There can be no pretense then that the provisions of the first contract requiring the enforcement of the debt against the mortgaged property immediately after the debt was "thirty days overdue," was annulled by the subsequent contract. On this

point there is nothing that can be construed even into a conflict.

But it is admitted that there was default of payment of the interest due in December or January, 1877, thus making the whole debt due, and that nothing was done toward carrying out the provisions of the contract with respect to enforcing collection against the mortgaged premises, at the end of thirty days or at any time afterwards. The commencement of this suit was the first step of any kind taken by the creditor or his agent, and that was many months after the whole debt was due. The mere forbearance by the creditor does not discharge the surety. But that rule applies only where the surety has not contracted for diligence. In this case, Teal specially contracted for diligence, as shown above, and went so far as to require a particular method to be pursued, and that, too, a summary method which would bring the matter to a crisis and enable him to know the extent of his loss, and indemnify himself much more speedily and surely than by waiting for a judicial foreclosure; and this part of the contract, this stipulation for diligence, being entirely disregarded, the property of Teal is certainly discharged on equitable principles, and we think as certainly upon authority. (3 Leading Cases in Eq. 542; *Bank of Ireland v. Beresford,* 6 Dow. 233; *Holl v. Hadley,* 2 A. & E. 758.)

Where the surety of a contractor binds himself upon the condition that the owner of the property shall pay to the contractor seventy-five per cent. of cost of construction as the work progresses, and the remaining twenty-five per cent. upon completion; if the owner pays more during construction than the seventy-five per cent., it discharges the surety. (*Bragg v. Shain et al.,* 49 Cal. 131.) Sureties on a bond for constructing a canal twenty feet in depth, are discharged if a canal eighteen feet is accepted, because any change in the terms of the undertaking of a surety releases him from liability. (*United States v. Corwine et al.,* 1 Baird, 339.)

Where the contract of suretyship provided that a mortgage from the principal should be given, and it was given, but

not recorded, by neglect of the principal, the surety was held discharged, though recording the mortgage would have been of no avail by reason of prior liens. (*Atlanta National Bank v. Douglass*, 51 Ga. 205.)

Where a surety bound himself to pay money to be found by the district court, and that court, after trial, settled the principles of the case, but referred it to a master to be appointed by the common pleas, to state the account upon the principles decided by the district court. *Held*, that the surety was discharged, because of the departure from the terms of his contract. (*Smith v. Heusman*, 30 Ohio St. 662.)

Where any alteration has been agreed upon and executed the surety is held discharged. (The recent English case of *Holme v. Branskill*, 38 L. J. Repts. N. S. 103.) When the creditor and principal substitute some other agreement for the one originally agreed upon, the surety is discharged. (*Mayhew v. Boyd*, 5 Maryland, 102; *Gass v. Stinson*, 2 Sumner, 453; *Bingham v. Wentworth*, 11 Cushing, 123; *Bangs & Alcott v. Strong*, 7 Hill, 250.)

The surety can not be bound beyond the letter of his contract. (*United States v. Cheesman*, 3 Sawyer, 424.) Hewett represented Walker, whose interests were adverse to Teal's. Teal reserved no power over the property or the proceedings, while Walker, being the creditor for whose sole benefit the property was placed in Hewitt's hands, could direct the proceedings—could speed them or delay them, could discharge the debt, extend the time, readjust the entire business; in short, could do with the whole matter as he might choose, within the limits of the contract, with no responsibility to any one but himself for consequences. This grew out of the very nature of the transaction. But it may be asked, were the duties of Walker's agent, Hewett, with respect to diligence and to the method of procedure, so specified in the contract, were those duties such as Teal may insist upon as a condition of his property being charged? Had he been a personal surety for the entire debt there might be some room for saying that these stipulations imposed no duty upon him, for he might go

forward at once and pay up the debt, and by proceeding immediately against Goldsmith, the principal debtor, protect himself as perfectly as he could be protected by diligence on the part of the creditor. That is the principle on which is founded the rule that, in the absence of a contract for diligence, the surety is not discharged by mere neglect of the creditor to sue. But Teal was not a surety for the entire debt. Neither had he undertaken for any definite part of it. How much he was to be damaged by his property being subjected to payment, could only be ascertained by a sale. Till it should be so ascertained, it was an undetermined, undeterminable sum. He could not be required to pay the entire debt, in order to protect himself, for that would be to require him to assume obligations far beyond those he had contracted, which is not required of surety in any case. (*Smith v. United States,* 2 Wall. 235.) A *pro tanto* assignment, by way of substitution or subrogation, is not known or allowed. (*Gannett v. Blodgett,* 39 N. H. 150.) Neither could he tender a certain sum in discharge of his obligation, for the extent of his obligation could not be ascertained. Neither could he proceed to ascertain the amount of his obligation by putting his property to sale, for he had parted with the legal title by the trust deed to Hewett, and could give no title to the purchaser.

And even had he paid such a portion of the debt as would have satisfied Walker and procured the discharge of his property, the amount for which he would have been subrogated, would still have been open to legal controversy, whenever he might seek indemnity or reimbursement from Goldsmith. An agreement for extension, indorsed on the note, for a specified time after maturity, if executed, discharges the surety. (*Chute v. Potter,* 37 Me. 102.)

In the case of *Huff v. Cole et al.,* 45 Ind. 300, the principal debtor indorsed on the note: "I hereby agree to pay ten per cent. on this note hereafter, July 29, 1868, M. E. Cole." The creditor forebore collection, which discharged the surety.

Catlin, Killin & Nicholas and E. D. Shattuck, for respondents.

The appellant Teal claims exoneration from liability on account of an alleged agreement between Walker and Goldsmith to give the latter time. The respondents insist that there was no valid or binding agreement at all to extend the time; that the most that can be found from the testimony is a conditional promise, without consideration or legal obligation, to make a new agreement at some future day, which conditional promise never had any effect or operation, and resulted in no new agreement whatever; that there was never at any time any act, agreement or omission on their part that in the least interfered with the use by Teal of all or any of the remedies known to the law for his protection; that there was no act of theirs or of either of them, between December and August, that could have created any bar or abatement to any proceedings on their part to collect the debt. Simple passiveness and fruitless negotiations were all.

The allegations of negligence in not recording one of the deeds from Goldsmith and misappropriation of some of the land are not proven, and if they were the facts alleged, if of any effect, could only operate to reduce the liability of Teal *pro tanto.* (3 Leading cases in Eq. 553; citing 7 Leigh, 135; 6 Smedes, A. M. 24; 2 Harris, 297; 37 N. Y. 606.) There is a sufficient consideration expressed in the agreement of 1876 for Teal's promise to pay the debt as well as for the conveyance of the additional lands. Walker had a valid claim and lien on all of Teal's lands conveyed in 1874, and a perfect right to proceed immediately to subject them to the payment of his demand. Teal promised and undertook, along with Goldsmith, that if Walker would wait one year longer the debt should be paid.

"An agreement" like this, "to forbear for a time to proceed at law or in equity to enforce a well-founded claim is a valid consideration for a promise." (1 Parsons Con. 444; Burge on Suretyship, 11.) Like an indorser for value, Teal became as to Walker a principal debtor. (2 N. Y. 352.)

"If a promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt and one moving between the parties to the new promise, it is not a case within the statute, and the point is too clearly settled to be questioned." (Kent, C. J., in *Leonard v. Underburgh*, 8 Johns. 36; 2 Parsons Con. 10.) We insist, then, that Teal being a promisor for value moving to himself, none of his defenses, even if they were founded in fact, which they are not, could avail him. He made the contract of 1876 as a principal, and he should be treated as a principal in the matter of extension. (2 N. Y. 352; 3 Leading cases in Eq. 569; 6 Cowen, 484.) But if it be held that Teal, by the contract of 1876 and the acceptance of the deeds in April, 1877, with the recitals therein, did not become bound to pay Walker's demand except as a surety, and only to the extent of the land conveyed, he is still bound that far. Nothing has occurred which exonerates his property from liability.

As a surety he had a right at all times to be able to pay the debt and immediately have his remedy over against Goldsmith, and as long as this right is preserved the surety is held. (Burge, 208.) The surety may also in equity, as soon as the debt becomes due and payable, file a bill to compel payment of the debt by the principal, in order to relieve himself or his property from liability. (1 Leading Cases in Eq. 143; 1 Story's Eq. Jur., sec. 327.) So long as the creditor puts no obstacle in the way of the surety enforcing these remedies, either before or after payment, he is held. (*Creath's Adm. v. Sims*, 5 How. 192, or 16 Curtis, 353.)

"Mere passiveness by the creditor in not taking proceedings against the debtor will not, in the absence of a stipulation in the instrument of suretyship rendering activity on his part necessary, release the surety." (3 Leading Cases in Eq. 542; *Creath's Adm. v. Sims*, 5 How. 192; *King v. Baldwin*, 2 Johns. Ch. 554; Story Eq. Jur., sec. 327.)

It is ever held that "the surety can not resist a suit on the contract, either at law or in equity, on the ground that the creditor has omitted to take measures against the prin-

cipal, after request to do so, and that in consequence all opportunity of collecting the debt from the principal has been lost." (*King v. Baldwin*, 2 Johns. Ch. 554.) And this is the rule in a majority of the states of the union. (3 Leading Cases in Eq. 550.) But there is no allegation or proof in this case that Teal ever requested Walker to proceed and collect his money.

If Teal can be released at all, then it must be by some absolute and valid agreement by Walker with Goldsmith to extend the time of payment, or some conditional agreement, of which the conditions were complied with, and to which Walker became bound so as to lose or have suspended his right to proceed against Goldsmith.

Because an "agreement to wait, without consideration, does not discharge the drawer of a bill, because the acceptor may, notwithstanding such agreement, be sued at any time." (2 Parsons Con. 26; *Reynolds v. Wood*, 5 Wend. 505; 11 Id. 312; 3 Paige, 629.)

"An agreement with the principal to extend the time of payment, which will have the effect to discharge his sureties, must be an agreement which the principal can enforce as a binding agreement between him and the creditor, and must be founded upon a sufficient consideration. When the creditor agrees to give time of payment to the principal debtor, in consideration that he will pay a part of the debt, when the whole of the debt is payable immediately, or that he will pay interest on the debt, such agreement is founded on an insufficient consideration and will not discharge the surety." (*Vilas v. Jones*, 1 Com. 286; 19 Wend. 387; 12 Wheaton, 554; 3 Leading Cases in Eq. 564; *McCann v. McDermott*, 13 N. H. 528.)

Teal's acceptance of the deeds of April, 1877, conveying Goldsmiths land to him subject to the indebtedness, by said note evidenced," is equivalent, as we contend, to a stipulation that the deeds were made "subject to the payment" of the debt referred to, which implies a personal obligation for its payment. (1 Jones' Mort. 749; *Halsey v. Reed*, 9 Paige, 446; 29 Barb. 524; 1 Hilliard's Mortgages, 232 (ed. of 1853); 1 Sugden on Vendors, 226 (ed. of 1845.)

The note and contract of 1874 recognize fully Walker's option to declare the whole debt due for twenty days default in payment of interest. It is provided that "if there be default in the payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable." This option continued after the agreement of 1876, unless it was taken away by that agreement. But Teal and Goldsmith, in the contract of 1876, expressly stipulated that "in default of the payment of said principal sum or interest, as hereinbefore specified, the whole of said principal sum and the then accrued interest shall become due and payable as provided in said agreement of August 19, 1874;" and Walker in the same agreement of 1876 expressly reserved his option by providing that "if default shall be made in the monthly payments of interest * * * then the whole of said principal sum with interest thereon accrued * * * shall become due and payable in gold coin of the United States as in said note specified."

The last clause of the contract of 1876 also clearly indicates that Walker's option continued through the whole year of the extension, else why was it provided "that if the interest shall be promptly paid, etc., without default, for a period of one year from the date hereof, so that the interest shall at that time all be paid," then there should be an extension for another year? But if Walker had no option, the case is simply one of a debt due twenty-first of January, 1877, and a forbearance to proceed to collect or sue till July, and upon the authorities cited Teal was not discharged nor his property exonerated. The promise, if any, to wait till May before collecting interest due, was wholly without consideration, and being so could have been no bar or obstruction to proceedings to collect the very day it was made. (5 Wall. 500, 507; 12 Wheat. 554.) The agreement to pay the interest in May was no consideration for the alleged agreement to wait until May. (*Van Allen v. Jones,* 10 Bosworth, 369.)

The alleged agreement of twenty-seven and twenty-eight

March (if any) to renew and modify the terms of the loan in May was also without consideration, and was conditional upon Goldsmith's paying up the interest and the making of new papers, notes and mortgages — conditions that were never performed nor offered to be performed. Such a state of facts can not discharge Teal. (Brandt, sec. 323; 24 Vt. 293.) A promise by a debtor keep the money is no consideration for a promise to extend time. (*Kellogg v. Olmstead*, 25 N. Y. 189.) In this case Hewett was trustee for both parties — as much Teal's agent and trustee as Walker's— and there could be no exoneration of Teal's property, by reason of Hewett's failure tc take possession and sell, unless Teal and Goldsmith had tendered possession and demanded that he proceed and satisfy the debt, and Walker prevented his doing so, which was not the fact in this case, but the very contrary.

By the Court, KELLY, C. J.:

On the nineteenth day of August, 1874, the appellant, B. Goldsmith, borrowed of the respondent one hundred thousand dollars, and gave his promissory note therefor, a copy of which is set out in the agreement of the parties hereinafter set forth. To secure the payment of this note, the appellants, Goldsmith and Teal, and their wives, executed certain deeds to the respondent, Henry Hewett, conveying a large amount of land to him, which deeds were absolute upon their face, but were, in fact, trust deeds, and the condition and terms of the trust were defined by a certain instrument of writing, executed at the same time, which is as follows:

"Whereas, B. Goldsmith, of the city of Portland, Oregon, has borrowed of James D. Walker, of the city of San Francisco, California, the sum of one hundred thousand dollars, for which he has executed his promissory note; and the same with this instrument and with the deeds hereinafter mentioned, are to be delivered contemporaneously, and take effect at the same time, of which promissory note a copy is in letters and figures following, to wit:

"$100,000. Portland, Oregon, August 19, 1874.

"Two years after date, without grace, for value received, I promise to pay to James D. Walker, or order, one hundred thousand dollars, with interest thereon at the rate of one per cent. per month, from date, till paid. Interest to be paid monthly. Principal and interest to be paid in gold coin of the United States, and not otherwise, at the office of Falkner, Bell & Co., in the city and county of San Francisco, California. And if there be default in the payment of interest for the period of twenty days, then the whole sum, principal and interest, shall, at the option of the holder of this note, be immediately due and payable; *provided,* that at any time after one year from date before maturity of this note, the same or any installment not less than twenty thousand dollars, exclusive of interest, may, at my option, be paid on thirty days' notice to the holder.

(Signed) "B. GOLDSMITH.

"And, whereas, Joseph Teal, of the City of Portland, Oregon, in consideration of said loan and the advance of the said one hundred thousand dollars by said Walker to said Goldsmith, has agreed to become surety for said Goldsmith to the extent of his, said Teal's, interest and estate in the lands hereinafter mentioned, and not otherwise; and at the request of said Goldsmith, the security for the payment of said money is taken by said Walker in the form of trust deeds, or deeds with a separate declaration of trust by way of mortgage instead of mortgages proper, and said B. Goldsmith and Emma, his wife, and Joseph Teal and Mary E. Teal, his wife, as parties of the first part, have executed to Henry Hewett, of the city of Portland, Oregon, as party of the second part, absolute warranty deeds upon their face, as follows:"

[Here follows an enumeration of the deeds executed, and descriptions of the land conveyed by such deeds.]

"Now, these presents made by Henry Hewett, aforesaid, party of the first part, said B. Goldsmith and Joseph Teal, party of the second part, and said James D. Walker, party of the third part, witness: That said parties, in considera-

tion of the premises, mutually agree and declare each to and with each as follows, to wit:

"1. Said Hewett holds the legal title to all the lands in the above-mentioned deeds described, in trust, and to the uses herein declared.

"2. Subject to the legal title in said Hewett, as aforesaid, said Teal and Goldsmith, or Goldsmith alone, shall retain and have possession of and control over all the said lands; and enjoy and have, without account, the issues, rents, and profits thereof, until such time as the promissory note above-described shall become due, and being overdue shall remain thirty days unpaid, and upon such default in payment being made, said Goldsmith and Teal, and Goldsmith will and shall on demand, peaceably surrender to said Hewett or his representatives or successors in said trust, the possession of all said lands, and every parcel thereof, to be by him disposed of as herein provided, it being understood and agreed that until and up to the time that said default in payment of said note shall happen, and possession of said land delivered to said Hewett or his successor in trust, the said Goldsmith and Teal, and Goldsmith will and shall pay all taxes of every sort and name, and all assessments and public charges levied on or becoming a lien on said land, and that if they fail to so pay in due time such taxes, charges and assessments, the said trustee may pay the same, and whatever sum he may so pay shall be added to the principal debt against B. Goldsmith, and be repaid with interest at one per cent. per month, from date of payment out of said lands, and be deemed as lien thereon.

"3. If the above-recited promissory note, and the interest thereon, and all the taxes, charges and assessments on said land be duly paid by said Goldsmith or for him, then the deeds aforesaid shall be deemed void, and said Hewett or his representatives or successors in trust shall reconvey all said lands and every parcel thereof to said Teal and Goldsmith, or said Goldsmith, or their representatives entitled thereto. But if the said Goldsmith shall fail to pay the above described promissory note or the interest thereon,

and default be made, so that according to the tenor of said note the same shall be thirty days overdue, then said Henry Hewett or his successor in trust may and shall proceed and take possession of said lands, and on thirty days' notice in writing to said Teal and Goldsmith and Goldsmith or said B. Goldsmith, requiring them to pay said debt (including also any delinquent taxes or any taxes paid by said trustee as hereinbefore provided), and on their failure so to pay, shall sell the same at public auction, or not more than thirty days' public notice, either in parcels or in a body (that is to say, the Linn county lands in a body and the Polk county and Benton county lands in a body or in parcels), at the option of said trustee, and such sale shall be (if made) for cash, and the party of the third part may at his option, being the highest bidder, become and be the purchaser, taking and applying the land purchased upon and in satisfaction in full or *pro tanto* of the debt aforesaid; and said parties of the second part covenant and agree that if upon such sale any other or further deed, release or conveyance by them or either of them may be necessary to convey their interest to the purchaser, or shall be demanded by such purchaser to quiet his title, they and their heirs or representatives will and shall make, execute and deliver the said deed, release or conveyance, at their own cost and charge. It is expressly understood, however, that when sufficient lands have been sold to pay said debt and charges, the residue of said lands remaining in the name of said trustee are to be reconveyed over to said Teal and Goldsmith or Goldsmith alone, as the right may be. And upon sale of said lands or any portion of them the said trustee is to dispose of the proceeds of sale in manner following, to wit: * * * It is agreed that if at the expiration of one year from date hereof, or at any time thereafter before the maturity of said note, said Goldsmith and Teal shall desire to dispose of any portion of said lands so as to make a payment on said principal sum in said promissory note named, to an amount not less than twenty thousand dollars, the trustee, said Henry Hewett, or his successor in trust, shall so dispoe of the

same and sell it at prices not under the fair and reasonable value thereof, at private sale, to wit: * * *"

This agreement was entered into August 19, 1874, and was signed by Walker, Hewett, Goldsmith and Teal.

On the eighteenth day of October, 1876, only a small portion of the debt having been paid, other lands were conveyed by Goldsmith and Teal and their wives to Hewett as additional security for the debt, and a second agreement was made between the parties, reciting the existing agreement and the failure of Goldsmith to comply therewith, and that Goldsmith desired an extension of time for one year, with the privilege of paying the interest at the rate of one twelfth of ten per cent. per annum, monthly, and the remaining two twelfths at the expiration of the year; and the fact that Goldsmith and Teal, as further and additional security, had by deeds absolute conveyed to Hewett other lands described to be held, as the lands already conveyed were held, under the agreement of August 19, 1874, and for the further purposes in the new agreement thereafter named. It was provided in this new agreement that Goldsmith should pay the interest monthly, and the principal at the end of the year as above recited. It was further provided as follows:

"The parties of the second part, in consideration of the extension of the time of the payment of said note for a period of one year from the date hereof, undertake and agree that said Goldsmith will promptly pay one twelfth of ten per cent. per annum of the interest upon the unpaid principal of said promissory note, each and every month, and at the end of the year he will pay the whole of said principal, and the remaining two twelfths of the interest specified in said note upon said principal sum of ninety-six thousand seven hundred and fifty dollars, and in default of the payment of said principal sum or interest, as herein above specified, the whole of said principal sum, and the then accrued interest, shall become due and payable as provided in said agreement of August 19, 1874. And, further, if suit shall be instituted for the collection of said money or any portion thereof, that he, Goldsmith, will pay

such attorney fee for instituting such suit and collecting such money, as the court may adjudge reasonable as attorney's fees in such suit, which sum may be added to the said principal sum and judgment or decree may be taken therefor, and it shall become a part of said principal debt payable in gold coin of the United States, and secured as said principal debt is by said trust deeds, and the property therein described, and conveyed to said Henry Hewett. That nothing herein contained shall be so construed as to prevent or prohibit said trustee from selling said land to him conveyed as provided in said agreement of August 19, 1874, upon the default of the payment of said principal sum and interest, as herein above provided that the same shall be paid.

"That said party of the third part agrees to extend the time of the payment of said principal sum of ninety-six thousand seven hundred and fifty dollars, and two per cent. thereon, for a period of one year from the date hereof, or until default shall be made in the monthly payments of the interest as herein above specified and provided, and no longer; but if default shall be made in the monthly payments of interest, as herein above provided, or of any such payments, then the whole of the said principal sum, with interest thereon accrued at the time of such default, at the rate of one per cent. per month shall become due and payable in gold coin of the United States, as in said note specified and the said property conveyed to said Hewett in trust, and mentioned and referred to in said agreement of August 19, 1874, and said property herein above described or referred to shall be sold for the payment thereof, as by law and in said agreement provided, and for the payment of such attorney fee as the court may adjudge reasonable in case suit shall be instituted.

"It is distinctly understood and agreed by the parties hereto that said sum of ninety-six thousand seven hundred and fifty dollars, and the interest to accrue thereon, is and shall be payable only in gold coin of the United States, and that none of the security heretofore given or now given by said Goldsmith and Teal to secure the payment of said

note is surrendered or forfeited. And, further, that the agreement of August 19, 1874, is not annulled, vacated or set aside by the execution of this agreement, excepting in so far as the same may conflict with this agreement; in all other respects the two instruments are to be taken and construed together. It is further understood and agreed that if the interest shall be promptly paid upon the principal now due upon said note, as herein above provided and agreed, that said interest shall be paid, without default for a period of one year from the date hereof, so that the interest shall at that time all be paid, then the term for the payment of said note (the principal thereof) shall be extended upon the same terms and conditions for a period of another year, the security for the payment thereof remaining the same."

The monthly interest due on the note was paid up until the twenty-first of December, 1876, but default was made in the payment of interest on the twenty-first day of January, 1877. Since then no interest has been paid. There is no evidence to show that Teal was ever notified of the failure of Goldsmith to pay the interest due on the note until some time in May, 1877. In January or February, 1877, at San Francisco, negotiations were entered into between Goldsmith and Hewett, as the agent of Walker, for an extension of the time for the payment of the debt, or, rather, for renewing the loan for several years at a lower rate of interest. Nothing, however, was definitely agreed upon at that time, and the matter was left open for further consideration. Goldsmith having returned to Portland, negotiations for an extension of the loan were resumed by telegraph on the twenty-seventh day of March, 1877, when the following correspondence was had:

"PORTLAND, OREGON, MARCH 27, 1877.

"To James D. Walker, Henry Hewett, agent, San Francisco, Cal., care of Faulkner, Bell & Co.:

"If you will delay collection of interest on that one hundred thousand dollar loan of mine, until May next, I will pay it up, and will accept your proposed modification of loan. If this is satisfactory, answer immediately.

"B. GOLDSMITH."

"SAN FRANCISCO, March 27, 1877.
"Received at Portland, Oregon, 27, 1877, 3 P. M.

"To B. Goldsmith:

"Walker absent to-day—unless urgent, wait my return next steamer.

"HENRY HEWETT.

"10 collect D. R. V."

"PORTLAND, OREGON, March 28, 1877.

"To H. Hewett, care Faulkner, Bell & Co.:

"It is necessary and of importance to have definite answer within two days.

"B. GOLDSMITH."

"SAN FRANCISCO, 28, 1877.
"Received at Portland, March 28, 1877, 1:57 P. M.

"To B. Goldsmith:

"We agree—payment back interest May—then renewing loan installment plan—seven years—ten per cent.—answer if accepted.

"J. D. WALKER.

"19 collect W. V."

Goldsmith answered this last telegram, accepting the offer it contained. Nothing further was done until after the first of May, when Hewett as the agent of Walker, notified Goldsmith of the expiration of time for payment of interest as follows:

"Portland, May 4, 1877.

"B. Goldsmith, Esq., Portland:

"Dear Sir:—When in San Francisco, we agreed to wait, until May, for the back interest due on your note to J. D. Walker. May is now here and Mr. Walker instructs me to collect at once or foreclose.

"Referring to our conversation of yesterday, I can only repeat that, from present appearances, it would not be wise for me to make any new arrangement regarding the Walker loan; but, when the interest is kept paid up, it is easy to arrange the balance. Yours truly,

"HENRY HEWETT, AGENT."

Teal was not a party to these negotiations for extension of time, and was not cognizant thereof. On the seventeenth day of April, 1877, Goldsmith and wife by deed conveyed

to Teal all their interest in the lands which they held in common. This deed contains a recital that Teal took the said lands "subject to the said James D. Walker's lien upon them for the payment of the promissory note aforesaid, and subject to the indebtedness by the said note evidenced."

Thus matters stood, and nothing further was done by the respondents until the twenty-sixth day of September, 1877, when this suit was commenced to foreclose the lien upon the lands conveyed in trust to Hewett by the deeds of Goldsmith and Teal on the nineteenth of August, 1874, and eighteenth of October, 1876.

The complaint, in addition to the usual allegations in a suit to foreclose a mortgage, avers that Teal became personally liable, under the agreement of October 18, 1876, to pay the full amount of Goldsmith's indebtedness. That he also became liable to pay the same by his acceptance of the deed of April 17, 1877, from Goldsmith to him of the lands conveyed in trust to Hewett.

Goldsmith filed a separate answer, raising the question of the reasonableness of the claim for attorneys' fees and charges of the trustees.

Teal and wife file a separate answer, in which they deny that Teal was ever personally bound as surety or otherwise. They aver the failure and neglect of Walker and Hewett to proceed according to the terms of the contracts to sell the trust property, and that Teal was thereby discharged from his liability as surety for Goldsmith. They further aver that in March, 1877, Walker and Hewett entered into an agreement with Goldsmith without his (Teal's) knowledge or consent, whereby the time for the payment of the said indebtedness, principal and interest, was extended to May, 1877, and that the property of Teal was thereby discharged from all liability for the debt.

The replication denies that averments set forth in the answer. These are all the points in the pleadings to which we think it necessary to refer.

The court below entered a decree in favor of the respondent Walker against Goldsmith for one hundred and eleven

thousand two hundred and twenty-seven dollars and ninety-five cents, and the further sum of two thousand five hundred dollars for attorneys' fees, besides costs. And further decreed that the land of Goldsmith and Teal described in the trust deeds be sold and the proceeds applied to pay the above sums found to be due from Goldsmith to Walker.

From this decree both parties have appealed to this court.

The first point made by respondents is that under and by virtue of the agreement of October 18, 1876, Teal became personally liable to pay Goldsmith's debt to Walker. In other words, that he then ceased to be a surety and became a principal equally liable with Goldsmith for the whole amount due to Walker. To establish this personal liability of Teal, the respondents rely on the following clause of the second agreement dated October 18, 1876: "The parties of the second part, in consideration of the extension of time of the payment of said note for a period of one year from the date hereof, undertake and agree that said Goldsmith will promptly pay one twelfth of ten per cent. per annum of the interest upon the unpaid principal of said promissory note each and every month, and at the end of the year he will pay the whole of said principal, and the remaining two twelfths of the interest specified in said note upon said principal sum of ninety-six thousand seven hundred and fifty dollars." We do not consider that Teal incurred any personal liability to pay Goldsmith's debt by this clause in the agreement. There is no promise by him to pay anything; and the parties themselves specify in the same sentence, and as a part of it, what should be the consequences of a non-payment by Goldsmith, in these words: "And in default of the payment of the said principal sum, or interest as herein above specified, the whole of said principal sum and the then accrued interest shall become due and payable as provided in said agreement of August 19, 1874."

This clause in the agreement is simply that in consideration of the extension of the time for payment, Goldsmith and Teal promised, not that they, but that Goldsmith would pay the specified interest every month and the principal at the end of the year; and on the failure of Goldsmith to do

so, the whole debt should become due according to the terms of the former agreement. This, certainly, did not create any personal obligation on the part of Teal to pay anything. If it was his intention to become personally liable for Goldsmith's debt, doubtless it would have been so expressed in the agreement.

On the seventeenth day of April, 1877, Goldsmith and wife conveyed to Teal all their interest in the common lands which had formerly been conveyed in trust to Hewett. This deed contained a recital that Teal "took said lands subject to said James D. Walker's lien upon them, for the payment of the promissory note aforesaid, and subject to the indebtedness by said note evidenced." It is now insisted by respondents that the acceptance of this deed by Teal rendered him personally liable to pay the debt of Goldsmith. This proposition we regard as untenable. The rule, as laid down in the leading authorities, is this: "Where one who has mortgaged land to secure a debt afterwards sells the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase-money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage in the first instance." (*Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Id. 595; *Russell v. Pistor*, 7 N. Y. 171; *Trotter v. Hughes*, 12 Id. 74; *Stebbins v. Hall*, 29 Barbour, 524.)

The supreme court of this state has, in effect, adopted this rule. (*Miles v. Miles*, 6 Or. 268.) The recital in Goldsmith's deed to Teal does not state that Teal assumed the payment of Walker's debt, nor is there any evidence in the case tending to prove that fact. On the contrary, the testimony of B. Goldsmith shows that the consideration for that deed was not the payment of Walker's debt, but the payment of some other notes which Teal had indorsed for him. We now come to consider the relations of Teal to the debt upon which this suit is founded, and the nature and extent of the liability of his property conveyed to Hewett in trust for the payment of that debt. Teal was not a maker of the note to Walker, nor was he a guarantor

or personal surety for its payment. In the words of the contract of August 19, 1874, he "agreed to become surety for said Goldsmith to the extent of his interest and estate in the lands described in the deeds hereinafter mentioned, and not otherwise."

This liability of Teal's property in the nature of suretyship for Goldsmith's debt gave him all the rights of a personal surety with respect to the enforcement of the contract. And any act on the part of Walker or Hewett, or the omission to perform any duty or obligation by them which would discharge Teal if he were a personal surety, will equally discharge his property from liability. (Brandt on Suretyship, sec. 21; *Vertie v. Underwood,* 18 Barb. 561; *Van Horn v. Everson,* 13 Id. 526; *Bank of Albion v. Burns,* 46 N. Y. 170; 11 Wend. 312.)

Teal claims that Walker and Hewett neglected to sell the trust property conveyed to Hewett, when by the terms of the contract he was required to do so within a specified time, and that such neglect thereby discharged his property from all liability for Goldsmith's debt. It is well settled, as a general rule, that the mere passive delay of a creditor in proceeding against the principal, however long continued and however injurious it may be to the surety, will not discharge the surety. But to this rule there are exceptions. If there be a stipulation between the parties that the creditor is on default to sue the debtor without delay, passiveness will discharge the surety. (*The Bank of Ireland v. Beresford,* 6 Dow. 233.) So where the defendant's testator was a guarantor for the value of coals to be supplied to one N. H. on condition that no application should be made to the surety for payment "but on the failure of the utmost efforts and legal proceedings 'of the plaintiffs to obtain payment from N. H.'" It was held by the court of king's bench that where the plaintiffs suffered two years to elapse before bringing suit against the principal, that the surety was discharged.

Lord Denman, delivering the opinion of the court, said: "The agreement virtually is (plainly for the surety's protection) that they, the plaintiffs, shall use their utmost efforts

against the principal, before they call upon the surety. * * * And we cannot hesitate to say that the utmost efforts were never made, and consequently that they have not performed the condition imposed upon them, which was made precedent to their right to sue on the guarantee." (*Hall v. Hadley,* 2 Adolph & Ellis, 758.) "It is a general rule, that if the condition, known to the creditor, upon which the surety agrees to become bound, is not complied with, the surety is discharged." (Brandt on Suretyship, etc., sec. 350; *Dundas v. Sterling,* 4 Pa. St. 73.)

In the agreement of August 19, 1874, it was stipulated, among other things, as follows: "But if the said Goldsmith shall fail to pay the above-described promissory note or the interest thereon, and default be made so that according to the tenor of said note the same shall be thirty days overdue, then said Henry Hewett, or his successor in trust, may and shall proceed and take possession of said lands, and on thirty days notice in writing to said Teal and Goldsmith and Goldsmith or said B. Goldsmith, requiring them to pay said debt, including also any delinquent taxes or any taxes paid by said trustee as herein before provided, and on their failure so to pay, shall sell the same at public auction on not more than thirty days public notice, either in parcels or in a body."

By the terms of the note, in the event that Goldsmith should make default in the payment of the interest for twenty days, it became optional with Walker to have the whole amount of the note become due and payable. But after it became payable by the lapse of two years, that option was gone. As it became due on the nineteenth day of August, 1876, Hewett was required, by the terms of the contract, to take possession of the lands on the eighteenth day of September following, and to give Goldsmith and Teal notice to pay the debt on or before the eighteenth day of October, 1876, and in case of failure to proceed and sell the lands within thirty days following.

On that day, the eighteenth day of October, 1876, the parties entered into the new contract, whereby the time for the payment of the debt was extended for one year from that

date, in case the interest should be paid every month, but making the whole debt absolutely due upon the failure of Goldsmith to pay the interest promptly at the end of each month.

By this contract, it was no longer optional with Walker to consider the debt due or not due upon the failure to pay the interest punctually. That option given by the first contract was taken away by the second, and a default in the payment of a month's interest, rendered the entire debt due at once. It became due by the terms of the contract, and independent of the will of the parties. And in that case, the second contract exacted promptitude in the sale of the lands by Hewett, in accordance with the terms and provisions of the contract of August 19, 1874, as follows: "But if default shall be made in the monthly payments of interest, as herein above provided, or of any such payments, then the whole of the said principal sum, with interest thereon accrued at the time of such default at the rate of one per cent. per month, shall become due and payable in gold coin of the United States, as in said note specified, and the said property conveyed to said Hewett in trust, and mentioned and referred to in said agreement of August 19, 1874, and of said property herein above described or referred to, shall be sold for the payment thereof, as by law and in said agreement provided."

Goldsmith made default in the payment of interest, on the twenty-first day of January, 1877, and on that day the whole debt became due and payable. By the terms of the agreements, Hewett was required to take possession of all the lands when the debt was thirty days overdue, that is on the twentieth day of February, 1877, and in case of a failure of Goldsmith and Teal to pay the debt after thirty days notice to them, the contract enjoined upon him the duty of selling all the lands at public auction, on not more than thirty days notice, after the failure of Goldsmith and Teal to comply with the requirements of the notice. In other words, Mr. Hewett, the trustee, was required to sell all the trust lands within ninety days after the twenty-first day of January, 1877. This is not like a case of mere forbearance to enforce

the payment of a debt, for which a surety is liable. Here the terms of the contract prohibited forbearance and require promptitude in the collection of the debt. In this case Teal specially contracted for diligence in the sale of the trust property. This was one of the conditions upon which he pledged his lands as security for Goldsmith's debt.

It is urged by the counsel for respondents that when default was made by Goldsmith in the payment of interest, Teal had the privilege of paying the debt and taking an assignment of the note from Walker, and that it was his duty to do so, if he desired no forbearance should be extended to Goldsmith in the sale of his property. That undoubtedly would be so in ordinary cases of suretyship, where the surety is under obligation to pay the whole demand in default of payment by his principal. But that is not so in this case. Teal did not agree to become surety for the payment of the whole debt, and to impose this burden upon him would be unjust. And yet he could not obtain possession or control of the note without payment of the full amount to Walker. Teal had, moreover, placed his own property beyond his control by conveying it to Hewett specially to pay this demand, and he had no power to dispose of it even to pay the debt for which it was pledged. This could be done by Hewett, and by him alone, and only in the manner specified in the agreement of the parties.

It is urged by the counsel for respondents, that Hewett, as trustee, was as much the agent of Teal as he was of Walker, and that his neglect to sell the property was as much chargeable to the one as to the other. We do not so regard it. Hewett directly represented Walker, whose interests were adverse to those of Teal. Teal had already parted with his title to the property, and could no longer control it or direct how or when it should be sold by the trustee. If, instead, the lands had been mortgaged directly to Walker, with power to sell the same at public auction in case of default in the payment of the debt, it could hardly be contended that the mortgagee would be the agent of the mortgagor in making the sale. We think that the neglect to sell the property conveyed to the trustee within the time prescribed

in the agreements of the parties discharged the property of Teal from all liability as security for the debt of Goldsmith to Walker; and that the trustee, Henry Hewett, should reconvey to Joseph Teal all the lands conveyed to him by Teal and wife on the nineteenth day of August, 1874, and the eighteenth day of October, 1876.

Taking this view of the case, it becomes unnecessary for us to decide what was the effect of the contract made by telegraph on the twenty-eighth of March, 1877, between Walker and Goldsmith as to the extension of time for the payment of the debt.

The decree of the court below is affirmed, so far as it relates to the appellant, B. Goldsmith, and revoked so far as it directs a sale of the lands conveyed by Joseph Teal and wife to Henry Hewett on August 19, 1874, and October 18, 1876. And the said Henry Hewett is hereby directed to reconvey the said lands to said Joseph Teal within three months from the date of this decree, upon the payment by said Teal of the reesonable fees for making such reconveyance.

THE STATE OF OREGON, Respondent, v. ARCHIE BROWN, Jointly Indicted With JAS. JOHNSON, and JOS. SWOARDS, Appellant.

HOMICIDE IN COMMISSION OF ROBBERY—PURPOSE TO KILL.—A homicide committed in the perpetration of rape, arson, robbery, or burglary, is under section 506 of the criminal code, murder in the first degree. In such a case a purpose to kill is incontrovertibly implied from the crime in which the person committing the homicide is engaged at the time.

ROBBERY, WHEN COMPLETED—REMOVAL OF GOODS.—The taking of goods, to constitute robbery, is not necessarily concluded so as to complete the crime, by the removal of the goods beyond the presence of the owner, and to constitute a killing during a robbery it is not necessary that the killing should be committed at the precise place and time of the act of violence. Three persons entered a store, struck the proprietor blows which rendered him insensible, took the contents of his safe and proceeded up the street, carrying the property with them upwards of three blocks of two hundred feet each, where they turned and fired upon a person who was endeavoring to pre-

vent their escape and killed a boy: *Held*, that the removal of the property having been continuous and uninterrupted, the killing was done during the robbery.

ERROR—WHEN DEFENDANT IS NOT PREJUDICED.—Where the commission of a robbery at the time of the killing was relied upon to constitute the homicide murder in the first degree, the court charged the jury that if they found that the killing took place after the robbery was completed, the defendant should be acquitted: *Held*, that such instruction was erroneous, but that it could not have prejudiced the defendant in any of his substantial rights.

APPEAL from Multnomah county. The facts are stated in the opinion of the court.

W. W. Page, and Stott & Gearin, for appellant:

To constitute murder in the first degree in this state it is necessary that the killing be purposely done. (*Fouts v. State*, 8 Ohio St. 98; *Robbins v. State*, Id. 131, 173, 175, 190; *Kain v. State*, Id. 307; *Hagan v. State*, 10 Id. 459; Id. 599; *Johnson v. Com.*, 24 Pa. St. 387.)

The court charges the jury that where the killing occurs in the perpetration of rape, arson, robbery or burglary, a purpose to kill need not be alleged or proved. Is such a charge consonant with the statute or consistent with reason or common sense? If it be, then is our statute a huge blunder, and our claim to an enlightened administration of justice an idle vaunt — a snare to lead us on to an interminable series of cruel mistakes. Section 506 of the statute is certainly clear enough, of itself, to show that a purpose to kill is one of the essential ingredients of murder in the first degree. But if it were not so, and recognizing the rule that an antecedent provision of a statute of which the meaning may be doubtful, is often best explained by a subsequent section of the same statute, we quote sec. 511, p. 407, Crim. Code: "If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter." Is this section entirely a nullity, or does it mean something? Is it possible that rape, arson, burglary or robbery are not unlawful acts? Or shall we be told that by the very language of the statute, under a given

state of facts, a man is guilty of murder in the first degree or manslaughter, as it may suit the pleasure of the prosecuting attorney to elect, and that the legislature intended that such a gross absurdity should come from its hands? Clearly so, if the charge of the court in this case is to be sustained. If it was intended that involuntary killing in rape, arson, robbery or burglary, was to be murder in the first degree, and in other unlawful acts only manslaughter, why did not the legislature so declare? How easy it would have been had the legislature so intended, to have inserted in section 511, "except the cases provided for in the first section of this act." Will this court presume that the legislature intended to trifle with so grave a subject to such an extent that the highest degree of criminal homicide could not be distinguished from the lowest? Or shall we, guided by reason, justice and humanity, conclude that the legislature really meant what they said, and before a man can be decreed to suffer the extreme penalty of the law, it is necessary that a purpose to kill be alleged and proved. The theory upon which this instruction was given, is, that the being engaged in the felony supplies both malice and purpose to kill. But this is a wrong assumption, for we see in section 519, immediately following, that the being engaged in a felony supplies only the malice contemplated in the statute. By what system of reasoning then can we say that there can, under any possible circumstances, be a murder under our statute, without a purpose to kill. We are aware that at common law such was the case, but the doctrines then promulgated were applicable to a day and age that is past, and have long since been swept away before the advancing waves of a purer and more humane exposition of the law which has followed.

To tell the jury that they must convict of murder in the first degree or acquit, was actually instructing them to convict, and every possibility of convicting of the second degree or of manslaughter was at once taken from their consideration. Although the robbery might have been completed, could not the larceny have continued? And if the larceny was still continuing, would not a killing in the commission

of larceny be murder in the second degree, under our statute? (Crim. Code, secs. 184, 507.) There is no robbery charged in the indictment, and the killing is not alleged to have been done in the commission of a robbery. It was, therefore, error to charge the jury that the indictment charged the killing to have taken place during the commencement of a robbery. We submit that in an indictment for robbery, not being armed with a dangerous weapon, under our statute it is necessary to state that the taking was from the person by force and violence. (Crim. Code, sec. 534, p. 410.) The indictment in this case does not so state, but contains only what might be used as a definition of larceny from the person. There is violence to the person in all larcenies from the person, but there must be the additional ingredient of force to constitute robbery.

The appellant requested the following instruction: "If you believe, from the evidence in this case, that the killing of Louis Joseph occurred, not in the building occupied by Walter O'Shea, and not at the place nor in the building where the property mentioned in the indictment was stolen, if any was stolen, but that such killing occurred some two or three blocks removed therefrom, and while the defendant, Brown, was endeavoring to escape, you can not find the defendant guilty of murder in the first degree." Which instruction the court refused to give. This was error. (*People v. Pool*, 27 Cal. 582.)

The court charged the jury in effect that the robbery would have been complete had the goods, which were the subject of the robbery, been thrown away or concealed; but while the goods were still in the robber's possession, the robbery was continuing. This was erroneous, and leads directly to the conclusion that a robber's casting away goods, showing an intention to abandon his enterprise, only aggravates the offense and makes that a complete robbery, which but for such act would be only an attempt to commit robbery. Again, if this be the law, when does the robbery end for the purposes of prosecuting for it. Suppose there had been no killing in this case, and the parties had been arrested on the corner of Third and Morrison. Upon an indictment against them for

robbery, admitting the facts proven by the state, would not a jury be justified in finding them guilty of a completed robbery? And if the robbery was complete for the purpose of prosecuting those engaged in it, why should it not be complete to avail the defendant in this case? Then suppose the parties had separated in making their escape, and each carried a portion of the plunder, and Brown had run out into Washington county, Swoards into Clackamas, and Johnson into Columbia, into each of which counties they could have got into in a short time; and suppose further that Johnson had accidentally discharged his pistol in Columbia county, and unintentionally killed a human being, would Brown and Swoards each be guilty of murder in the first degree for this? It would hardly be contended that such a conviction would be right, and yet, under the view of the law as given to the jury in this case, no other conclusion could be arrived at.

Robbery, both at common law and under the statute, is treated as a crime against the person; larceny as a crime against the property. How, then, can it be said that robbery follows the property, and not the person? The force and violence or assualt, or the putting in fear of force and violence or assault, must be to the person and not to the property; and the parties defendant once having got beyond the presence of the person, having reached such a distance that the force and violence could be no longer used nor feared, this constituent element of robbery no longer existed; they were neither assaulting nor putting in fear of assault, and consequently were not engaged in the commission of a robbery, although the larceny still continued. (2 Arch. Criminal Practice and Pleading, 1288, 1289, 1291, 1292, 1297, 1301.) In a capital case, where there is error shown, it will be presumed to have injured the defendant unless the contrary is clearly shown. (47 Cal. 103.)

J. F. Caples, District Attorney, and M. F. Mulkey, for the state:

The first objection is raised on the demurrer to the indictment. It is insisted that it does not state facts suffi-

cient to constitute a crime, because it does not allege a purpose on the part of the defendants to take the life of Louis Joseph, the person killed. In answer to this objection we have to say: That the indictment conforms to the requirements of chapter 8 of the Criminal Code of this state. It was framed after form No. 2 of the appendix and fulfills every requirement of section 71, and is sufficient under the code. (Form No. 2 of Appendix Code, 457; *State v. Dodson*, 4 Or. 64.)

But it is not necessary to allege or prove a purpose to take life in a case like this, where it is alleged that the homicide was committed in the perpetration of a robbery. It is murder in the first degree without the allegation of purpose or of deliberate and premeditated malice. Every evil intent and purpose in one engaged in such high crime is laid implied. (Crim. Code, p. 457, sec. 787; Wharton on Homicide, sec. 183; 53 Ind. 412; *People v. Vasquez*, 49 Cal. 560; 6 Am. Rep. 533; *State v. Garraud*, 5 Or. 216.)

But the indictment is not liable to the objection that it does not allege a purpose to take human life. It does allege a purpose to take the life of Sprague, not in the exact words of the statute, but in words conveying the same meaning. Section 79, page 350, of the Criminal Code, provides that "words used in the statute to define a crime need not be strictly pursued in the indictment, but other words conveying the same meaning may be used." The indictment alleges that the defendants "maliciously assaulted Daniel Sprague, with intent then and there to kill and murder him," and by the same act killed and murdered Louis Joseph. This clearly shows that the act was one of intention and purpose, and not the result of misadventure and accident. If they intended to kill Sprague, and assaulted him with a dangerous weapon with such intent while engaged in the perpetration of a robbery, every other evil purpose and intent is implied in the killing of Louis Joseph, and it is murder. At common law it would be murder; it is nothing less under our statute. (Wharton on Homicide, sec. 184.)

Where there is a taking by violence the violence follows

the act of taking until it is completed. O'Shea having been rendered insensible by the blows of the robbers prior to the taking, the act of taking, while he so continued to be insensible, is presumed to have been a taking by violence, since it was a taking in consequence of the violence and while the effect of the violence was continuing. The act of taking being then by violence necessarily implies that the entire act of taking was by violence.

The true boundaries of the robbery are limited by the acts of the robbers. These acts may continue through many minutes. They are not limited to a precise time or a particular spot. The robbery continues until the last act of the robbery is completed—until, in other words, the act of taking (the first act of taking) is completed. It is not practicable to assign any other limits to the crime. It is irrational to say that the robbery must have ended when the removal of the goods had continued precisely so many inches or feet from O'Shea, or when it had reached the doorway of the room or an aperture in the wall. Neither the act of carrying away nor the effect of the violence can have any such limits. Each case must rest upon its own circumstances, and the circumstances of this case are exceptional. Had this been a case where the robbers struck or violently snatched his purse from O'Shea's hand, and having then made away with it, killed a person two or three blocks away, while O'Shea, in the possession of his usual faculties, remained at the place where the act of violence was done, there would be greater force in the position of counsel for the defendant. In such case it might be argued that when the purse was removed beyond O'Shea's presence he relinquished it by not making pursuit, and that the robbers' possession ceased to be violent and was complete. But in the present case there was no relinquishment of his property or of pursuit by O'Shea. The violence having deprived him of his capacity to act was in fact continuing at the moment of the shooting.

It is argued that the consequence of this doctrine would be to make it possible to continue a robbery into another county, and to a distance of hundreds of miles, which

would be absurd. It is time enough to deal with such cases when they arise. It is possible, however improbable, that a county boundary line may run through the middle of a room in one part of which there may be a violent taking of property from the owner and a removal over the line into the other part, and yet the owner's presence may be immediate all the time. In the other case there may be a taking by violence, and the owner refusing to part with his property keep continuously in sight of it and continuously struggle to regain it, while the robbers are proceeding on ther way with it and repelling the owner's efforts by violence. This may continue for many miles, and yet it will scarcely be denied that the elements of the crime of robbery in this case are present all the while.

In this case the instructions of the court precluded the jury from finding that the robbery was continuing at the time of the shooting unless all these elements of the crime were present. The jury were so instructed as to preclude them from finding against the defendants unless they found that the robbers at the time of the killing were in the same act of carrying away that was begun in O'Shea's immediate presence, that there had been no interruption or delay, no putting down of the goods, no intervention of another act inconsistent with the act of carrying away; that the carrying away was continuous and uninterrupted, near in time and very near to the place where the act was begun; that it was the same act of carrying which the act of violence had given the opportunity for; that they were engaged at the moment in the furtherance of their plan, and were endeavoring to prevent its frustration. And further, they were instructed that there must have been no opportunity to secrete or secure the fruits of the robbery. These instructions do not admit of a case where the robbery can not be said to continue in any reasonable view of it.

The feloniously and violent "taking" that was commenced in the presence of O'Shea and continued uninterruptedly in his absence, away from him, was undoubtedly a portion of the *res gestae* and occurred during the criminal enterprise and in furthering its object. (3 Greenleaf, sec. 228; *Bissot*

v. State, 53 Ind. 413; *Stocking v. State,* 7 Id. 327; Revised Statutes of Indiana, sec. 388; 2 East, P. C. 709; 1 Russ on Crimes, 876; *State v. Pool,* 27 Cal. 576.)

The question in this case involves the construction of section 506, and is a new question in this state. We claim that the section should be construed as though it read: If any person shall purposely and of deliberate and premeditated malice kill another, or in the commission or attempt to commit any rape, arson, robbery or burglary, "kill another," such person shall be deemed guilty of murder in the first degree. The words "kill another" are understood after the word "malice" in the second line, and such reading evidently conveys the true meaning of the section and the intention of the legislature. The Indiana statute, which is similar to ours was so read and so construed by the supreme court of that state. (Revised Statutes of Indiana, sec. 388; *Stocking v. State,* 7 Ind. 331.)

The rule of the common law that penal statutes are to be strictly construed, does not apply to the code, but each provision is to be construed according to the fair import of its terms and with a view to effect its object and to promote justice. (Crim. Code, sec. 787.) To say that "purposely" qualifies every clause of the section is not such rendering as to give a fair construction of the sentence, but is a narrow, forced and unreasonable rendering.

How can deliberate and premeditated malice exist in the mind without a purpose? How can one perpetrate a "deliberate killing," or a "premeditated killing," without first willing or forming a purpose to kill? How can "malice exist without a purpose?" When an act is committed with deliberate and premeditated violence, can it be said that it was not intended? Is not the latter necessarily included in the former? Malice implies a wish or desire to vex and annoy; it is a wicked intention to do an injury. Can the mind deliberately and premeditatedly wish, desire and intend to do a criminal act, and in pursuance of such motive commit such act unintentionally and without a purpose to commit the criminal act? This would be absurd. When then, it is conceded, as it is in the case cited in *Robbins v.*

State, 8 Ohio State Reports, 177, that where a homicide is committed in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, "deliberate and premeditated malice" is implied, how in human reason can it be said that guilty purpose and intention are not implied as well? (27 Cal. 585, 586; Am. Crim. Law, 5 ed., sec. 1084.)

By the Court, KELLY, C. J.:

The facts of this case, as they appear in the bill of exceptions, are substantially as follows: On the twenty-third day of August, 1878, in the city of Portland, the defendant Brown, in company with the co-defendants, Johnson and Swoards, entered the pawnshop of Walter O'Shea, locked the door behind them, knocked O'Shea senseless, and took from his safe, near where O'Shea was assaulted, the articles named in the indictment. These were put into a valise, and with the property in their possession the defendants broke out the back windows of the pawnshop and made their escape through an adjoining store into the street. They had been observed before leaving the shop and were pursued by Sprague, a constable, who had been notified of the robbery. After running four blocks of two hundred feet each, and across two streets of sixty feet each, pursued by the constable, they were about to be overtaken. When Sprague was within twenty-five feet of them, Brown was heard to say: "Don't let us run; let us make a stand." The defendants then all stopped, turned around and drew their revolvers. Brown fired at Sprague. The pistol ball missed him, struck the side of a tree, glanced off, and killed the boy Louis Joseph. After firing this shot Brown made several motions as though he was going to shoot Sprague, who was dodging from side to side of the tree behind which he was standing endeavoring to keep out of the range of Brown's pistol. After shooting the boy Joseph, the defendants ran across the street where a delivery wagon and horse were standing, got into the wagon with the property taken from O'Shea and drove off, Brown drivin the horse and having a pistol on the seat beside him. The defendants did not know that Sprague was a constable.

The defendants were afterwards jointly indicted on the

twenty-second day of October, 1878, for the crime of murder. The crime is charged in the indictment as follows:

"Archie Brown, James Johnson and Jos. Swoards are accused by the grand jury of the county of Multnomah, by this indictment, of the crime of murder, committed as follows: The said Archie Brown, James Johnson and Jos. Swoards, on the twenty-third day of August, A. D. 1878, in the county of Multnomah and state of Oregon, were then and there unlawfully and feloniously engaged in the commission of the crime of robbery, by then and there feloniously taking, stealing, and carrying away twenty-two gold watches of the value of eleven hundred dollars; fourteen silver watches of the value of one hundred and forty dollars; two hundred fifty cent pieces, silver coin of the United States; two gold watch chains of the value of twenty dollars; the moneys and property of Walter O'Shea, from the person of Walter O'Shea and against his will, by violence to his person; and the said Archie Brown, James Johnson and Jos. Swoards, while then and there engaged in the commission of such robbery, maliciously, unlawfully and feloniously then and there assaulted Daniel Sprague with a pistol, then and there charged with gunpowder and leaden ball, by shooting at him, the said Sprague, with said pistol, with intent, him, the said Daniel Sprague, then and there to kill and murder. And the said Archie Brown, James Johnson and Jos. Swoards then and there by their said act of shooting at said Daniel Sprague as aforesaid, killed and murdered Louis Joseph by then and there shooting him with said pistol so loaded and charged with gunpowder and leaden ball as aforesaid, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon.

"Dated at Portland, in the county aforesaid, this twenty-second day of October, 1878.

"J. F. CAPLES, District Attorney."

On the twenty-eighth of October, 1878, the defendants demurred to the indictment, on the grounds:

1. That it charged more than one offense;

2. That the indictment is insufficient in law to constitute an offense.

The demurrer having been overruled, the defendant Brown was put upon his trial and convicted of murder in the first degree, as charged. On the twenty-first day of November, 1878, he filed his motion for a new trial, alleging:

1. Misconduct and irregularities of the jury that occurred during the trial;

2. Insufficiency of the evidence to justify the verdict, and that it is against law:

3. Error in law occurring during and at the trial, and excepted to by the defendant.

The motion for a new trial was overruled by the court and the defendant sentenced to be hung. From this judgment he appeals to this court. The first objection is raised on the demurrer to the indictment. It is insisted that it does not state facts sufficient to constitute a crime, because it does not allege a purpose on the part of the defendant to take the life of Louis Joseph, the person killed. The indictment is based on section 506 of the Criminal Code, which reads as follows: "If any person shall purposely and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

It is insisted, on the part of the appellant, that the indictment is insufficient, because it does not charge that the defendant purposely killed Louis Joseph while in the commission of the robbery. The case of *Robbins v. The State,* 8 Ohio State R. 131, is referred to in support of this view. It is sufficient for us to say that while the statute of Ohio, defining the crime of murder, is somewhat similar to our own, yet there is such a difference between them as to warrant us in saying that the decision in that case is not in point in construing the statute of Oregon. In that case two out of the five judges dissented from the opinion of the court upon the very point now presented for consideration and which this court is urged to adopt. The reasons ad-

duced in support of that decision are unsatisfactory, and we decline to adopt them in construing our own statute.

In an indictment for murder in the first degree under our code it is necessary to allege that the killing was done purposely, and of deliberate and premeditated malice, except in cases where the killing was done in the commission or attempt to commit any rape, arson, robbery or burglary, in which cases it is not necessary to allege in the indictment that the killing was done either purposely or with deliberate and premeditated malice. The meaning of the section, according to grammatical rules of construction, is as though it read as follows: "If any person shall purposely, and of deliberate and premeditated malice, kill another, or if any person shall, in the commission or attempt to commit any rape, arson, robbery or burglary, kill another, such person shall be deemed guilty of murder in the first degree."

When a homicide takes place in the commission of a robbery it is not necessary, in order to constitute murder in the first degree, that the one perpetrating it should purposely kill the person slain, and where purpose is not required to constitute the crime it need not be alleged in the indictment.

Section 71 of the Criminal Code declares that "the manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient in all cases where the forms there given are applicable."

The indictment in this case literally conforms to the precedent published in the appendix to the code. (*State of Oregon v. Dodson,* 4 Or. 64.) And we hold it to be good and sufficient in law.

On the trial of this cause, and during the impaneling of the jury, the following proceeding took place, as appears from the bill of exceptions: "Chas. Mitzner, a juror, being called to sit as a juror on the above entitled case, in response to questions upon the *voir dire* touching his qualifications to serve as such juror, answered, among other things, as follows: 'I have now an opinion as to the guilt or innocence of this defendant. It would take evidence to remove such opinion from my mind.' Whereupon defendant, by his

counsel duly challenged said juror for cause, and the court propounded the following question to said juror: 'What do you mean by an opinion that would take evidence to remove? Do you mean that you could find this defendant guilty if no evidence at all were introduced?' To which question by the court as aforesaid, the said juror answered as follows: 'Of course, if the evidence should be different from what I heard it, I could not find him guilty.' The juror answered much more to the same effect as that stated in the foregoing answer, among the rest that he had no fixed opinion. Whereupon the court overruled defendant's said challenge to said juror, to which question by the court, and answer from said juror, and the overruling of said challenge the said defendant, by his counsel, then and there duly excepted."

It is now insisted that the circuit court erred in overruling the defendant's challenge to the juror. Section 185, page 143, of the code, declares that, "a challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 183. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances, that the juror can not disregard such opinion, and try the issue impartially."

It is very questionable whether the decision of the court in sustaining or overruling the challenge for actual bias in a juror is the subject of review in this court. We are inclined to think it is a matter altogether discretionary with the court, after taking all the circumstances into consideration. As this point was not argued, we do not decide it now. Certainly it can not be considered here, unless all the testimony be preserved which the court had or heard upon the trial of the challenge; and it appears from the record that this was not done. From what was preserved we think the challenge was properly overruled.

The next assignment of error arises under the bill of ex-

ceptions, and is as follows: "The regular panel of jurors having been exhausted before a jury in said case could be obtained, the court ordered a special venire to issue, directed to the body of the county, and to be drawn therefrom. In pursuance of which special venire so issued as aforesaid, the sheriff summoned, among others, one Hosford, who upon examination made by the defendant's counsel touching his qualifications to serve as a juror in said case, among other things, answered as follows: 'I was present in the court-room this morning during the drawing of jurors in this case, and was summoned immediately after adjournment of court and while I was on the court-house steps; am not on the regular panel.' Said juror stated that he was a farmer and resided some miles from the city. Defendant, by his counsel, objected to said juror on the ground that he was a bystander, and not drawn from the body of the county, in accordance with the special venire; and thereupon challenged said juror for cause. The court overruled the challenge, and defendant, by his attorneys, then and there to such overruling of such challenge duly excepted."

Hosford might have been a bystander when the court was in session in the morning, but after adjournment he was not. He resided some miles from Portland, and was of the body of the county.

The next assignment of error arising under the bill of exceptions is as follows: "On Tuesday morning, after the coming in of court and jury, the court announced that it had been brought to the attention of the court that there had been misconduct on the part of some of the jurors during the morning, and previous to the meeting of court. That it had been reported to the court that one of the jurors had, during the morning, and against the order of the court in that respect, before made for the confinement of the jury, separated from his fellows and had gone out of the jury room to the stairs leading to the lower story of the court-house, and had brought a newspaper to the jury room. It was at an early hour, about half-past eight o'clock A. M. when the juror did this. It did not appear that he saw or

conversed with any person while so out, and the paper which he obtained and took to the jury room was the Daily Standard of that day, a copy of which is hereto attached and made a part of this bill of exceptions. The court thereupon inquired of the jury if such was the fact, when the jury replied in the affirmative. Whereupon the court submitted to counsel for the defense whether they would go on and try the case with the jurors already called as part of the jury? Counsel for the defense refused to waive any rights in the premises to afterwards, or at that time avail themselves, representing defendant, of any misconduct on the part of the jury; when the court offered to discharge the jury and draw a new jury. Whereupon counsel for the defense stated that they would except to such discharge of the jury by the court, and to any order calling a new jury. Upon which, at the request of counsel for the state, the court allowed the jurors to sit, and the drawing of the jury was continued with the jurors already drawn as part of the jury to try said case. To all of which defendant, by his counsel, then and there duly excepted."

There was nothing in the newspaper referred to in the exceptions in regard to the proceedings in the court in the case of *The State of Oregon v. Brown,* except the following: "The trial of Brown, the principal murderer in the O'Shea-Joseph tragedy was called in the circuit court. The afternoon was consumed in marching in citizens to serve as jurymen, most of whom were quickly bounced." We can not conceive how a juryman possessing common sense could be influenced in any way, either for or against the defendant, by reading that paragraph. The statute says: "Neither a departure from the form or mode prescribed by this code in respect to any pleadings or proceedings, nor any error or mistake therein renders it invalid, unless it has actually prejudiced the defendant or tend to his prejudice in respect to a substantial right." (Crim. Code, 362, sec. 170.)

We see nothing improper in the court permitting jurymen sitting in the trial of a criminal cause to read newspapers when the trial is not progressing, if such papers

contain no testimony or comments upon the case which they are impaneled to try.

When the testimony in the case was all before the jury, the defendant, by his counsel, asked the court to instruct the jury as follows: "If you believe from the testimony in this case that the boy, Louis Joseph, was actually killed by a pistol shot fired by the defendant, and that said shot was fired, not at said Louis Joseph, but at one Daniel Sprague, and that the killing of said Louis Joseph was not purposely intended, you can not find the defendant guilty of murder in the first degree." We hold that there was no error committed by the court below in refusing to give this instruction. The defendant was accused in the indictment of having killed Louis Joseph in the commission of a robbery, and if the evidence given on the trial satisfied the jury beyond a reasonable doubt that such was the fact, then no purpose or intention to kill was required to be proven in order to constitute murder in the first degree. The instruction asked was not applicable to the case, and was properly refused by the court.

The next two instructions asked by the defendant's counsel may be considered together. They are as follows: "To constitute murder in the first degree in this state it is necessary that the killing be purposely done," and "To constitute murder in the second degree in this state it is necessary that the killing be purposely done." These are mere abstract propositions without any reference to the evidence in the case, and were properly refused by the court. (*Shattuck v. Smith*, 5 Or. 125.) The defendant then asked the court to give the jury the following instructions: "If you believe from the evidence in this case that the killing of Louis Joseph occurred not in the building occupied by Walter O'Shea, and not at the place nor in the building where the property mentioned in the indictment was stolen, if any was stolen, but that such killing occurred some two or three blocks removed therefrom, and while the defendant Brown was endeavoring to escape, you can not find the defendant guilty of murder in the first degree." "To constitute murder in the first degree, the unlaw-

ful killing must be accompanied with a clear intent to take life."

"I charge you that a robbery is complete when the goods which are the subject of the robbery are removed from the person and immediate presence and control of the party robbed." "If, from the testimony before you, you have a reasonable doubt as to whether defendant fired the shot which killed Louis Joseph, or as to whether such shot was fired with an intent to take life, or prevent pursuit, you can not find the defendant guilty as charged." "If you believe from the evidence in this case that the killing, if such was done, was committed while the defendant was trying to get away, and after the robbery was committed, you can not find the defendant guilty of murder in the first degree."

These instructions were asked by the defendant and refused by the court, to which rulings the defendant excepted.

The court, in its general charge to the jury, substantially passed upon the questions involved in these several instructions asked by the defendant; and when they each required a modification to meet the views of the court, it had a right to refuse to give them to the jury, and to give them as modified and explained by the court.

The charge to the jury was in writing, and the defendant excepted to the whole of it. We, therefore, consider together the instructions asked and the charge given and excepted to. Together they present the great question whether the case was properly or improperly submitted to the jury for their consideration. As the entire charge of the court to the jury was excepted to, we here present it, except some immaterial portions, so that it and the instructions asked may be considered together. It is as follows:

"Under our code you may, in a case like this, find the defendant not guilty, guilty of murder in the first degree, of murder in the second degree, or of manslaughter.

"Murder in the first degree is where one purposely, and of deliberate and premeditated malice, kills another, or where one while in the commission of, or in the attempt to commit rape, arson, robbery, or burglary, kills another.

"Murder in the second degree is where a person purposely and maliciously, but without deliberation or premeditation, or in the commission or attempt to commit any other felony than rape, arson, robbery or burglary, kills another, or where a person by an act imminently dangerous to others, evincing a depraved mind, regardless of life, although without the design to effect the death of any particular person, kills another.

"Manslaughter is where a person without malice, express or implied, or without deliberation, upon a sudden heat of passion caused by a strong provocation, kills another, or where a person in the commission of an unlawful act, or in the commission of a lawful act, without due caution or circumspection, involuntarily kills another.

"The difference between murder in the first degree and murder in the second, is this: There must be deliberation, premeditation and malice to constitute murder in the first degree, unless the killing is done in the perpetration of a rape, arson, robbery, or burglary, while premeditation and deliberation are not necessary to constitute murder in the second degree; but where the ingredients of premeditation, deliberation and malice are all wanting, and where there is a voluntary killing in a sudden heat, it is manslaughter.

"Under this indictment it is not necessary to prove expressly either a purpose to kill, or deliberate and premeditated malice. The indictment having alleged the killing in the perpetration of a robbery, it is only required that the robbery and the killing, in the manner alleged during the robbery, be proven to make out the case. In such a case, and under such proof, the intent to kill and the deliberate and premeditated malice are incontrovertibly implied.

"Robbery is the felonious taking of property from the person of another by force. The personal possession of the property by the party robbed may be actual or constructive. If the property is in his presence and control, though not on his person, it is sufficient. If a man knocks another down and takes from him property so in his presence and control, it is robbery. This is the well established rule of the law. There must be an actual taking and carrying away.

Such actual taking and carrying away, being necessary to the robbery, is a part of the robbery; and while those engaged in the criminal enterprise are in the act of so carrying away, they are in the act of the robbery. But such carrying away must be from the person, actual or constructive; that is, it must be the same carrying away by which the goods were removed from the immediate presence of the owner. If the goods are left, or thrown away, or concealed, and afterwards the robbers return and take them up and carry them away, this is a new asportation or carrying away and is not a part of the robbery. If there had been no interruption or delay in the removal, no putting down of the goods, no intervention of another act inconsistent with the carrying away; if the removal was continuous, uninterrupted, and near in point of time and place to the act of violence; if there had been no opportunity to secrete or secure the fruits of the robbery, and while in such act of carrying they shot and killed a person in the manner alleged, it is murder. Mr. Greenleaf, a very high law authority, speaking upon this subject of robbery, says: It is sufficient if it be proven that the taking by the robber was actually begun in the presence of the party robbed, though it was completed in his absence. The taking is not necessarily concluded by the removal of the goods beyond the presence of the owner. It may be concluded away from, and at a distance from his presence. It has been contended in this case that unless the killing, if there was a killing, took place at the precise time and place of the act of violence, it is not murder; that the robbery was completed as soon as there was any removal of goods, at the time of the violence. I direct you that such is not the law applicable in this case. There may be a completed robbery if there is any removal, however slight, of the goods taken. A case often referred to in the law books illustrates this: A person snatched a ring from the ear of a lady, but before he entirely withdrew his hand, dropped it in the curls of her hair, where it was found. It was held that there was a sufficient carrying away or asportation to make the crime complete. But in this case if the asporta-

tion had continued further the robbery would not have continued further. The precise point at which the crime is completed must vary with the circumstances of each case. As already stated, the carrying away of the goods or property which is the subject of the robbery, from the person of the owner, is a necessary ingredient in the crime. It is a part of the crime, as much so as the felonious taking or the violence. We can not, with rule and measure, mark the exact spot where the crime is completed, as we would distances upon the highway, nor can we mark the precise moment of its completion upon the dial plate. Crime is not a matter of addition or subtraction. It must be ascertained by the intentions and conduct of the persons engaged in it, by the objects which are disclosed by such conduct, and by their act in carrying out these objects.

"As already stated, if there was in this case a robbery, as alleged, and if those engaged in the robbery, within a few minutes of the act of violence, and very near the place where it occurred, were still engaged in or continuing in the same act of removing or carrying away that was begun in O'Shea's presence, and for which it was the object of the violence to afford an opportunity; if there had been no intervening act or interruption inconsistent with such carrying away, and if, while in such act, and in furtherance of it, and to prevent the frustration of their plan, the defendant, or either of his two companions (the three being together, and acting in concert from the beginning), deliberately fired at Sprague, and killed Louis Joseph, it is murder in the first degree.

"If you should find that the defendant shot at Sprague, and killed Joseph, but before such shooting the robbery had been completed, the defendant should be acquitted under the indictment. It having been alleged that while in the commission of the robbery, the defendant shot at Sprague with intent to kill Sprague, the shooting at Sprague and the intent to kill him must be proved, and they must be proved to have taken place before the completion of the robbery. An intent to commit murder is conclusively presumed from the deliberate use of a deadly weapon causing

death within a year. The statute so provides. So that, if you find that the defendant made use of a deadly weapon against Sprague, resulting in the death of the boy Joseph within a year, and that this was done before the robbery, if there was a robbery, was completed, the crime is made out as charged."

It is claimed by the defendant that the crime of robbery charged in the indictment as having been committed by Brown and his co-defendants was completed when they left the pawn shop of Walter O'Shea, and that the subsequent killing of Louis Joseph, three or four blocks away, was not done in the commission of the robbery; and exception is taken to that part of the charge of the court, which reads as follows: "To constitute robbery there must be an actual taking and carrying away. Such actual taking and carrying away being necessary to the robbery, and while those engaged in the criminal enterprise are in the act of so carrying away, they are in the act of robbery. But such carrying away must be from the person actual or constructive; that is, it must be the same carrying away or asportation by which the goods were removed from the immediate presence of the owner. If the goods are left or thrown away, or concealed, and afterwards the robbers return and take them up and carry them away, this is a new asportation, or carrying away, and is not a part of the robbery. If there had been no interruption or delay in the removal, no putting down of the goods, no intervention of another act, inconsistent with the carrying away; if the removal was continuous, uninterrupted and near, in point of time and place, to the act of violence; if there had been no opportunity to secrete or secure the fruits of the robbery, and while in such act of carrying, they shot and killed a person in the manner alleged, it is murder."

The defendant admits that he committed a robbery in the pawn shop of O'Shea, but insists that the crime was completed when he and his co-defendants forcibly seized the property described in the indictment, and being completed, he denies that the killing of Joseph was done in the commission of the robbery. We do not assent to the correctness of

this conclusion. If this interpretation be given to that part of section 506 which declares that any person who kills another in the commission of any rape, arson or robbery, shall be guilty of murder, then the statute will be practically nullified. If this construction be given to that section, then a man who commits a rape which results in the death of the woman, will insist that the crime having been perpetrated before his victim died, he did not kill her in the commission of that offense, and therefore he could not lawfully be punished for the crime of murder under that section of the law. When an incendiary appplies his torch to a dwelling-house and sets it on fire, he has committed the crime of arson. If an hour afterwards, unknown to him, a human being should perish in the flames, ought the perpetrator of the deed to escape being punished as a murderer, because his victim was burned to death after the house was aflame?

The burglary is complete where the burglar, with intent to commit a crime, breaks and enters a dwelling-house at night. If after having committed the crime, by entering the house, he should slay the owner while defending his property, could he escape punishment as a murderer under this statute, because the killing took place after the breaking into the house?

These crimes are referred to to show what would be the effect of construing the statute as the defendant insists it ought to be construed in the case under consideration. Must the killing precede the commission of the rape, arson or burglary in order to constitute murder under that part of the section? If so, then no one can be convicted under it, for the killing never takes place before the commission of either of those offenses.

When a person takes with force or violence the goods of another from his person or presence and against his will, he has committed robbery. Or to use the more exact phraseology of the old writers upon English criminal law, "an act of violence constitutes robbery," but it does not necessarily complete the crime. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery

itself may be prolonged beyond the time when that liability is fixed. When Brown and his co-defendants took the property by force from the person or presence of O'Shea, they committed the crime of robbery so far as to render themselves liable to punishment for it, but the robbery in contemplation of law was not completed until the taking and carrying away was ended. The asportation of the goods is a necessary ingredient of the robbery, as essential to complete the crime as the violence to the owner, or as the seizure itself. And while anything remains to be done by the robbers to secure complete control over the property taken the robbery is incomplete. The act of taking and carrying away in the case of Brown and his co-defendants, commenced when the seizure was made in the pawn-shop of O'Shea, and continued until they had unmolested dominion over the property which they had taken. When they first acquired that control the robbery was ended, and not before.

From the statement of facts in the bill of exceptions we are satisfied that the asportation was one continuous act, from the violent seizure when O'Shea was stricken down senseless, until after Louis Joseph was killed. There was no cessation in flight; no casting away or secreting the property; no division of the spoils; no disposition to relinquish control of the goods. But on the contrary, there appeared to be a concerted action to keep possession of them and to defend that possession even if it became necessary to take human life to secure it.

This we regard as the fair construction to be put upon section 506 of the criminal code, and its application to the case of the defendant. The statute is to be construed according to the fair import of its terms; and not according to the rule of the common law, that penal statutes must be construed strictly. (Crim. Code, sec. 767.) It is the same construction as that which the supreme court of Indiana placed upon a statute of that state similar to our own. To give it any other construction would, as has already been stated, practically nullify that clause of section 506 and render it almost impossible to convict any one of murder who should kill another

in the commission or attempt, to commit any one of the crimes enumerated.

After a careful consideration of this important point we are satisfied that there was no error in that part of the charge to the jury by the circuit court.

There is an allegation of error in the charge of the court to the jury, when the instruction was as follows: "If you should find that the defendant shot at Sprague and killed Joseph, but before such shooting the robbery had been committed, the defendant should be acquitted under the indictment." In giving this instruction we think the court erred, but it was an error in favor of the accused, and could not possibly prejudice his case before the jury. It is claimed, by the defendant, that this instruction left it optional with them only to convict the defendant of murder in the first degree, or to acquit him altogether.

We do not so regard it. The court had, in a former part of its charge to the jury, said to them: "Under our code you may find the defendant not guilty, guilty of murder in the first degree, of murder in the second degree, or of manslaughter." It was an error that worked no prejudice to any substantial right of the defendant, and under section 170 of the criminal code, is not such a one as to require a reversal of the judgment of the court below.

Having given this case the full consideration which its importance demands, we find no error in the proceedings of the circuit court, and its judgment is affirmed.

THE STATE OF OREGON, Respondent, v. JAMES JOHNSON, Jointly Indicted with ARCHIE BROWN and JOSEPH SWOARDS.

ACTS OF EACH PERSON CONCERNED IN CRIMINAL ENTERPRISE INVOLVE ALL. All persons associated together in a criminal enterprise are to be held equally responsible for any crime committed by either in furtherance of their common object.

INTENTION TO KILL — NEED NOT BE SPECIFIC AS TO PERSON KILLED. — Where one intending to kill another shoots at him and missing his aim kills a third person, he is equally guilty as though he had killed the person at whom the shot was fired.

APPEAL from Multnomah county. The facts are stated in the case of the *State v. Archie Brown, ante,* 186.

C. A. Ball, Wm. M. Evans and E. D. Shattuck, for the appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for the State:

By the Court, KELLY, C. J.:

The defendant, James Johnson, was jointly indicted with Archie Brown and Joseph Swoards for the crime of murder in the killing of Louis Joseph, while in the commission of a robbery. The facts, as proven on the trial, appear to be very meagerly stated in the bill of exceptions; but so far as they appear, they are substantially the same as in the case of *The State of Oregon v. Archie Brown,* just now decided. The exceptions taken to the rulings of the circuit court in the admission of testimony are quite numerous; but they have not been pressed upon the consideration of the court, and are, therefore, presumed to have been abandoned. We have examined them, and find no error in the rulings of the court below upon the admission of testimony.

The defendant asked several instructions to be given by the court which were refused. He also took exceptions to the instructions of the court to the jury in the general charge. We have considered them, and with one exception, to be presently specified, find that they are substantially the same as those considered by this court in the case of *The State of Oregon v. Archie Brown.* It is needless to here recapitulate what we decided there. The defendant asked the court to instruct the jury as follows:

The law is too well settled to be now controverted, that all persons associated together in a criminal enterprise are to be held equally responsible for any crime committed by either of them in furtherance of their common object. In the case of *The People v. Vasquez,* 49 Cal. 561, quite similar in many respects to the one now under consideration, the supreme court of that state held that "if several are associated to-

gether in the commission of a robbery, and one of the associates does not intend to take life, and prohibits the others from taking life, yet if one of his associates takes life while they are engaged in the robbery and in furtherance of the common purpose to rob, he is as much guilty of murder in the first degree as though his own hand had given the fatal blow." It is equally well settled that if one person intending to kill another shoots at him, and missing his aim kills a third, he is as guilty as if he had killed the one at whom the shot was fired. This is an elementary principle of criminal law.

Finding no error in the proceedings of the court below, its judgment is affirmed.

DE LASHMUTT & OATMAN, and THOMAS CONNELL, Appellants, v. W. R. EVERSON et al., Respondents.

Equity Practice—Verdict of Jury, Effect given to.—This court adheres to its decision in the case of *Swegle v. Wells*, made at the present term, that the verdict of a jury upon questions of fact submitted to them by the court on the trial of an equity suit is not conclusive upon the court, yet it should not be disregarded unless it be clearly against the weight of testimony.

Promissory Note—Purchaser Before Maturity—Notice. — Where the holder of a negotiable promissory note purchases it for a valuable consideration before maturity, the maker will not be permitted to set up fraud or a want of consideration as a defense to the payment of the note unless the holder had notice of these defects before he bought it. If, however, the holder buys such note from the payee before maturity, with full knowledge at the time of the purchase that it was obtained from the maker by fraud or without any consideration, he takes subject to all equities and all defenses which would exist between the original parties to the note.

Idem—Estoppel.—The holder of a negotiable promissory note purchased before maturity, and for value, but with notice that it had been obtained from the maker by fraud and without consideration, can not by way of estoppel prevent the maker from setting up such defenses as against him, by showing that the maker before the purchase told him that he had no objection to his buying the note from the payee, if it appear that at the time such statement was made the maker was ignorant of such fraud and want of consideration.

Idem—Admissions in Pleading. — Where the holder of a negotiable promissory note who bought it before maturity, with notice that it was obtained from the maker by fraud or want of consideration, brings suit against the maker and alleges in the complaint that he bought the note from the payee, and this allegation is admitted in the answer, such holder will not be allowed to prove on the trial that he received it from a prior holder without such notice of fraud or want of consideration.

Appeal from Washington county. The facts are stated in the opinion of the court.

Caples & Mulkey, for appellant Connell.

Claude Thayer, for appellants De Lashmutt and Oatman.

There is no precedent for the submitting of a case to a jury upon testimony taken before a referee. Such a practice is contrary to the spirit of the law. (*Green v. Gouverneur & Kemble*, 5 Johns. Cases, 501, 507, 508.) The defense of warranty and false and fraudulent representations can not be joined in one plea. They are antagonistic; one being in the nature of a contract and the other that of a tort. (*Edick v. Crinn*, 10 Barb. N. Y. 446; *Chandelor v. Lopus*, 1 Smith Leading Cases, 291; *Rose v. Hurley*, 39 Ind. 78.) Admitting that the defenses of warranty and fraud could be set up in the same answer, they should be pleaded as separate defenses. (See Code, p. 120, sec. 72; *Benedict v. Seymour*, 6 How. P. R. 298; *Lippincot v. Goodwin*, 8 Id. 242; 2 Estee's Pleadings, 263; *Rolfes v. Russell*, 5 Or. 400, and cases there cited; *Dunning v. Cresson*, 6 Or. 241; *Rose v. Hurley*, 39 Ind. 78; *Pike v. Fay*, 110 Mass. 134; *Barber v. Morgan*, 51 Barber 116; 18 How. P. 321.) The representations must be proven to have been made during the negotiations or at the immediate time of the sale. (Moak's Van Santveerd's Pleadings, 472.)

"Every person reposes at his peril on the opinion of others, when he has equal opportunity to form and exercise his own judgment—*simplex, commendatis non obligat.*" (2 Kent, 484.) Representations as to profits are mere matters of opinion, and are not such as constitute fraudulent representations. They are not such as a purchaser has a right or is supposed to rely on. (*Sandford v. Handy*, 23 Wend. 268;

Fowley v. Cowgill, 5 Blackf. 18.) They must establish a total failure of consideration. If only a partial failure is established it is not sufficient. (*Water v. Armstrong,* 5 Minn. 450; *Dunning v. Cresson,* 6 Or. 241; *Wheelock v. Barney,* 27 Ind. 463; *Oakley v. Boorman,* 21 Wend. 594; *Wentworth v. Dows,* 117 Mass. 14.) The mere fact that the recipe would not produce stone would not avoid the note, if the patent right for the states purchased possessed a market value. (*Gifford v. Carville,* 29 Cal. 589.) The patent right for Virginia and West Virginia possessed a market value up to November or December, 1876, sufficient to constitute a consideration for the note. In case of failure after the transfer of the note, such defense can not be set up. *Splivallo v. Patten,* 38 Cal. 138; *Nevith et al. v. Meyer,* 33 Ind. 511.) Respondents should have, within a reasonable time, tendered a reassignment. (*Rose v. Hurley,* 39 Id. 83; *La Fayette Agri. Works v. Phillips,* 47 Id; *Perley v. Balch,* 23 Pick. 283; *Lawton v. Kelly,* 61 Barb. 566; *Gifford v. Carvill,* 29 Cal. 589.)

If the defense relied upon is that of warranty, the respondents, by the production of the written and sealed assignment containing a warranty of title, have restricted themselves from the proof any other or further warranties. They can not introduce any parol evidence to vary or extend the terms of that instrument. (Code, 248, sec. 682; 1 Parsons on Con. 576; *Pouree v. Adams,* 12 East, 1; *Rose v. Hurley,* 39 Ind. 81; *Johnson v. McCabe et al.* 37 Id. 540; *Goss v. Eagle Sugar Refinery,* 103 Mass. 333.) The maxim of the law is *expressum facit cessare tacitum.* (*McClure v. Jeffrey,* 8 Ind. 83; *Van Ostrand v. Reed,* 1 Wend. 424.)

A warranty is a contract, and it must appear that Everson was a party and assented thereto. The representations appearing in the recipe can not be construed into warranties unless it appears in some manner that they were regarded as such by the parties. They must have become a part of the *res gestae.* (1 Parsons on Con. 580 and N. M.; *Hotchkiss v. Gage,* 26 Barb. 142; *Seixas v. Wood,* 2 Caines' Cas. 48.) But if all defenses claimed by respondents were properly pleaded

and amply proven they can not be deemed to affect the rights of appellants herein.

First, they took the note from Wm. Connell, and he was an innocent holder. The appellants became entitled to all his rights, and are not subject to any equities between the original parties to the note. (*Mornyer v. Cooper,* 35 Iowa, 258; *Peabody v. Rees,* 18 Id. 571; Story on Prom. N., sec. 119; *Riley v. Schawcker,* 50 Ind. 592.)

Respondents can not take advantage of any defenses unless they can prove that the appellants knew fully and completely all the defenses and equities that existed between Everson and Leathers. Mere suspicion that there was fraud or defects is not sufficient, nor is knowledge sufficient to put one upon inquiry. Actual knowledge must be proven, and the total burden of proof rests upon respondents. (*Hotchkiss v. Nat. Bank,* 21 Wall. 359; *Mague v. Badger,* 34 N. Y. 247; *Riley v. Schawcker,* 50 Ind. 592; *Sacket et al. v. Kellar,* 22 Ohio St. 554.)

Catlin, Killin & Nicholas and E. C. Bronaugh, for respondents:

The fact that this note was offered for one thousand five hundred dollars, when it was perfectly good, was enough to put the parties upon inquiry. The supreme court of Illinois, in *Taylor v. Achison,* 54 Ill. 196, held that the fact that the note was for a patent right which was being sold by strangers going through the country on that business was enough to put a purchaser on inquiry.

This court, in *Carter & Mason v. Portland,* 4 Or. 339, 350, in an ably argued case and well considered opinion, said: "We think that notice should, with rare exceptions, be implied where a party is shown to have such knowledge as would superinduce further inquiry in an honest, conscientious man." "It is a well settled principle that to constitute notice it is not necessary that it should be in the shape of a distinct and formal communication." (*Bohlman v. Coffin,* 4 Or. 318.)

The sale of a patent right for the manufacture of an article which is known to the vendor to be useless and worthless ren-

ders the contract void for want of consideration. And while it has been held that if a bill of sale be given and accepted which contains no clause or covenant of warranty as to usefulness, oral representatives of the vendor in that particular, made prior to or contemporaneously with the writing, cannot ordinarily be given in evidence, because such proof tends to vary or enlarge the written contract, yet where the element of fraud or deceit enters into the making of the representations, as when the vendor knew at the time of making them that they were false, and that the article manufactured by the process was worthless and useless, and this is alleged in the pleadings and established by the proof, the contract will be avoided both at law and in equity. (*Dickinson v. Hall*, 14 Pick. 217, 220; *Jolliffe v. Collins*, 21 Mo. 343; 1 Parsons on Con. 436, 437; *Rowe v. Blanchard*, 18 Wis. 441; *Lester v. Palmer*, 4 Allen, 145; *Taylor v. Achison*, 54 Ill. 196.)

To prove a conspiracy to defraud Everson, he may show conspiracy to defraud others about the same time. (2 Hilliard's Torts, 309.) The manner in which the appellants set up their acquisition of this note in the complaint casts a suspicion upon their title. After showing the making of the note, they say "that subsequently, to wit: on the twenty-fifth day of October, 1876, said L. L. Leathers, for a valuable consideration to him in hand paid, indorsed said note and passed the same to these plaintiffs."

If the note was not taken from Leathers merely for a cover and for the purpose of collection and division by halves, why not say that they bought the note, or that Leathers sold and delivered it to them? Why not fix the date?

By the Court, Kelly, C. J.:

This was a suit to foreclose a mortgage given by respondents, W. R. and Margaret Everson, to secure the payment of a note dated October 9, 1876, made by W. R. Everson to L. L. Leathers, for three thousand dollars, and made payable to L. L. Leathers, or bearer, one year after date, with interest at the rate of ten per centum per annum.

The complaint is in the usual form in foreclosure cases, and, among other things, it is averred that before the note became due the said Leathers, for a valuable consideration to him paid, indorsed the note and passed it to the appellants, who were then the owners and holders thereof.

Respondents W. R. and Margaret Everson, in their answer allege that there was no valuable consideration received by W. R. Everson for making said note; that at the time it was made Leathers represented to him that he was the owner of a patent process for manufacturing artificial stone, and that by a recipe given in and with said patent, durable and valuable building stone could be manufactured; that he (Everson) believed said representations, and said Leathers assigned his interest in said patent for Missouri and West Virginia, which assignment was the only consideration for making said note. Respondents then allege that the patent was entirely worthless, and that the process by said recipe would not make building or any other kind of stone of any value whatever; that the compound made by the recipe is brittle and soft, and utterly worthless; that Leathers, when he received the note and made the assignment, knew all this, and that he falsely, fraudulently and deceitfully, and for the purpose of cheating said Everson, represented to him that the patent was valuable and would produce valuable building stone.

The answer also alleges that the appellants, at the time they took said note from Leathers, knew that it was for no other consideration than the assignment of the said patent right; that they knew at the time that it was utterly valueless and that it would not make stone of any value; that they knew that Leathers had falsely represented to said Everson that the patent was valuable, and that he had fraudulently procured him to make the note, and that there was no valuable consideration therefor.

The appellants, in their replication, denied these allegations in the answer, and alleged that before maturity thereof they purchased said note, paying therefor one thousand five hundred dollars; that before purchasing the same they inquired of Everson as to the validity of said note, and he rep-

resented to them that the note was genuine, and relying upon such representations they purchased it, with the full knowledge and approval of Everson. After the issues were made the court appointed a referee to take and report the testimony, and when the case was called for trial, on motion of respondent's counsel, the court submitted the following questions to a jury:

1. Was there a *bona fide* and valuable consideration for the note sued on in the case?

2. Did the payee named in said note procure the payor thereof to execute the same by fraud or deceit? If yea,

3. Did the plaintiffs, or any of them, have notice that the note had been so obtained, or was without a *bona fide* or valuable consideration before or at the time it was transferred to them?

And it was ordered that a jury be formed to inquire of the same. A jury having been impaneled and sworn, and having heard the evidence adduced, the arguments of counsel and charge of the court, returned the following verdict: "To the first question the jury say that they find and make answer that there was no valuable consideration for the note sued on in this case. To the second question the jury say they find and make answer there was fraud and deceit in procuring the note. To the third question the jury say and find and make answer that the plaintiffs had notice that said note was obtained by fraud and deceit, and was without a *bona fide* and valuable consideration before or at the time it was transferred to them." The court also submitted the following question to the jury: "Did William Connell hold and own the note sued on in this suit before it came to the ownership and possession of the plaintiffs?" To this question the jury answered "No."

In the case of *Swegle v. Wells,* decided at the present term of this court, we had occasion to consider under what circumstances it is proper to submit questions of fact arising in a suit in equity to the determination of a jury. It was there held that as section 392, page 192 of the code, did not provide in what cases it became necessary or proper to inquire of a fact by the verdict of a jury, courts of equity must be gov-

ernied in this respect by the general equity practice; and that when the facts in a case were strongly controverted and the evidence nearly equally balanced, it was proper to submit these controverted facts for their determination. This court further held that where a verdict has been taken in such cases in the court below it comes up with the transcript on appeal and may be read in evidence, and while not conclusive upon the court should not be disregarded unless clearly against the evidence."

The decision in that case must govern us in the determination of this. Whether artificial stone fit for building or other purposes could not be made by the process set forth in the Leathers patent was a fact strongly controverted in the evidence, and we think the weight of testimony decidedly is that it could not. If stone of a good quality could be made by this patented process as cheaply as represented, it is somewhat singular that no one of the many who, as it appears from the evidence, became purchasers of the patent right, has ever considered it worth while to manufacture the stone, or has ever deemed his investment in the Leathers patent to be of the least value. The jury necessarily came to this conclusion when they found that there was no valuable consideration given for the note of respondent.

The second finding of the jury that there was fraud and deceit on the part of Leathers in procuring the note from Everson is in accordance with the evidence in the case. As the patented process was worthless this fact must have been known to Leathers, and it follows, as a matter of course, that he perpetrated a fraud in obtaining the note in question for the transfer of a thing that was of no value whatever.

The third finding of the jury is that the plaintiffs had notice before they purchased the note that it was obtained through fraud and deceit on the part of Leathers, and that there was no valuable consideration given by him for it. This averment in the answer was the most strongly controverted of any in the case. The testimony upon it is voluminous; some of it is irrelevant, and much of it bears but remotely upon the

question at issue, and were it left to the court in the first instance to determine on which side was the preponderance of testimony upon this point, it would be a matter of some difficulty to reach a correct conclusion.

As this point was strongly controverted, the evidence conflicting and nearly evenly balanced, it was, as stated in the case of *Swegle v. Wells,* a proper matter to be submitted by the court to a jury to determine the disputed facts, and their verdict should not be disregarded by the court unless it was clearly against the weight of the evidence. We regard their finding as conclusive upon the court. These facts having been found by the jury, the conclusions of law arising upon them are easily determined. It is undoubtedly well settled that a *bona fide* holder of a negotiable note for a valuable consideration, without notice of facts which would impeach its validity between former parties, if he takes it under an indorsement made before the note becomes due, holds the title unaffected by these facts, and he may recover thereon, although as between the antecedent parties the transaction may be without any legal validity.

It is equally well settled that where a negotiable note has been obtained from the maker through fraud, or without any consideration, and the payer has transferred it by indorsement before becoming due, to a holder who had notice before taking it that the note was procured through fraud or without any consideration, such holder will take it subject to all the equities and all the defenses which would exist between the original parties to the note. It is insisted, however, by appellants, that Everson is estopped from making any defense to the payment of the note, because Thomas Connell, one of the appellants, before purchasing it, asked him whether he had any objection to their buying the note from Leathers, when respondent replied that he had not—that he would rather that appellants should have it than Leathers.

This would be a good defense if appellants were not aware that the note had been obtained from the maker by fraud and without consideration; and at the same time the respondent, when he made this statement, was fully informed of these de-

fects in regard to it. But the jury in their verdict say that the appellants had notice that the note was obtained by fraud and deceit and without consideration before they purchased it, and therefore this defense can not be allowed. This was the exact point decided by the supreme court of Ohio in *Sackett v. Kellar,* 22 Ohio St. 554. In that case the court declared that the holder of a negotiable promissory note, purchased before maturity and for value, but with notice that it had been obtained from the maker by fraud and without consideration, can not by way of estoppel prevent the maker from setting up such defenses as against him by showing that the maker, before the purchase, had informed him that the note was all right and would be paid at maturity if it appear that at the time such declarations were made the maker was ignorant of such fraud and want of consideration, and that the holder at the time believed him ignorant thereof, unless he also show that he informed the maker of the facts which had previously come to his knowledge affecting the validity of the note.

This case in Ohio was similar in all respects to the one under consideration, and we think the principles there held were correct and should be adopted here. It is further insisted by the appellants that the defense interposed by the respondents ought not to be allowed, because they took the note from William Connell, who first purchased it from Leathers, and who was an innocent holder, having bought it without any notice of the equities existing between the original parties. It is a sufficient answer to say that this defense is not made in the pleadings of the parties. In the complaint it is alleged that for a valuable consideration to him paid, Leathers indorsed and transferred the note to the appellants, and the answer admits that they took it from Leathers.

If the complaint had been amended, as was done in the case of *Mornyer v. Cooper,* 35 Iowa, 258, cited by counsel in support of the position, then evidence of the fact that William Connell was a purchaser without notice of any defects in the note would have been proper. At it was, that evidence was irrelevant to any issue made by the pleadings, and inadmis-

sible to show that William Connell was an innocent holder of the note. Not being made an issue in the case, the defendant was not expected to be prepared to disprove it. This disposes of all the questions raised on the appeal, and we think the decree of the court below should be affirmed.

Decree affirmed.

CHARLES SWEGLE, Appellant, v. R. F. and EMMA WELLS, Respondents.

EQUITY—QUESTION OF FACT MAY BE SUBMITTED TO JURY.—In equity, the general rule under the code is that both issues of the law and fact shall be tried by the court, but whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, a statement of the question may be made submitted to them, and their verdict may be read in evidence at the trial.

IDEM.—The general equity practice must be looked to to determine when it is necessary and proper to inquire of a fact by a jury. Under such practice, if the facts are strongly controverted and the evidence nearly equally balanced, or if the difficulty upon the facts are too great to be removed by the report of the master or commissioner, in the opinion of the chancellor, an issue of fact may be directed to be tried at law to relieve the chancellor's conscience, and that he may be satisfied by the verdict of a jury of the truth of the matters in controversy.

IDEM—EFFECT OF VERDICT ON APPEAL.—When a verdict has been taken in such case in the court below, it comes up with the transcript on appeal and may be read in evidence, and, while not conclusive upon the court, it should be disregarded unless clearly against the evidence.

NEGOTIABLE PAPER—PAYMENT, AUTHORITY TO RECEIVE.—While a person not in actual possession of negotiable paper is presumed from that fact alone to have no authority to receive payment thereon, yet such presumption may be rebutted and overcome by evidence showing actual authority.

APPEAL from Polk County. The facts are stated in the opinion of the court.

Thayer & Williams, W. H. Holmes and Warren Truitt, for appellant.

Knight & Lord, B. Hayden and J. A. Stratton, for respondents:

This was a suit to foreclose a mortgage to secure the payment of a promissory note for one thousand five hundred dollars, made by the respondent, R. F. Wells, to N. Henton, dated February 4, 1876, due one year after date. The complaint alleges that the note was assigned to plaintiff in February, 1876, and that no part thereof has been paid except one hundred and eighty dollars, interest to February 3, 1877; two hundred and eighty-five dollars paid February 3, 1877, and one hundred and fifty dollars paid November 2, 1877, and claims a balance of one thousand one hundred and seventy-four dollars and thirty-five cents, and interest from November 2, 1877.

The answer admits the making of the note and mortgage in question; denies all the other allegations of the complaint, and alleges in effect as a further and separate answer: 1. That one C. W. Shaw and N. Henton were partners in the broker business in Salem, and were at the dates mentioned in the complaint the agents of appellant for the purpose of negotiating and collecting loans; that the money for which the note and mortgage were given was the property of appellant, and in making said loan and taking said note and mortgage said Shaw & Henton acted as his agents. 2. That on the seventeenth day of October, 1876, respondents paid on said note to said Shaw & Henton, agents as aforesaid, the sum of one thousand dollars, gold coin, and on the thirteenth day of November, 1876, paid to said Shaw & Henton on said note the further sum of five hundred dollars, gold coin; that on the second day of November, 1877, respondents paid to appellant on said note the further sum of one hundred and fifty dollars gold coin, said sum being seven dollars and seventy-three cents more than was then due.

For a second further and separate answer respondents allege: 1. That for their pretended services in securing said loan said Shaw & Henton charged them seventy-five dollars, which they paid; that this sum was thus charged upon an unlawful agreement between such agents and the appellant, by which the latter was to receive one half of the sum so charged in addition to the twelve per centum interest allowed by law

for the money loaned. The appellant moved to strike out the last separate answer. The motion having been denied, he replied, putting in issue all the new matter in the answer.

A jury was called and the facts in issue submitted to them, as follows:

1. Is the plaintiff (appellant) the owner and holder of the note and mortgage sued on?

2. Were Shaw & Henton the agents of plaintiff when they loaned to defendants (respondents) the money named in the note and mortgage sued?

3. Did the defendants pay to said Shaw & Henton any money to be applied on said note and mortgage, and if yes, when was the same paid, and how much money was paid at each time?

4. If any money was paid to Shaw & Henton on said note and mortgage, were said Shaw & Henton then the agents of said Swegle, and authorized by him to receive said money for him?

5. Did the plaintiff receive as a consideration for loaning said money secured by said note and mortgage any part of the commission charged defendants by said Shaw & Henton for negotiating said loan for them, and if yes, then how much?

The jury found for the appellant upon the first question, and upon all the other questions their verdict was in accordance with the allegations of the separate answer. This verdict was offered in evidence and the court found the facts in conformity therewith, and rendered a decree accordingly.

By the Court, PRIM, J.:

This case comes here on appeal to be tried *de novo* on the pleadings, evidence and verdict of the jury rendered upon the issues of fact submitted to them in the court below. It is provided by section 392, page 192, of the code, that "In suits of equity both issues of law and fact shall be tried by the court unless referred." The same section further provides that: "Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may

direct a statement thereof, and that a jury may be formed to inquire of the same. The statement shall be tried as an issue of fact in an action, and the verdict may be read as evidence on the trial of the suit." As the code does not provide when or in what cases it becomes necessary or proper to inquire of a fact by the verdict of a jury, it becomes necessary to look into the general equity practice in order to determine that question. Mr. Greenleaf, in speaking upon this subject, says: "The chancellor may if he pleases assume to himself the determination of every matter of fact suggested by the record, but if the facts are strongly controverted and the evidence is nearly equally balanced; or if one of the parties has a peculiar right to a public trial upon the fullest investigation, as if the will of his ancestor or his own legitimacy and title as heir at law is questioned, or the chancellor feels a difficulty upon the facts too great to be removed by the report of the master or commissioner; in these and other cases of like character it is the practice in general for the chancellor to direct an issue to be tried at law, to relieve his own conscience and to be satisfied by the verdict of a jury of the truth or falsehood of the facts in controversy." (3 Greenl. on Ev., sec. 261; 2 Daniell's Chancery Practice 1071; 15 Cal. 378.)

Thus it will be observed that under the old chancery practice the verdict of a jury having been taken by the chancellor as merely advisory to his conscience upon certain controverted facts, was not regarded as conclusive or binding upon him, but might be disregarded and treated as a mere nullity if in his opinion it was not supported by the evidence. And in this case it appears from the record that the issues of fact made by the pleadings were submitted to a jury in the court below, and without any objection whatever being interposed there by either party. And it is claimed here for the first time, on behalf of appellant, that this was not a proper case to be submitted to a jury, but that the issues of fact as well as law should have been tried by the court below without any intervention of a jury.

Upon looking into the transcript and the evidence taken at the trial and reported by a short-hand reporter, and sub-

mitted upon the hearing of the case here, we think that position is not well taken. Upon the principal issues of fact the evidence was very contradictory and conflicting, and so nearly equally balanced that it was doubtful which scale preponderated; consequently if we are to be guided by the rules of the old equity practice we must necessarily come to the conclusion that it was a proper case to be submitted to a jury. But we are not led to inquire how the verdict of a jury taken under such circumstances in the court below shall be regarded in this court on appeal. Our answer to this proposition is, that it occupies the same position here that it did in the court below; it may be read in evidence, and while not conclusive upon the court it should not be set aside unless clearly against the evidence. But in a case like this, where the main witnesses are either the parties to the suit or persons deeply interested in the transaction out of which the suit arose, and the evidence contradictory and nearly evenly balanced, we think the verdict is not only entitled to weight but to special consideration. The jury having heard the oral examination of the witnesses in the court below, their opportunity and competency for passing upon the credibility of the witnesses and judging of the weight of the testimony were far better than this court could be by merely reading the evidence committed to paper. But having carefully reviewed all the evidence we find that the verdict of the jury is supported by a preponderance of it. It shows that Messrs. Shaw & Henton were engaged in carrying on the business of real estate agents and money brokers in the city of Salem; and that respondent applied to them at their office for a loan of one thousand five hundred dollars, offering to secure the same by a mortgage upon certain lands in Polk county; that said Shaw & Henton having no money of their own to invest in loans, reported the application to appellant, who after making the necessary inquiry and satisfying himself as to the sufficiency of the security offered, agreed to furnish the money and take the loan. Being unwilling, however, to have his name known in the transaction on account of not wishing to be annoyed with renewal of notes, extension of time and the collection of notes,

it was arranged that the note should be executed in the name of Henton and made payable to him or bearer. Appellant having consented to this arrangement, the one thousand five hundred dollars were paid into the office and the arrangement carried into effect. The theory of appellant is, that this loan was negotiated by Shaw & Henton upon their own account and not as his agents, and that he was a mere purchaser of this note and mortgage in good faith as a matter of speculation and investment. But this theory we think is inconsistent with many circumstances developed by the evidence in this case. In the first place it appears that Shaw & Henton had no money of their own to invest in such loans. And it is not very likely that the appellant would have paid the full one thousand five hundred dollars for this note if he had been buying it on speculation.

But it further appears from the evidence in this case, that prior to the maturity of this note, and while in the actual possession of appellant, that respondent paid the full amount due thereon, including principal and interest, to Messrs. Shaw & Henton, at their office, with the understanding that it was to be credited upon this note. And the question is raised upon this state of facts as to whether they were the agents of said Swegle and authorized by him to receive said money for him. And while the general rule is that authority to receive payment upon a note like the one in question may be presumed from its possession, yet this presumption may be rebutted and overcome by the evidence. Shaw & Henton not having the actual possession of this note at the time these payments were made, raises a presumption against their authority to receive the money due thereon; but as a matter of fact they may have been the fully authorized agents of appellant for that purpose. The jury by their verdict having so found, and this being the main point upon which the evidence was strongly controverted, we do not feel warranted in disturbing their verdict.

Entertaining the views herein expressed, we hold that the decree of the court below should be affirmed, with costs.

*J. C. TRULLINGER, Plaintiff and Respondent, v. N. KOFOED, MARY J. A. KOFOED, PETER RUNEY and G. W. PARKER, Defendants and Respondents, and B. G. CRANE, Defendant and Appellant.

APPLICATION OF PAYMENTS — CREDITOR MAY DETERMINE WHEN. — A debtor, when he pays a sum of money to his creditor, may direct to which of different debts due from him to his creditor it shall be applied. If he does not so direct the creditor may make the application of the payment, and if neither of the parties make the application, then the court may make it, and will generally apply it on a debt that is unsecured in preference to one that is secured.

MECHANICS' LIEN WAIVED BY TAKING MORTGAGE.—When a mechanic has a lien on real property for materials and labor furnished by him in erecting a building thereon, he waives the same by taking a mortgage on said property to secure the amount due him for which he has said lien.

The respondent Trullinger furnished Kofoed certain materials for a building in Astoria, amounting to nine hundred and three dollars and thirty-six cents, for which he claimed a lien upon the building and lot. He included in his account an item of thirteen thousand one hundred and twenty-five feet of lumber which was not used in the building, but was used in constructing streets adjacent thereto.

The respondent Runey furnished material and performed work on the building in question, for which he took the promissory note of Kofoed, secured by mortgage. On the same day, March 16, 1877, Runey duly filed notice of his intention to hold a mechanics' lien upon the building in question to secure his claim. The respondent Parker had a mortgage upon the same property, which was executed in December, 1876, and the appellant Crane had a mortgage executed March 13, 1877, the mortgages of both Parker and Crane being prior to that of Runey.

Trullinger brought suit to foreclose his lien. After his complaint was filed Kofoed paid him one hundred and forty-one dollars upon his demand, which sum Trullinger applied in payment of that part of his demand which was for materials used in constructing the sidewalk adjacent to the building in question.

*See 33 Am. Rep. 708.

The court below decreed that the one hundred and forty-one dollar payment should not go in reduction of Trullinger's lien, and that Runey had a mechanics' lien, notwithstanding his mortgage, anterior to the mortgage lien of Crane. The latter brings this appeal.

O. F. Bell, for appellant.

J. Q. A. Bowlby, for respondent Trullinger.

By the Court, BOISE, J.:

This case being at issue was referred to Frank J. Taylor to take the testimony and report the facts to be found by him to the court. And among other findings made by the said referee are the following on which the questions made in this case arise, to wit:

1. That between the first of August, 1876, and the eleventh day of October, 1876, plaintiff, J. C. Trullinger, furnished to defendant, N. Kofoed, boards, timbers, lumber and building materials to be used, and which were used, in the construction of the building described in the complaint, to the value of seven hundred and seventy-eight dollars and sixty-four cents, and also thirteen thousand one hundred and twenty-five feet of street lumber and timbers of the value of one hundred and twenty-four dollars and sixty-eight cents, which said street lumber and timbers were used in the construction of the street and sidewalk adjacent to said building, and that on the eleventh day of December, 1876, and prior to the completion of the building, plaintiff, J. C. Trullinger filed in the clerk's office of the county of Clatsop his mechanics' lien, in the sum of nine hundred and three dollars and thirty-six cents, against said building and the parcel of land (lot 6, block 134, Shively's Astoria), on which said building is situated, and that said sum included the one hundred and twenty-four dollars and sixty-eight cents for the thirteen thousand one hundred and twenty-five feet of lumber and timber used in constructing said street and sidewalk; that since the commencement of the suit, said defendant, N. Kofoed, has paid said plaintiff the sum of one hundred and forty-one dollars.

The report then finds that between the fifteenth day of

October, 1876, and the fifteenth day of March, 1877, defendant Runey furnished materials and lathed and plastered said building, and filed a lien therefor for the sum of one thousand two hundred and sixteen dollars and twenty-five cents; that on the same day the defendants, Mary J. Kofoed and N. Kofoed, who were the owners of the property, gave to Runey a note for the same amount, due one day after date, and also at the same time executed a mortgage on this same property to secure the note; that the note and mortgage to Parker were executed in December, 1876, and the note and mortgage to Crane, the appellant herein, on the thirteenth day of March, 1877, and are consequently both prior to the mortgage of Kofoed and wife to Runey, and unless Runey's lien attaches, these mortgages would give Parker and Crane liens on the property prior to Runey's.

It therefore becomes necessary to consider the question whether Runey waived his lien by taking a note and mortgage on the property to which the lien attached. From this statement two questions are presented for our consideration:

1. Was the item for the thirteen thousand one hundred and twenty-five feet of lumber and timber used in constructing the street and sidewalk a lien, or if not a lien, was that item paid by the payment of the one hundred and forty-one dollars, paid, after the commencement of the suit, to Trullinger by N. Kofoed?

Trullinger claims that he so applied it, and that he had a right to do so as it was not applied to Kofoed when it was paid. As Kofoed did not make the application, Trullinger had the right to do it. (2 Parsons on Bills and Notes, 224.) And in case neither party had made the application, then the court could make it, and when the court does make such application, the payment will be first applied to unsecured debts. (2 Parsons on Bills and Notes, 228.) If, therefore, this payment was not applied by either Kofoed or Trullinger, it was the duty of the court to apply it as did in the decree, first to the debt for the thirteen thousand one hundred and twenty-five feet of lumber used in the construction of the

street and sidewalk, if that was not secured by the lien, and the decree is right in this respect whether it was a lien or not.

We will now consider the other question, whether the taking of the note and mortgage was a waiver of the lien. It has been uniformly held in England and in nearly all the states of the Union, except some of the New England states, that the taking of a promissory note for a precedent debt, or for a thing sold, is not a payment of the debt, but is only evidence of the indebtedness and of the amount and present satisfaction to become an actual payment or satisfaction if paid at maturity. (*Cumber v. Wone,* 1 Smith L. C. 333; Houk on Liens, sec. 190.) And under the lien laws it has been held, and is the rule, that the taking of a negotiable note for the amount of work and materials furnished in constructing a building is not a waiver of the mechanics' lien, unless the time of payment is extended to a time that will extinguish the lien. It is claimed, however, in this case, that the taking of the mortgage by Runey on the same property was a waiver of the lien. It would seem from the record and the conduct of the parties that it was not the intention of Runey to abandon his lien and rely wholly on the mortgage for his security, for he filed his mechanics' lien on the same day that the mortgage was executed and filed. We can see no reason for taking the mortgage, unless he comtemplated indulgence to Kofoed beyond the time when he would have to enforce his lien. He might have taken the note in order to have the amount of the debt fixed and interest secured; but the mortgage was no better security than the lien during the time that the lien would continue.

It is a rule that where a vendor takes a mortgage on the property sold he waives his vendor's lien, and it has been so held by this court. (3 Or. 417; 6 Ves. 752; *Lagow v. Badollet,* 1 Blackf. 416; *Gilmore v. Brown,* 1 Mason, 191; *Williams v. Roberts,* 5 Ohio, 35; 4 Kent. Com. 154; Houck on Liens, sec. 202.) And there seems to be no difference in principle between vendors' liens and the liens of mechanics, and it has been so held in many cases. (*Kinney v. Thomas,* 28 Ill. 505; *Gardner v. Hall,* 29 Ill. 277; *Gorman v. Sagner,* 22

Mo. 137; *Borrows v. Baughman,* 9 Mich. 213; Phillips on Liens, sec. 280, and cases there cited.) From these numerous authorities the rule seems to be well settled that where a mechanic takes a mortgage, either on the same property to which the lien attaches or on other property, that he thereby waives his lien, and the reason is, as observed in many of the cases cited, that subsequent lien-holders and purchasers have a right to rely on the record, and should be protected against secret liens. In this case it is true that the lien was filed at the same time that the mortgage was given, but if the general doctrine be established, that the taking of a mortgage on the property is not a waiver of the mechanics' lien, a mechanic may hold a mortgage on the property and afterwards, at any time allowed by the statute, file his lien. In these cases of waiver, if it only concerned the immediate parties, it would ordinarily be a matter of little consequence how it was determined. "But when the acts of individuals become the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented. And though one of the parties to the transaction is overreached, or was in error as to its consequences, that error cannot be remedied at the expense of third persons."

The decree of the circuit court should be so modified as to postpone the claim of Runey to the claims of Parker and Crane under their mortgages. All the findings of fact made by the referee and circuit court are correct, and we only dissent as to the finding that the taking of the mortgage from Kofoed by Runey was not a waiver of his lien.

C. H. McCORMICK and L. J. McCORMICK, Appellants, v. C. H. BLANCHARD, Respondent.

STATUTES OF LIMITATIONS—DEBT CREATED IN ANOTHER STATE.—When a debt is contracted in another state by a person who afterwards removes to this state, the statute of limitations begins to run against the debt at the time when the cause of action accrued where the debt was created, and not at the time of the debtor's arrival in this state.

APPEAL from Washington County.

In July, 1866, the respondent, in the city of Chicago, Ill., executed his promissory note to the appellants, promising to pay to them or their order, at their office in said city, on or before the first day of July, 1867, the sum of sixty-four dollars ($64.00), with interest on the same from date until paid, at the rate or seven per cent. per annum; that said note is due, and only the sum of eighteen dollars and eighteen cents has been paid on said note, which was paid and indorsed thereon the twenty-ninth day of November, 1871, etc.

The complaint alleges "that the defendant has resided in this state for three years last past and no longer."

The respondent appeared and filed a demurrer to the complaint, alleging only the following cause of demurrer, to wit: "That the action has not been commenced within the time limited by the laws of Oregon."

The demurrer was sustained and the respondent had judgment, from which this appeal is taken.

Bonham & Ramsey, T. H. Tongue, for appellants:

It is well settled that the *lex loci contractus* governs as to the validity, interpretation and obligatory force of personal contracts, and that the *lex fori* prevails as to the remedy on such contracts, and the time within which actions upon them must be instituted. (Angell on Limitations, secs. 64-67; Story on Conflict of Laws, secs. 556, 572.)

The authorities concur in holding that the statute of limitations pertains to the remedy, and that the question whether the note in this cause is barred or not is to be determined by the statute of this state. (Angell on Limitations, sec. 65; *McArthur v. Goddin,* Law Register for November, 1876, 672; Story on Conflict of Laws, secs. 576, 577.) The statute merely suspends the remedy, it does not extinguish the right. (*Myer v. Beal,* 5 Or. 130.)

The Civil Code (sec. 16) provides that "if, when the cause of action shall accrue against any person who shall be out of the state, or concealed therein, such action may be commenced

within the terms herein respectively limited, after the return of such person into the state," etc. This statute declares in effect that if, when the action accrued, the defendant was out of the state, the action may be commenced any time within six years after he came or "returned" into the state. (11 Pick. 36; 6 Cush. 239; 21 Barb. 359; 18 Ala. 248; 3 Johns. 264; 14 Mass. 203; 6 Vt. 127; 19 Id. 178, 209; 10 Mass. 30; 17 Id. 180; 14 Id. 203; 16 Pick. 363; Angell on Lim., secs. 66, 67; 8 Pet. U. S. 361; 4 Wheat. 122, 200, 207; 11 Id. 361; 13 Pet. 313; 9 How. U. S. 407; 7 Mo. 241; 2 Tex. 414; 38 Me. 179; 13 Gray, 535; 2 Parsons on Notes, 282; 4 Or. 105; 5 Nev. 238; 10 N. Y. 106; 18 Iowa, 224.)

The phrase "after the return of such person into the state," used in section 16 of the code, *supra*, applies to the original coming into the state by a person who had never been here before as well as to the coming into the state by a person who had been here before. (3 Par. on Con. 96; 3 Johns. 261; 14 Mass. 203; Angell on Lim. 207-9.)

The defendant does not rely upon the statute of limitations of the state of Illinois, and has not pleaded it. The statute of another state must be pleaded, like any other fact, or it is waived. (Secs. 69 and 70, p. 119, of the code; Angell on Lim. sec. 285; Estee on Pl. 247.)

T. B. Handley, for respondent submits:

1. The construction given by the courts below is correct. The exceptions made in section 16 to the rule in section 6 do not include the case of a non-resident who incurs a liability and thereafter becomes a resident of this state. Any other construction would render section 26 of the same chapter nugatory. The court will not make exceptions to a statute of limitations. (*Beaubien v. Beaubien*, 23 How. 190; *Humbert v. Trinity Church*, 24 Wend. 587; *Bacon v. Howard*, 20 How. 23.)

2. It lies upon the plaintiff to aver and prove the facts which create an exception to the rule of the statute. (*Ford v. Babcock*, 2 Sandf. 318; *Huntington v. Brinckerhoof*, 10 Wend. 278; *Perin v. Garfield*, 37 Vt. 304.) An allegation that defendant was not a "resident of Oregon" does not imply that

he was not within the state. (*Drew v. Drew*, 37 Me. 217; *Bucknam v. Thompson*, 38 Id. 171; *Smith v. Harrow*, 8 Bibb. Ky. 446.)

By the Court, Prim, J.:

The only question presented for determination in this case, is whether the note upon which this action is based was barred by the statute of limitations. It was executed in the state of Illinois, on the twenty-fifth day of July, 1866, and was payable to the appellants or order at their office in Chicago on the first day of July, 1867. At the time when this cause of action accrued all of these parties were residents of the state of Illinois, and continued to be so until about three years prior to the commencement of this action since which time respondent has resided in this state.

Section 6 of our code, page 106, provides that actions upon contracts not under seal must be commenced within six years after the cause of action accrued. More than six years had elapsed prior to the commencement of this action and since the right of action accrued, but it is claimed that it comes within the exceptions contained in section 16, which are in these words: "If when the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or the time of his concealment, and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action." It will be seen that this section provides for two classes of persons excepted out of the general rule contained in the various sections, in which the respective actions are therein limited:

1. If a person shall be out of the state or concealed therein when the cause of action accrues, such action may be commenced against him within the terms therein re-

spectively limited after his return to the state, or after his concealment.

2. If after a cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

It will be seen that non-residents are not embraced in either of these exceptions, nor do we think it was intended by the legislature that they should be; and this becomes more evident when we take into consideration section 6, which is in these words: "When the cause of action has arisen in another state, territory or county, between non-residents of this state, and by the laws of the state, territory or country where the cause of action arose, an action can not be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." These sections being *pari materia* must be construed together.

The statutes of New York and Massachusetts contain the same provisions substantially adopted in section 16 of our code, but not the provision of section 26. Their courts hold that these provisions apply to both residents and non-residents. To adopt their construction of these provisions would render the provisions of section 26 of our code nugatory. *Rugles v. Keeler,* 3 Johns. 265, is one of the early cases decided in New York by Judge Kent in 1808, and the courts of that state and Massachusetts have followed that decision ever since. It was held in that case that although the cause of action was barred in the state in which it arose, it was not barred in the state of New York, unless the party had been in that state six years prior to the commencement of the action. The doctrine announced in that case is denied in the state of Texas. (3 Texas 106.)

It was held there that the statute of limitations begins to run on debts contracted in another country, by a person who afterwards removes to that state, at the time when the cause of action accrued there, and not at the time of the debtor's arrival in Texas—that if a law passed by the legis-

lature of Texas is similar in its terms to a law of other countries or states, the courts of the state are not obliged to give it the same construction.

Not having either the book in which the case is reported, or the statute of Texas before us, we are unable to ascertain what the provisions of the Texas statute are, but infer from the digest that they are similar to those in New York.

We have reached the conclusion that the provisions of section 16 of our code considered in connection with section 26 should be construed to apply to residents only. We therefore hold that the statute of limitations of this state began to run on the note upon which this action is based, at the time when the cause of action accrued in Illinois, and not at the time when the respondent arrived in this state.

THE STATE OF OREGON, Respondent, v. CHARLEY LEE, Indicted under the name of CHARLEY LEE QUONG, and AH LEE, Indicted under the name of LEE JAW, Jointly indicted with LEE JONG, Appellants.

MURDER—DEGREE OF CRIME—INSTRUCTIONS.—In a case of murder where the degree of the crime is not admitted by the prisoner, and there is any disagreement among the witnesses for the prosecution on the subject of premeditation, it is error for the court to charge the jury that there is nothing in the testimony tending to convict to reduce the degree of the crime from murder in the first degree, and that the jury should either find the prisoner guilty as charged or acquit him.

IDEM—REASONABLE DOUBT.—Where evidence is introduced in a criminal case to establish any proposition necessary to prove guilt, the evidence is sufficient to establish such proposition if it satisfies the jury of its truth beyond a reasonable doubt.

EVIDENCE—DYING DECLARATIONS.—The admission in evidence of dying declarations is to a certain degree in the discretion of the court that hears the witnesses.

APPEAL from Multnomah County.

This is a case under an indictment which charged the respondents with the premeditated and malicious killing of one Chin Sue Ying.

The jury found the defendants guilty as charged. From the judgment upon such verdict this appeal is taken.

Upon the trial the court below gave to the jury the instructions, among others referred to in the argument of appellant's counsel, as follows:

4. "It is one of the distinguishing characteristics of perjury that the testimony of different witnesses agree too well. No two men see a thing exactly alike, and, if they could do so, differences of temperament and of expression will give to their respective stories many points of difference. The event described in its essential features may be the same, but the narratives which describe it should be and will be different. Thus if a number of witnesses describe an occurrence as having taken place at exactly the same moment; if they locate it at precisely the same spot; if those who took part in the transaction described are described in the same attitude, speaking the same words, making precisely the same gestures; if in a case of homicide the relative position of the slayer and the slain are the same in the versions of different witnesses; if their gestures, the different blows, the different weapons employed, the struggle, and all the minute details of the occurrence are found to be exactly alike; it affords very strong grounds for presuming, if indeed it is not conclusive of the fact, that the different stories have been carefully rehearsed, and their delivery practiced beforehand; and while such previous rehearsal does not necessarily imply that the narrative is false, yet it affords strong grounds for such a presumption. Witnesses who go upon the stand to speak the truth do not find it necessary to rehearse beforehand the story they expect to tell.

5. "The fact that the false swearing has been concerted between a number of witness makes it all the more dangerous to society. And this is so for the reason that preparation and the association of persons for a criminal object give that confidence which makes crime aggressive and lends to falsehood the assurance of truth.

6. "I have said that the differences in the testimony of the different witnesses increases your responsibility, and

this is so for the reason that these differences involve a crime second to that concerning which you are to inquire of. You cannot afford to let perjury succeed; your verdict is more important in this view than it is in respect to the matter of punishing the killing of Chin Sue Ying. If witnesses in this case have banded themselves together to swear against these defendants, or to swear for them, and if they shall succeed, the law will be less able hereafter to provide safeguards against the false witnesses who will be encouraged by their success to invade the precincts of your courts and cheat justice with false oaths.

7. "The fact is undisputed that Chin Sue Ying, a person entitled to protection under our laws, under solemn treaty stipulations, and under the universal laws of humanity, was, in the heart of the city, in the broad light of day in a place open to all, in the presence of a large number of persons, killed. However atrocious this crime may be, if there are circumstances of atrocity surrounding it, it is less serious in its consequences than the perjury that has been committed in this trial, in your presence and hearing. And while you may not be able in this proceeding to reach the false witnesses, it becomes a matter of the highest importance that the perjury which they have committed be not allowed to accomplish its purpose.

8. "What motive or temptation have these witnesses for the state who testify to facts tending to show the guilt of the defendants? What motives or temptations are they under to accuse innocent persons? On the other hand, what motives or temptations have those witnesses for the defense who testify to facts tending to show the innocence of the accused? What motives or temptations are they under to acquit those who are guilty.

9. "It is sought, on the part of the defendants, to prove an *alibi*. When fully established, this is one of the most conclusive defenses that can be made out. The testimony introduced for that purpose should in every case be scrutinized carefully. It is a probable fact that guilty persons more frequently resort to this defense than to any other, and that, as has been remarked, more perjury has been com-

mitted in defenses of this description than in all other defenses interposed in criminal trials. But while this is true, it must be borne in mind that an *alibi* is a proper defense, and that to an innocent man, as has been said, it is almost always an essential defense, indeed it may be his only defense. While, therefore, it is the duty of the jury in such cases to scrutinize the testimony carefully, they should not discredit the defense because it is of this character. The fact that the defense is easily fabricated and is often resorted to devolves upon the jury the duty of exercising unusual care and minuteness in considering it."

The facts are fully stated in the opinion of the court.

Dolph, Bronaugh, Dolph & Simon, and Whalley & Fechheimer, for appellants:

The court erred in charging the jury, as stated in exception third, that there were "irreconcilable differences in the testimony of the witnesses for the prosecution and that of the witnesses for the defendants;" and in saying to the jury that "in this case it must be presumed that all of the principal witnesses on one side or the other have sworn falsely;" and in saying to the jury, "there has not only been rank perjury here, but there has been, if I may so speak, wholesale perjury — perjury that has evidently been concerted between witnesses." The jury are by law the exclusive judges of the credibility of witnesses, and as to whether the differences in their testimony are irreconcilable, and the statute makes it the duty of the jury to reconcile those differences, if possible, where any exist, and they were to judge as to whether or not perjury had been committed. In charging the jury, therefore, as was done in this behalf, the court clearly invaded the especial province of the jury, and such error entitles defendants to a new hearing. (Civ. Code, 246, sec. 673; 3 Graham & Wat. New Trials, 729, 750, 1261; 16 Gray, 505; 42 Ind. 454; 55 Ga. 456.)

The same objection and authorities are applicable to the matter contained in that portion of the charge contained in exceptions fourth, fifth, sixth, seventh, eighth and ninth, *supra,* beside that, with all due respect for his honor, the

judge of the court below, we submit that such is the evident intent and meaning of much of the language used therein, when read by the light of the circumstances of the case, that he might as well have said to the jury directly, and in fewer words, that the witnesses for the defense were all perjured, and therefore should not be believed. As is shown by the bill of exceptions, there were but two witnesses on behalf of the prosecution who testified to having seen the difficulty in the course of which deceased was mortally wounded, while there were four witnesses for the defense who said they were also present and saw the affray. Beside these there were two others who swore that Charley Lee Quong was below stairs in a back room at the time the difficulty occurred, and three other witnesses who testified that defendant Lee Jaw was at the same time lying sick in the wash-house, so then there were virtually eight or nine witnesses against two. Now with this fact in mind, let us recur to some of the expressions used in that portion of the charge embraced in exceptions three to nine, inclusive.

"But it is a rare case when all of the principal witnesses upon one side or the other, when there are a number of witnesses called, must be presumed to have sworn falsely. Yet this is such a case. There has not only been rank perjury here, but there has been, if I may so speak, wholesale perjury —perjury that has evidently been concerted between witnesses. The fact that the false swearing has been concerted between a number of witnesses. If witnesses in this case have banded themselves together. It is sought on the part of defendants to prove an *alibi*. * * It is a probable fact * * that, as has been remarked, more perjury has been committed in defenses of this description," etc.

Could the jury have failed to understand from such expressions that the court meant to charge them that defendant's witnesses ought not to be accredited. The portion of the charge embraced in exception "ninth," *supra*, is erroneous, and was calculated to mislead the jury. The law is not that the defense of an *alibi* must be "fully established" in order to avail the prisoner. On the contrary, if the proof is such as to create a reasonable doubt as to his presence at

and connection with the commission of the crime, he is entitled to an acquittal. (*Pollard v. State,* 53 Mo. 410; *Binns v. State,* 46 Ind. 311; *Adams v. State,* 42 Id. 373.)

But again the court, as we submit, invaded the province of the jury by delivering such utterances as those contained in exception "tenth," supra. This portion of the charge is erroneous in point of fact as well as of law. Doctor Saylor was called as a witness for the state, but his evidence tends strongly to impeach the testimony of the two principal witnesses for the prosecution, and to show that the killing may have occurred under circumstances wholly inconsistent with the facts necessary to constitute murder in the first degree.

Now, that portion of the charge was necessarily based upon one of these two propositions:

1. That under our statutes the malicious and unjustifiable killing of a human being is presumed to be murder in the first degree, and evidence is required to overcome that presumption and reduce the crime to the lower grade of murder in the second degree; or,

2. That the court has the right to charge the jury that the effect of the evidence on behalf of the prosecution is to show that the killing was done of deliberate and premeditated malice, and that therefore the defendants must be found guilty of murder in the first degree unless the evidence on their behalf is such as to reduce the offense below such grade.

We submit that neither of these positions is correct or can be maintained. The presumption of law under statutes similar to ours (Code, p. 406, secs. 506, 507) is that the killing a person purposely and maliciously is murder in the second degree. And as to whether the deed was done deliberately and of premeditation, the jury are the sole and exclusive judges. (Code, p. 275, sec. 835; *People v. Sanchez,* 24 Cal. 28, 30; *State v. Garraud,* 5 Or. 216; *State v. Foster,* 61 Mo. 549; *McCue v. Commonwealth,* 78 Pa. St. 185; 108 Mass. 296.)

Neither can the effect of such instructions be compensated by proper ones on the same subjects elsewhere con-

tained in the charge, if such there be; for it can not be known or shown which the jury accepted for their guidance, or how far they may have been misled by the erroneous instructions. (*People v. Campbell,* 30 Cal. 312.)

J. F. Caples, District Attorney, and M. F. Mulkey, for the state:

It was held in the case of the *State v. Garraud,* 5 Or. 220, that if there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury and may charge them that they cannot consider the question of manslaughter.

It is clear that in a case where there is no testimony tending to reduce the grade of the offense below murder in the first degree it is not only the right but it is the duty of the judge presiding in the trial to tell the jury so. The jury should not be allowed to presume facts concerning which there is no testimony—to find facts without evidence. Is it true that there is no such testimony? If so, the instruction is proper; if it is not, this cause should be reversed.

The witnesses for the state who testify to having seen the killing testified that one of the defendants struck deceased a blow on the head from behind with a hatchet; that deceased turned his head in the direction of the blow, where upon the said defendant struck him again, and that immediately or at the same time the other defendant and the third person in the indictment drew pistols from under their clothing and shot deceased twice in the front part of the body; that this was done in the Chinese joss room, which contained a large number of persons—probably a hundred persons at the time; that the person who struck with the hatchet was behind the deceased and the other defendants were at his side; that they did not see the deceased do anything except to turn his head when struck.

There was testimony tending to prove that the deceased was a member of the Chinese mission school and that he had embraced the Christian faith; that on the day before

he was killed he was at the festival at the joss house, and that while there Lee Quong requested a policeman to put him out, alleging as a reason for so doing that he had poured some offensive fluid on the floor of the room about two hours previously; that some such fluid had been poured on the floor at about that time; that the policeman, in obedience to such request by Lee Quong, took deceased from the room; that while he was escorting deceased from the room Lee Quong followed and applied an offensive epithet to the deceased in the Chinese language; that about this time or soon after, the officer having asked Lee Quong why he did not have deceased arrested if he had committed the nuisance, as Lee Quong has stated, replied, "I'll arrest him to-morrow, or I'll have him arrested to-morrow; I know him." There was no testimony on the part of the state tending to show that the deceased had done or said anything other or more than that which is here stated, or that he had in any way provoked or attempted to provoke the defendants or either of them, or to cause them to be angry with him, or that either of them thought he had done so, beyond what is here stated.

The defense sought to be established for the two defendants on trial was that of an *alibi*. For this purpose, testimony was offered on the part of the defense tending to show that they were at another place when the killing occurred, and also that the killing was done by Lee Jong alone, and that the other defendants were not present.

Upon these facts could the jury have found either of the defendants guilty in any less degree than murder in the first degree? Was there any testimony whatever to sustain such a verdict? It is stated in the instructions, if the witnesses for the defendants were to be believed, or if there was a reasonable doubt as to their having told the truth, the defendants should have been acquitted. The case could not have been more strongly stated for the defendants. Was there then anything in the testimony of the witnesses for the state tending to prove murder in the second degree or manslaughter? And in the consideration of this question let us consider whether the state's testimony tends to

show the statutory ingredients of murder in the first degree. The statute provides that if any person shall purposely and of deliberate and premeditated malice kill another, he shall be guilty of murder in the first degree. (Crim. Code, p. 406, sec. 506.)

And it further provides that there shall in such case be some other proof of malice than the mere fact of killing, and that premeditation and deliberation shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cold blood, and not hastily upon the occasion. (Crim. Code, p. 407, sec. 519.)

It is also provided that an intent to murder shall be conclusively presumed from the deliberate use of a deadly weapon, causing death within a year. (Crim. Code, p. 260, sec. 765, sub. 1.) What, then, is the law applicable in a case like this in regard to the facts to prove premeditation and deliberation necessary to constitute murder in the first degree.

In 1794, the state of Pennsylvania enacted that "All murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, premeditated and deliberate killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, burglary or robbery, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." (Wharton on Hom. sec. 171.)

The substance of this statute is now incorporated in the codes of a majority of the states in the Union. It will be seen by a comparison between this statute and our own that the two are in all essential features alike, and that our statute, like those of a majority of the states, has been framed after the Pennsylvania statute.

Mr. Wharton says that these statutes do not touch the common law distinction between murder and manslaughter; that they simply divide murder into two classes, with the object of diminishing the area of cases in which the death penalty is applicable, by making such penalty apply to the higher of the two classes of murder. (Wharton on Hom. sec. 177.)

The construction of these statutes has been fully settled by many decisions. Mr. Wharton lays it down that under these statutes premeditation does not require positive proof of an intent prior to the commission of the act, as such prior intent may be inferred from the act. (Wharton on Hom. sec. 180, and note.) Deliberation and premeditation simply mean that the act was done with reflection and conceived beforehand. No specified length of time is required for such deliberation. It would be a most difficult task for human art to furnish any safe standard in this particular. Every case must rest on its own circumstances. The law, reason and common sense unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of premeditation. The true view is that intent and deliberation are to be inferred from facts; that they are not to be negatived because there is no direct proof of their existence prior to the fatal blow; and that the character of the weapon used, if it be used coolly and intelligently, is sufficient to give inferences by which the nature of intent can be determined. (Wharton on Hom. secs. 180, 31, and note.)

In two or more cases covering this point the question has been thus stated: "But let it be supposed that a man without uttering a word should strike another on the head with an ax, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence. (Wharton on Hom., secs. 180, 181; notes.)

In the case of *Commonwealth v. Green*, 1 Ashmead, 289, the accused and the person killed belonged to a marine corps. The prisoner had refused obedience to an order of the deceased, who was a drill sergeant, by whom he had been placed under arrest. At this time a difficulty occurred, and the deceased struck the prisoner, who was in the act of being taken to the guard-house, over the head with a musket. After being taken to the guard-house the prisoner got leave to go and get his head dressed. Shortly after this he returned to where the deceased was, and, seizing a musket, shot him dead. There were some threats between the affray and the shooting by the prisoner, and expressions

both of satisfaction and regret afterwards. (Wharton on Hom., sec. 182, p. 147.)

Let us apply the doctrine of these authorities to this case. Upon the assumption that the state's witnesses are to be believed, the three persons attacked the deceased simultaneously. The first blow was struck from behind, when the deceased turned his face, as he was caused to by the blow; the other two persons engaged in the killing shot him from the side, both shooting almost at the same moment. There was nothing to show that anything was done or said by the deceased at the time to provoke the attack. The three persons were all within the requisite distance for the purpose of the assault at the same moment, two armed with pistols, the third with a hatchet. Their positions were such that all could act at the same moment. Were these things the result of accident — the concurrent assaults from different directions by three men with deadly weapons, in convenient positions about the person assaulted, there being no provocation and no suspicion by the assaulted person of a purpose to harm him? Can these facts lead to any other conclusion than that the three were acting in concert, in pursuance of a design previously formed and matured and understood between them? To say that all this may have been mere coincidence, mere accident, that the three may have happened, without any previous understanding between themselves, to have been at the same moment within arm's length of the deceased, that one may have happened to have been behind him while the others were at his side; that the one behind him happened to be armed with a hatchet at that particular time and happened to lead in the violence, while the others had pistols; that while the deceased was doing nothing, the three may have happened, without any previous understanding or intention, and without any knowledge on the part of either as to what the others were about to do, each hastily, and on the occasion formed the purpose to kill, and proceeded simultaneously to carry that purpose into execution—I say to assume that these things may have been the result of mere coincidence, of chance, is to discard reason and deny experience.

It must be borne in mind that the defendants do not claim that the acts described by these witnesses were justifiable or excusable, or done in a sudden heat or undue provocation. Their defense disputes the facts altogether. They rest their case upon the *alibi*. But the testimony tending to show deliberation and premeditation does not stop here. The testimony shows that there was some difficulty between the deceased and one of the defendants on the day before the killing; that the deceased had renounced the religion of his race; that one of the defendants accused him of an act offensive to the Joss worshippers and to decency, and had an officer eject him from the building; that he called deceased an offensive name and said he knew him and would arrest him or have him arrested to-morrow. Here was an antecedent grudge on the part of one of the defendants and provocation as to all of them that furnishes the motives for the act.

The fact that a hatchet was used is a circumstance from which premeditated and deliberate malice may be inferred. A hatchet is an unusual weapon. It is not as a rule carried upon the person. There is nothing to show that hatchets were used or were kept near where the killing took place. It must be presumed to have been specially provided. With this hatchet the defendant Lee Jaw approached the deceased from behind and struck him a murderous blow. Does not the man who specially arms himself with an unusual and deadly weapon, and who approaches his adversary from behind, give by such acts every indication of a design formed and matured in cold blood that would be afforded by the circumstances of lying in wait?

The refinements of technical learning will have to be improved before presumptions can be found in favor of the assassin who stealthily approaches his victim from behind that do not equally obtain in favor of the one who awaits the approach of his victim in ambush.

Under these facts, it was the duty of the court to instruct the jury that there was no testimony tending to prove murder in the second degree or manslaughter. The jury would have no right to presume, in the absence of testimony, that

the killing might have been provoked or that other facts may exist that would give to the matter a different face from that which the testimony presented.

By the Court, BOISE, J.:

These appellants were indicted at the October term of the circuit court of Multnomah county for the crime of murder in the first degree, jointly with Lee Jong, who escaped and fled the country, and were tried at the same term of the court, and convicted of the crime charged, and sentenced to be hanged by judgment of said court, rendered January 4, A. D. 1879, the same being the sixty-fourth day of said term of said court, from which judgment and sentence this appeal is taken.

The facts are, briefly, that the deceased, Chin Sue Ying, was mortally wounded by two blows in the head with a hatchet and two shots in the abdomen from a pistol or pistols, in the Chinese joss house, at or about two o'clock of the afternoon of the third day of October, A. D. 1878, from the effect of which wounds he died at or about two o'clock of the morning of October 5, 1878.

That deceased had been in said joss house on the evening of the second of October, about nine or ten o'clock. Charley Lee Quong applied to a special policeman, who was on duty below stairs, to go up into the second story of the building, into the joss room, and take deceased out, complaining that deceased had burst a Chinese stink-pot on the floor. That the policeman went up stairs accordingly, and found that some dark-looking fluid had been poured on the floor, which had a very offensive odor, and the deceased, being accused by Lee Quong of having poured it there, he was accordingly put out of the house by said officer. That as he left the room Lee Quong followed as far as the door, exclaiming in an angry tone, "Ki Gi," which was interpreted to mean "a man who acts like a prostitution," and as being a term of reproach. That said officer inquired of Lee Quong why he did not have the deceased arrested, to which Lee Quong replied: "I will arrest him to-morrow," or "I will have him arrested to-morrow." That about half-past one o'clock

P. M. of October 3, the two and only witnesses for the state who claimed to have witnessed the tragedy, left their respective places of employment in the suburbs of the city and came to the store of Wing Hing & Co., about two blocks distant from the joss house. That one of said witnesses met deceased at said store and they went directly to the joss house. That the other of said witnesses, when he reached the store, followed on immediately to the joss house, and the three had been in the joss room but a few minutes when the affray occurred. That said witnesses had been in the habit of leaving their places of employment about one o'clock of each day previous to October 3.

In giving an account of the killing, Wo Jung, a witness, testified: "That he is acquainted with defendants now on trial, and with Lee Jong, named in the indictment and not on trial, and was acquainted with the deceased in his life time; that deceased was wounded in the Chinese joss house in the city of Portland; that witness was present in the joss house at the time deceased was wounded, and was standing within seven or eight feet of deceased when he was attacked by the three defendants named in the indictment; that the first thing witness saw that indicated any difficulty between the defendants and deceased was that witness saw the defendant Lee Jaw raise a hatchet and strike the deceased from behind; that the deceased turned his face in the direction of Lee Jaw, who then struck him a second blow with the hatchet; that deceased received both blows of the hatchet upon his head; that deceased was struck the first blow with the hatchet, and as he was in the act of turning his face towards Lee Jaw, the defendants, Charley Lee Quong and Lee Jong, each shot at deceased with pistols; that the pistols were fired from the side of the deceased—the witness could not tell from which side; Charley Lee Quong fired one of the pistols and Lee Jong fired the other at deceased; that the shots were fired in quick succession, the one immediately after the other; that after the second shot the deceased fell to the floor, and the witness was badly frightened and ran away; that witness is positive that deceased was first struck by Lee Jaw; that Lee Jaw was stand-

ing behind deceased when he struck him the first blow with the hatchet, and that upon being so struck deceased turned his head to one side, about which time Charley Lee Quong and Lee Jong fired pistols at him from his side, and the defendant, Lee Jaw, about the same time struck the deceased the second blow on his head with the hatchet, whereupon deceased fell to the floor and witness ran away; that there were a large number of persons present in the joss house at the time, but that there were no persons between witness and deceased at the time he was attacked and wounded by the three defendants named in the indictment; that a band of China musicians were performing upon their instruments in the joss room at the time, and there was much noise in the room; that witness did not see deceased do anything nor hear him say anything to either of defendants before he was assaulted by them." The witness also testified to the situation of the tables in the room, and some other things not necessary to mention here.

Another witness, Lun Sing, was introduced by the prosecution, who testified that he was present in the joss house at the time of the wounding, and was standing near the north wall of the room, which is opposite the side at which the difficulty occurred, which was near the south wall at the south end of the tables. This witness in describing the same says the first thing he saw to indicate trouble was that he saw Lee Jaw raise a hatchet and strike deceased on the head; that Lee Jaw was standing behind deceased at the time, the back of deceased being toward Lee Jaw, who struck him from behind, and struck him on the head with the hatchet; that this blow was on the back of the head of deceased; that deceased when struck turned his head with his face towards Lee Jaw, who then struck him a second blow with the hatchet; that deceased received this second blow on his forehead; that Charley Lee Quong and Lee Jong were standing close to deceased at the time, and witness saw both of them put their hands in their pockets and draw them out again; they each, Charley Lee Quong and Lee Jong, raised their arms, having their hands under their sleeves, and two pistols were fired in rapid succession, but

witness did not recognize by whom they were fired; they seemed to be fired from about where the defendants Charley Lee Quong and Lee Jong were standing, but witness could not recognize who fired either pistol; says he was at the north side of the room and at the north end of the same table that deceased was standing at the south end of; and that he could see him and what took place.

These witnesses Wo Jung and Lun Sing, were the only witnesses introduced on the part of the prosecution who claimed to have been present up stairs in the joss room when deceased was wounded, and were the only witnesses on behalf of the state who testified to having seen the difficulty. Both of said witnesses testified that they were at and before the difficulty scholars in the Chinese mission school in the city of Portland, and that deceased was also a scholar in said school. Lun Sing testified that he went to the joss house with the deceased, and the other witness went there about the same time; and they had been there but a short time when the difficulty occurred.

The first witness named above, Wo Jung, testified on cross-examination that after the shooting he ran away and went to Wilbur's, where he was employed, and did not tell any one what had happened or that he saw deceased when he was hurt; said he had never told the facts to any one until the time he was then examined in court on the trial. On re-examination by the prosecution he said he had testified before the grand jury and talked with Mr. Mulkey, the attorney for the state, and given him the names of the defendants the next day after the killing, and he was also before the coroner's jury, and when asked why he ran away from the joss house he answered: "I was afraid the other side would turn to and kill me."

Dr. Saylor, a witness for the state, testified that he made a *post mortem* examination of the body of the deceased; that deceased had received two blows on the head, inflicted by some sharp instrument which witness supposed to be a hatchet; that the wounds were on the left side of the head, and both cuts penetrated through the skull into the brain. This witness also found on the deceased two gun-shot

wounds—one in the bowels, near the navel, and the other in the pelvis; that the first gun-shot wound perforated the bowels, and was the immediate cause of his death; that the wounds in the head extended from about two and one half or three inches above the eye, backward to or beyond the curve of the skull behind; that these wounds were something over half an inch apart in front and came together behind, thus forming a V shape; that in the opinion of witness either of said wounds would most probably have proved fatal, but the immediate cause of the death was inflammation from the gun-shot wound in the bowels; that the gun-shot wounds were received from the front; that either of said cuts on the head would have knocked down any ordinary man; that in the opinion of the witness both blows on the head were inflicted by a party standing in front of deceased when the blows were struck; that deceased was probably not so tall as Lee Jaw or Charley Lee Quong by two or three inches; that wounds in the head might have been given by one standing behind deceased if deceased had been sitting down at the time or had been seized and drawn backwards; but that witness is of the opinion that both blows were struck by a person standing in front of deceased at the time; witness thinks all the wounds were given by a person standing in front of deceased, and that the wounds on the head were made with a hatchet having a blade from three and one-half to four inches wide.

The dying declarations of deceased were also admitted, in which deceased said that Lee Jaw cut him and that Charley Lee Quong shot him. In these dying declarations the deceased did not explain how he knew that defendants were the parties; and if the statements of the witnesses Wo Jung and Lun Sing are true, it would seem that the deceased could not have seen Lee Jaw when he struck him with the hatchet, and he would not have been likely to have seen Charley Lee Quong shoot him when stunned by a blow that penetrated his brain. So the probabilities are that if he knew these men to have been the parties he must have learned it from those who witnessed the attack.

The defendants offered evidence tending to prove that

neither of these prisoners, Lee Jaw or Charley Lee Quong, were present in the joss room at the time the wounds were inflicted. The defendants then introduced three or four witnesses, who testified that they were present when deceased was wounded and saw the whole difficulty; that deceased came to about the same place in the joss room as stated by witnesses for the prosecution, and then raised his right hand, having a piece of meat in it, which he attempted to throw at the joss; that the defendant, named Lee Jong in the indictment, was standing at the time immediately in front of deceased, between him and the joss, and about three feet distant from deceased; that when deceased raised his hand to throw the meat Lee Jong seized him with both hands by his arms and exclaimed: "Don't do that!" That thereupon a scuffle ensued between Lee Jong and the deceased, during which Lee Jong drew a hatchet from under his coat or garment behind, and struck at the head of deceased with the hatchet.

The witnesses are not certain whether the hatchet came in contact with the head of deceased at that time, but think not; that thereupon deceased, having dropped the meat, seized the hatchet with both hands and Lee John did likewise, and a scuffle ensued between them for the possession of the hatchet; that Lee Jong, unable to wrest the hatchet from deceased, let go of it with his right hand, but still held on with his left and drew a pistol with his right hand from under his clothes and shot deceased; that deceased staggered, and Lee Jong again cocked said pistol and shot him a second time; that at the second shot deceased loosed his hold on the hatchet and fell to the floor, whereupon Lee Jong put the pistol back under his clothing, and taking the hatchet in his right hand, struck deceased twice in the head with the blade of the hatchet as he lay on his back on the floor. Each of these witnesses for defendant who so testified to having seen the difficulty also testified that they did not see either Lee Jaw or Charley Lee Quorg present at the scene of the difficulty, and that neither of them participated in it.

From the testimony of these witnesses, who claimed they

each saw the whole transaction, it is evident that there are different accounts as to the manner in which the wounds were given and who participated in the attack. The judge of the circuit court said to the jury in instructing them that this testimony could not be reconciled and that perjury had been committed by the witnesses on the one side or the other, and we think he was warranted in making that statement, for the testimony of all the witnesses can not be true. There is no reason to suppose that they were honestly mistaken; but to determine who among the witnesses had sworn falsely, or how much of the testimony of each or any of them was true or false, was a question for the jury.

The testimony of the witnesses for the prosecution, who state that the deceased was struck with a hatchet from behind, does not accord with the opinion of Dr. Saylor, who gives it as his opinion that the blows came from a person standing in front of deceased, and in addition to the reasons given by Dr. Saylor, the wounds were both on the left side of the head, where they would be likely to be made by a person standing in front and using the hatchet in his right hand. If they were made by a person standing behind they would be likely to be on the right side of the head, if the person assaulting used his right hand.

The witnesses for the defense described the transaction with unusual minuteness and precision. They say that thereupon deceased having dropped the meat he was going to throw at the joss, seized the hatchet with both hands and Lee Jong did likewise, and a scuffle ensued between them for its possession; that Lee Jong, being unable to wrest the hatchet from deceased, let go of it with his right hand, but still holding it with his left, drew a pistol with his right hand from under his clothes and shot deceased with said pistol from in front; that deceased staggered, and Lee Jong again cocked said pistol and shot him the second time; that at the second shot deceased loosed his hold on the hatchet and fell to the floor, whereupon Lee Jong put the pistol back under his clothing, and taking the hatchet in his right hand, struck deceased twice in the head with the blade of the hatchet as he lay upon his back upon the

floor. If all these witnesses saw this transaction and describe it alike in all these minute details, their testimony is liable to criticism, for witnesses to such a transaction rarely agree in details, and there was a large number present and much noise and excitement in the room. The intrinsic value of this testimony is greatly weakened by the exact agreement of each witness in these minute details, and we think the criticism thereon by the court was just and proper.

It may be that each party (for it seems there were two parties in the room at the time) has given a highly colored and partially false statement of the real facts. At any rate, it was the province and the duty of the jury to pass on the value of all this evidence on both sides and try to ascertain the real facts of the transaction from all the evidence.

After the evidence was closed, the court, among other things, charged the jury: "In this case there is no testimony tending to reduce the grade of the crime from murder in the first degree, except the testimony of those witnesses for the defense, who give an account of the killing, as they claim to have seen it. But if the testimony of these witnesses is true then these defendants were not present at all. If therefore you believe these witnesses these defendants are entitled to a verdict of acquittal. If you have a reasonable doubt as to whether or not they have told the truth the defendant should be acquitted. If you think beyond a reasonable doubt that they have not told the truth, then there is no testimony, as stated, tending to reduce the grade of the crime below that of murder in the first degree. In other words, in the testimony tending to convict these defendants there is nothing that will justfy you in finding the defendants guilty in any less degree than that charged." As before indicated, the evidence on both sides was liable to criticism. The witnesses for the prosecution did not agree as to the position of the parties, when the wounds were given, and the counsel for the defense had a right to submit to the jury the question as to the entire truth of their theory, and also the theory that some truth and some falsehood had been spoken by the witnesses on each side.

That is, that if the jury should reject the theory of the *alibi* —still that the evidence tended to show that deceased was committing an act of sacrilege on the Chinese religion, which its votaries had avenged in the sudden heat of passion. This instruction puts the case to the jury by presenting each side separately, telling the jury to look at the evidence, and if they believe the witnesses for the prosecution, then it is murder in the first degree. If they believe the witnesses for the defense, then the defendants should be acquitted. But suppose the jury believed from the appearance and conduct of the witnesses on each side that they had come into court to swear through their case, and that some truth and some falsehood had been testified to on each side, and though they believed there had been a crime committed, yet they doubted as to whether it had been premeditated or had arisen in a sudden quarrel, then the defendants had a right to the benefit of such doubt. And we think the last part of this instruction which says: "In other words, in the testimony tending to convict these defendants there is nothing that will justify you in finding the defendants guilty in any degree less than that charged," is erroneous, for the jury probably understood by this the testimony for the prosecution. In that testimony the two Chinese witnesses swear that deceased was struck with a hatchet by Lee Jaw, standing behind him, while Dr. Saylor, a witness for the prosecution, gives it as his opinion from the position of the wounds that the blows were inflicted by a person standing in front of deceased, and also that either of these blows would have caused sudden paralysis and caused the deceased to fall, while the two Chinese witnesses say he stood up and looked around after he was struck. These facts had a tendency to contradict the theory that deceased was struck by a person standing behind him, which fact was the strongest one in the case to prove premeditation, which was one of the facts to be found by the jury in order to justify them in finding the prisoners guilty of murder in the first degree.

We think this instruction might have prejudiced the rights of the defendants. It is true that the court afterwards, in

his instructions, told the jury that they must find the defendants guilty beyond a reasonable doubt, and also, that if they believed from the evidence that either of the defendants killed or assisted in killing Chin Su Ying, and entertained a reasonable doubt as to the grade of the crime, the defendant was entitled to the benefit of that doubt, and the jury should find such defendant guilty of the lower grade.

But the court, having in the instruction referred to, first told the jury that there was no evidence tending to reduce the degree of the crime from that charged unless they believed the defendants' witnesses, we think the instruction was likely to have influenced the jury against the defendants. There is exception taken also to the ruling of the court in admitting the dying declarations of the deceased. As to this we think, as that is a matter to a certain degree in the discretion of the circuit court who hears the witnesses, that this court should not hold such a ruling erroneous unless it is evidently so, and we hold from the evidence here presented that such ruling was correct. The defendants' counsel also asked the court to charge the jury that "if the jury find that none but Chinese witnesses testify to the circumstances of the killing and as to the parties concerned in it, and the jury are in such doubt as to the credibility or truthfulness of such witnesses as to feel uncertain whether they should be believed, the jury should acquit the defendants."

This instruction was refused, and we think properly, because the word uncertain may include any doubt, whether reasonable or not. There is more or less uncertainty as to all facts attempted to be established by parol evidence. Nothing is absolutely certain that rests on the testimony of men, and where evidence is given to establish any proposition tending to prove guilt, it is sufficient if it remove all reasonable doubt.

There are many other instructions and rulings of the court which were controverted in the argument, but we think they were substantially correct. The judgment of the circuit court will be reversed and a new trial ordered.

EMIL SCHUTZ, Respondent, v. THE DALLES MILITARY ROAD CO., Appellants.

ACT OF CONGRESS FOR CONSTRUCTION OF DALLES MILITARY ROAD—REQUIREMENTS OF ROAD UNDER.—An act of Congress, approved February 25, 1867, granted to the state of Oregon certain lands to aid in the construction of a military wagon road from Dalles City to a point on Snake river. It provided that such road should be built of such width and grade and with such bridges as to permit of its use as a wagon road, and in such other special manner as the state should provide, and that it should be free to the use of the United States in the transportation of its property, troops or mails: *Held*, that when an incorporated company accepted this grant from the state it undertook to construct the road in the manner then prescribed by the laws of the state for the construction of toll roads by private corporations, and to so maintain it.

IDEM.—The building of such road of a less width than prescribed in the law relating to roads built by private corporations will render such company liable for any damages sustained by reason thereof.

IDEM—DAMAGES—TOLLS PAID BY MAIL CARRIER.—If the company fails to build bridges at necessary points on such road and a carrier of mails is compelled to cross bridges owned by others, he may recover the tolls which he is compelled to pay therefor from such company.

IDEM—CARRIERS OF MAILS EXEMPT FROM TOLLS.—The right reserved to the government of free passage for its mails exempts all persons from the payment of tolls who are engaged in carrying United States mails, whether such persons are contractors from the government or the employees of such contractors.

APPEAL from Wasco County. The facts are stated in the opinion of the court.

B. Whitten and W. H. Effinger, for appellant.

Hill, Durham & Thompson, for respondent.

By the Court, BOISE, J.:

The complaint alleges in substance that the appellant is a corporation organized under the laws of Oregon for the purpose of constructing and maintaining a wagon road from Dalles city in Wasco county, by the way of Canyon city and other points mentioned, to Fort Boise, Idaho territory, and collecting tolls thereon; that prior to the incorporation of appellant congress passed the act granting land to the state of Oregon to aid in constructing a military wagon road be-

tween the same *termini*, by which act it was provided that such land should be appropriated exclusively to the construction of such road; that the road so constructed should remain a public highway for the government of the United States, free from tolls and other charges upon the transportation of troops, mails and other property of the United States; that the road should be constructed with such widths, grades and bridges, as should permit of its regular use, as a wagon road, and in such other special manner as might be prescribed by the state of Oregon, all of which requirements were, by said act, made express conditions thereof; that on the twentieth of October 1868, the state of Oregon, by an act of the legislature granted said lands to appellant upon the conditions, restrictions and limitations imposed by the act of congress; that appellant accepted the grant, with the rights and privileges and subject to the obligations connected therewith, and engaged in building and maintaining the road; that during the time the damages complained of were being suffered by respondent, the said road, from Dalles to Canyon city, was a duly established mail route of the United States, and one J. M. Gorman was contractor for carrying the mails over and upon the same, and was required to carry the mails as often as twice a week each way; that during that time, to wit, from April 1, 1876, to April 1, 1877, respondent was the duly authorized mail carrier on said route under said contractor, and did, as such mail carrier, during all that time, carry the mails upon and over said route, using for that purpose wagons, vehicles and teams, carrying said mails at his own expense; that the appellant did not construct the road with such widths, gradations or bridges as to permit its use as a wagon road, but wholly failed so to construct or maintain it, and neglected to construct or maintain the road in accordance with the said acts of congress and of the legislature of Oregon; that the road crosses a number of streams which are not fordable except at certain seasons of the year, and others that are not fordable at any time, specifying among these streams the Deschutes river, John Day river, and several of its branches and tributaries; that upon said streams ap-

pellant failed and neglected to build or maintain bridges or other means of crossing, as by said acts required; and that by reason of such failure and neglect respondent has suffered damages, in carrying said mails and as such carrier, in the sum of two thousand six hundred and ninety-four dollars, by breaking and injuring wagons and other vehicles necessarily employed in carrying the mails, in tolls and ferriage which he was compelled to pay on private bridges in order to cross said streams, in delays and consequent expense, in moneys necessarily expended in making the road passable for the mails, and in extra labor, and hire of extra wagons in order to carry the mails, which would have been unnecessary had not the appellant so neglected and failed to construct and maintain said road as required by said acts. All these matters are set out in the complaint with particularity and directness, and a bill of particulars of the damages is filed.

The answer admits the incorporation to build the road and collect tolls, but denies that it undertook to maintain the road; admits the acceptance of the grant, with its conditions and obligations, and alleges that appellant did construct the road with such widths, gradations and bridges as to permit its regular use in transporting the troops, mails, etc., of the United States, under the provisions of said act of congress, and that long before respondent became mail carrier the road was examined and accepted by George L. Woods, then governor of Oregon, as constructed in accordance with the requirements of said acts; that the acceptance of the road by said Woods, as governor, was approved by the secretary of the interior before the time when respondent claims to have become mail carrier; denies any knowledge as to whether Gorman was mail contractor, as alleged; denies that respondent was a duly or otherwise authorized mail carrier at the time of the alleged damages; admits the road was a mail route, but denies that respondent, as such carrier, carried the mails over the route; denies knowledge as to whether, in carrying the mails over the route, it was necessary to use wagons or other vehicles, or whether the mails were carried at respondent's expense;

denies the alleged neglect and failure to construct the road and bridges as referred to by the said acts, or that appellant has failed or neglected to maintain the road in good repair; denies knowledge as to whether there are any streams that are not fordable; denies the alleged damages and the facts out of which they are alleged to have arisen; avers that while respondent was carrying the mails, as alleged, he was also carrying passengers and freight, not for the United States, and that his damages resulted from that fact and not from unfitness of the road to be used in carrying the mails; denies each item of the damages stated in the bill of particulars.

For further answer it is alleged that prior to the first day of January, 1876, the appellant abandoned its right to the road and its right to collect tolls thereon.

It is further alleged that the respondent has no legal capacity to sue, in this, that he has no contract with Gorman; and that originally the contract for carrying the mails and the route in controversy was a part of a contract with one De Lacy, who failed to perform the contract on his part, and it was afterwards let to Gorman; that while De Lacy was contractor he let this route to Ad. Edgar, who thereafter employed J. H. Marshbanks and John Davis to carry the mails, and these latter sold out to respondent.

That whatever interest respondent may have had in carrying the mails over the route in question, was a certain proportion of the contract price therefor, and was in violation of the laws and regulations of the United States on that subject, and was void.

The reply denies the averment of compliance by appellant with the law, in the construction of the road; denies knowledge as to whether the governor of Oregon accepted it; and the same as to approval by the secretary of the interior; denies that respondents' damages resulted from carrying passengers and freight; denies the abandonment of the road by appellant, the averments concerning his legal capacity to sue, and the averment of facts supposed to render his interest as mail carrier illegal and void.

The first assignment of error is that the court erred in

admitting the testimony of the respondent in regard to the contract under which he was carrying the United States mails over that part of the route.

This assignment of error seems to be based on the following part of the bill of exceptions: "The plaintiff offered himself as a witness in his own behalf, and testified that he was mail carrier on that part of mail route 44,140, between Dalles and Canyon city, and was such at the time the alleged damages accrued, carrying the United States mails by himself and his employees, in stage coaches and on buck-boards drawn by horses; that one J. M. Gorman was the contractor with the United States government for the carrying the said mails, and that he, plaintiff, was carrying said mails under said Gorman's contract, and received pay therefor from said Gorman. To the introduction of this evidence defendant's counsel objected, and the objection was overruled, to which ruling of the court the defendant's counsel excepted."

It is claimed by appellant that this evidence was improperly admitted, for the reason that the laws of the United States forbids the sub-letting of mail contracts, and that it was improper to allow evidence to show that respondent was carrying the mail under Gorman, who was the contractor. (U. S. Postal Laws 1873, p. 57, sec. 271.) It appears from this statement that respondent was employed to carry the mail, and that he received his pay for so doing from Gorman. We think the law of congress referred to does not prohibit a contractor from employing persons to assist him in carrying the mails. Such a construction would render the transportation of the mails difficult, if not impracticable.

The second error assigned is that the court erred in instructing the jury that: "Under the acts of the legislature and under the act of congress, the defendant was and is obliged to keep the road in such condition as that the mails among other things, may be safely, securely, and expeditiously transported over it."

An act of congress, approved February 25, 1867, granted to the state of Oregon certain lands, to aid in the construction of a military wagon road from Dalles city on the Columbia river by way of Camp Watson, Canyon City and Mormon

or Humboldt basin, to a point on Snake river opposite Fort Boise in Idaho territory. It is also provided that the land so granted should be applied exclusively to the construction of said road. Section second of said act provided that the state legislature should dispose of these lands for the purpose of building said road, and for no other purpose; and that said road shall remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops or mails of the United States. Section 3 provides that said road shall be constructed with such width, gradation and bridges, as to permit of its regular use as a wagon road and in such other special manner as the state of Oregon may prescribe.

The state of Oregon, by an act approved October 20, 1868, granted these lands to the appellant for the purpose of aiding said company (the appellant) in constructing the road mentioned and described in said act of congress upon the conditions and limitations therein prescribed. When the appellant accepted the grant it undertook to construct and maintain said road in such condition as to enable the mails to be transferred over it with safety and convenience to the mail carrier.

The act of the state legislature did not particularly prescribe the manner of constructing the road, but we think that the appellant, when it was organized as a corporation to construct a road in Oregon, undertook to construct it in the manner then prescribed by the laws of the state for the construction of such roads. While the road remained under the control of appellant it was obliged to maintain the same, and we think this instruction was not erroneous.

The third ground of error assigned is to the following instruction: "It was the duty of the road company to construct the road sixteen feet in width generally, and where there was necessity for cuts of six feet deep or more, the road need not be more than ten feet wide, with turnouts sixteen feet wide every quarter of a mile of such cut. This rule is not to be construed rigidly. A variation of a few feet will not be regarded as a material departure from the

law." This instruction is correct so far as it charges the jury that the road must be sixteen feet wide generally and ten feet in the deep cuts. We think the court erred in saying to the jury that a variation of a few feet will be disregarded. A road is not of legal width when less than sixteen feet generally and ten feet in the cuts of six feet and upwards. If accidents occurred occasioned by the road not being constructed the legal width, the company would be liable for damages occasioned thereby, but this error did not injure the appellant, and it can not allege the same as error.

The fourth error assigned is to the following instruction: "It was the duty of the road company to construct bridges over such streams along the road as are not fordable, but when such streams are conveniently fordable at all seasons of the year the road company was not obliged to build bridges. Before plaintiff can recover he must show that he was engaged in transporting the United States mails; and upon this point it is sufficient if the testimony shows that the mails were delivered to him or his employees and by him or them transported over the route." The first part of this instruction is correct, being in accordance with the statute of Oregon prescribing the manner in which such roads shall be constructed. (Statute, p. 531, sec. 30.) The last part of the instruction is correct, for if the respondent was recognized by the United States officers and the mails delivered to him, and by him transported, we think he would be a sufficiently accredited mail carrier to be entitled to pass over said road free of tolls.

The fifth error alleged is to the following instruction: "On the subject of tolls I charge you that under the law a mail carrier or one employed in transporting the mails, has a right to pass along the Dalles military road and over the bridges over the streams on said road without paying tolls therefor. If the Dalles military road company has failed to build bridges at necessary points, and the plaintiff had to cross the streams over bridges owned by others and paid tolls therefor, he may recover the same; but the amount of toll which he can recover is such as would have been charged

for such vehicles and teams as could have conveniently taken the mails." As has before been said it was the duty of the said road company to construct bridges over the streams on their road. If they had not done this we think the respondent, if by reason of their negligence in not constructing bridges had to incur expense in passing over bridges owned by other persons and pay tolls therefor, it was a damage which resulted to him from such negligence of the appellant, and that the appellant would be liable for the same. And as to the amount of such damage, the measure would be what he had to pay to pass said bridges, which is correctly stated in this instruction now under consideration.

The sixth ground of error is alleged to be the refusal of the court to give this instruction: "That a contract with the government to carry the mails, either directly or through others, is not the government of the United States carrying the mails; and that the government of the United States was only and is entitled, when carrying by itself said mails, to have free transportation for its mails as by the contract under which the defendant as alleged took its grant." This instruction is not skillfully worded and is scarcely intelligible, but we suppose the appellant's counsel desired the court to say to the jury that the United States in order to have a right to pass its mails over this road free of toll must carry the mail itself and not by its mail contractors. We think this is not correct. The government being a corporation can not do any act except through agents, and all persons are its agents who are employed to perform its functions. Among these are those who are employed by the government to carry the mails. Where one person contracts with the government to carry the mails over long routes such contractors have authority to employ others under them to assist them, for where any person is employed to do a certain thing he has implied authority to employ the means necessary to accomplish it. Any other conclusion would defeat the accomplishment of the purpose of the government in letting the contract to carry the mails, and we think there was no error in the refusal of the court to give this instruction.

These considerations dispose of the questions raised in the case, and as we find no substantial error in the proceeding of the circuit court its judgment will be affirmed.

FELIX G. DORRIS, Appellant, v. B. F. SMITH, and ELLA M. SMITH, Respondents.

NEGLIGENCE—AFTER ACQUIRED TITLE—ESTOPPEL.—D., having purchased a certain lot, caused the same to be conveyed to his two minor children. Thereafter, being in possession in behalf of his children, he executed a quitclaim deed, in which his wife joined, to the lot in favor of I., by whom it was subsequently conveyed to S. The conveyance by D. was in his own name, which was identical with that of one of the children. Subsequently D., having succeeded to the interest of the child, sought to enforce his title against S.; *Held*, that the execution of the quitclaim deed by D., the wife having joined in the deed and the names of D. and his child being identical, was such an act of negligence on his part as should estop him from asserting his after acquired title against innocent purchasers.

APPEAL from Multnomah County. The facts are stated in the opinion of the court.

Seneca Smith and John B. Waldo, for appellant:

It is claimed on behalf of the respondents that the fact of the identity of the names of the appellant and his son Felix G., was a circumstance which was likely to deceive subsequent purchasers, and that the act of the appellant in executing a deed which might so deceive, was such an act, or such negligence on his part as ought now to estop him from asserting the truth.

In speaking of estoppel *in pais* the supreme court of California say, "where invoked in respect to title it must appear: 1. That the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive or with such careless negligence as to amount to constructive fraud; 3. That the other party was

not only destitute of all convenient and ready means of acquiring such knowledge by the use of ordinary diligence, and that he relied directly upon the admission, and would be injured by allowing it to be disproved." (*Martin v. Zellerback*, 38 Cal. 315.)

The same language is used in the case of *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, and in 43 Cal. 526. The quitclaim deed of the appellant was executed on the ninth day of October, 1857. It does not appear on the face of the deed what interest was sold; there is no assertion or recital that the grantor owned or sold any interest whatever. The pleadings and testimony show that the deed from Day to Geo. P. and Felix G. Dorris was upon record at the time Smith took the mortgage, and was notice to every one that Felix G. owned but an undivided interest, the other moiety belonging to his brother, Geo. P.

In a late case in the supreme court of the United States Mr. Justice Field says: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud by which another has been misled to his injury."

In all this class of cases, says Story, the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud; and therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge, that the cases on this subject go to this result only—that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud. (1 Story's Eq. 391.) To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania that the primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied when on the faith of that denial others have acted.

The element of fraud is essential either in the intention of the party estopped or in the evidence which he attempts to set up. (*Brant v. Virgina Coal and Iron Co.* 3 Otto, 335.)

The nature of a quitclaim charges the purchaser with notice. The vendor says in effect to the purchaser: "I make no assertion or pretense of ownership. You take simply what I may have and take the risk absolutely as to my interest being anything." In *Van Rensselaer v. Kearny,* 11 How. 322, the court say: "A deed of this character purports to convey, and is understood to convey nothing more than the interest or estate of which the grantor is possessed at the time, and does not operate to pass or bind an estate not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title." And again in *Marshall v. Roberts,* 18 Minn. 405, 10 Am. R. 201, it is said: "But besides this, the grantee in a quitclaim deed like that from Roberts to Lamprey, though he may not in fact have known that his grantor had previously conveyed the described premises to another, and though he may not in fact have intended to defraud such prior grantee, is not a purchaser in good faith against such prior grantee, for nothing is attempted to be transferred to him except whatever right, title, etc., the grantor has at the time when the quitclaim deed is executed, so that as in the case of *Hope v. Stone,* the very terms of the deed are notice of the existence of the rights which have been conferred upon such prior grantee or any other person."

The doctrine is laid down in a case in Missouri, decided in 1876, which is directly in point. (*Mann v. Best,* 62 Mo. 491; *Merrit v. Merrit,* Id. 150; *Ridgway v. Haliday,* 59 Mo. 444; *May v. Leclair,* 11 Wall. 232; *Jackson v. Waldron,* 13 Wend. 205.)

Says Chancellor Kent, in *Demming v. Smith,* 3 Johns. 345: "If a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny

notice, even though it be not charged, and he must deny it positively, not evasively; he must even deny fully and in the most precise terms every circumstance from which notice could be inferred." And in *Gallatin v. Cunningham*, 8 Cow. 382, the court, after having quoted the above from *Demming v. Smith*, approvingly say: "Why must he do thus?" Because want of notice is an essential part of the purchaser's title, and unless he or those claiming under him aver that he had not notice the title is defective. To omit such an averment is as fatal as if the party had omitted any other fact (as the death of an ancestor, for example) essential to a perfect title."

In *Evarts v. Agnes et al.* 4 Wis. 367, in an able opinion the court say: "To entitle a party to the protection which a court of equity extends to a subsequent *bona fide* purchaser, he must make a full statement of all the facts and circumstances of his case, so that the court may be able to do perfect equity between the parties. It is not sufficient to allege that he purchased for a valuable consideration without notice, but the consideration must have been actually paid before notice, and if a part of the consideration only has been paid before notice, he will be protected only *pro tanto.*, hence it is necessary that the actual consideration be stated and the amount actually paid. The mere averment that he is a purchaser for a valuable consideration, and that the consideration is paid, is not sufficient, and no instance it is believed can be found where such a statement in an answer has been held sufficient."

In *Duncan v. Johnson et al.* 13 Ark. 190, it is said: "And not only is it necessary to set forth the subsequent title relied upon, but the answer must positively deny all notice whatever, and that not alone before the contract of purchase, but before the payment of the purchase-money and the execution of the deed also." In Story's Eq. Pl., sec. 806, it is said: "The plea must also deny notice of the appellant's title, or claim, previous to the execution of the deed and payment of the consideration." In the case at bar the only allegation of want of notice is: "And he, (the respondent, Benj. F. Smith) had not at the time of said purchase any

notice or knowledge concerning the title thereto, except what appeared by the records aforesaid."

There is no allegation as to when the purchase was made, from whom, what consideration was paid, except he alleges he purchased for a "full consideration," or whether the consideration was paid at the time of the purchase and before the notice or not. Besides the words, "except what appeared by the records as aforesaid," is a negative pregnant, and carries with it an admission that he had notice by the record.

Cattin, Killin & Nicholas, for respondents:

In July, 1856, more than twenty years before this suit was commenced, F. G. Dorris, the plaintiff, purchased from Lewis Day an equitable title to the lot in controversy, and took the deed in the name of F. G. and Geo. P. Dorris. In October, 1857, F. G. Dorris, the appellant, conveyed said lot by a good and sufficient deed to W. S. and B. R. Ingles, and received a full and adequate consideration therefor; and the deed was recorded. Afterwards the respondents bought the lot and paid a full price for it, and have ever since been in the possession of it, and made large and valuable improvements on it; it was a gully or hollow; they filled it up, made plank streets, built sidewalks, and an expensive house; they, during all the time they were making their improvements, having no knowledge except what was imparted to them by the deed of record. In 1866 respondents got in the legal title from the heirs of D. H. Lownsdale, who held it.

F. G. Dorris, the appellant, now sues to hold the respondents as trustees, for his use; and alleges that when he purchased the lot and took the deed to F. G. and Geo. P. Dorris, he intended the undivided half for an infant son by the name of F. G. Dorris, and not himself; that the son is dead, and he, as sole heir, succeeded to the equity of the son, and is entitled to have the Smiths convey to him. Among other defenses, limitations, want of equity, etc., respondents plead an estoppel by deed and also *in pais*. They claim that Dorris having taken the deed in the name

of F. G. Dorris, with nothing to indicate that it was for the child, and having sold the lot and obtained all it was worth, and having stood by knowing that the Smiths were relying on the face of the record, and having witnessed their great expenditures up to the time of his child's death in 1862, and having ever since failed to notify them of the ambiguity in the record, and having never come near or offered to pay the taxes or street assessments, is estopped now to claim that he committed a fraud and a forgery when he deeded the property away in 1857.

By the Court, PRIM, J.:

Felix G. Dorris, the appellant, who claims to be the equitable owner of lot 7 in block 25, of the city of Portland, brought this suit in the court below to compel respondents to convey to him the legal title of the undivided one half of said lot. The following facts are developed by the pleadings and evidence produced at the trial: On October 8, 1850, Daniel H. Lownsdale, being a settler upon the tract of land embracing the lot in controversy, sold and conveyed said lot by deed, for a valuable consideration, to one Hiram Wilbur, which was duly acknowledged by said Lownsdale, but not witnessed. At the time when this deed was executed Lownsdale had not completed his four years' residence and cultivation upon said land, so as to entitle him to a patent under the act of congress of September 27, 1850, commonly called the donation law, under which he was seeking to acquire the title. Thereafter said Wilbur, for a valuable consideration, conveyed said lot to Lewis Day. On or about July, 1856, appellant bought said lot for a valuable consideration, and procured the same to be conveyed by said Day and wife to George P. and Felix G. Dorris. On October 9, 1857, the appellant sold it to W. S. and B. R. Ingles, for two hundred dollars, and he and his wife conveyed the same to said Ingles by good and sufficient deed, which was duly witnessed, acknowledged and placed upon the records of deeds; that thereafter B. F. Smith, one of the respondents, having paid the full value of said lot and acquired the possession of the same by sundry mesne

conveyances from B. R. and W. S. Ingles, conveyed the same to his daughter, Ella M. Smith. Respondents have remained in possession of said lot ever since, and have made many valuable improvements thereon; that in February, 1866, Lownsdale having died, and his heirs being the owners of the legal title to the tract of land embracing the lot in controversy, the respondent, Ella M. Smith, commenced suit in the circuit court of Multnomah county against said heirs, to compel them to convey to her the legal title of said land, claiming to be the equitable owner thereof through the said sundry mesne conveyances from Lownsdale to herself. The Lownsdale heirs appeared therein, but failed to answer the complaint and permitted a decree to be taken against them, according to the prayer thereof. In pursuance of said decree, they subsequently duly executed a conveyance of the legal title to her.

The complaint of appellant alleges that the said George P. and Felix G. Dorris were his minor children, and that appellant, being in the possession of the said lot for and on behalf of his said minor children, and supposing that he had an interest or right to hold the possession of said land until his said children should become of age, executed the deed of October 9, 1857, together wth his wife, to the said W. S. and B. R. Ingles, intending thereby to convey to them his said supposed right to the possession of said lot until his children should arrive at their majority; that on or about the year 1861, Felix G. Dorris, the said minor child of the appellant, and one of the grantees of said Day, died intestate, leaving the appellant his sole heir at law.

The complaint further alleges that all the allegations of the said complaint of Ella M. Smith in her suit against the Lownsdale heirs, so far as they refer to the conveyance by Lownsdale and mesne conveyances to Lewis Day, and from Day to George P. and Felix G. Dorris were true, but that all the allegations of the said complaint as to the deed from Felix G. Dorris were false and a fraud upon the right of the appellant; that Felix G. Dorris, one of the grantees of Day, never did convey his interest in the said land, but owned the same at the time of his death, and that the said quit-

claim deed of the appellant to Benj. R. and William S. Ingles could pass, and was intended and understood to pass, no greater interest than he then had, which was his supposed right to retain the possession until his said children should become of age, and that the appellant, as heir at law of his son, Felix G. Dorris, is now the owner of the equitable title and entitled to a conveyance of the legal title from the respondents.

The answer denies all the material allegations of the complaint except that in the said suit of respondent, Ella M. Smith, against the Lownsdale heirs, in which she obtained the decree compelling them to convey the legal title she in her complaint claimed to deraign her equitable title by and through the said conveyance from Lownsdale to Wilbur and mesne conveyances to Geo. P. and Felix G. Dorris, as alleged in the complaint, but avers that the said Felix G. Dorris was the appellant herein.

The answer, as new matter of defense, sets up that this suit was not commenced within twenty years from the time the cause of suit accrued. Also, that the suit was not commenced within five years from the date of the patent from the United States to Lownsdale to the tract of land embracing the tract in controversy, and that all the matters and things set out in the complaint upon which appellant claims relief occurred prior to the issuing of the patent, and that appellant's claim for both these reasons is barred.

The answer also denies that the deed from the appellant to the Ingles was a quitclaim deed, and makes the said deed a part of the answer marked "A," and alleges that by it appellant undertook to convey to the Ingles the fee-simple title to the land, as well as any interest he then had, "as any interest he might afterward acquire," and in effect, that appellant ought now to be estopped to claim under any subsequently acquired title.

Alleges that the said deed was duly recorded and that the respondent, B. F. Smith, relying upon the said record, purchased the said lot. There is a further allegation in these words: "And he had not at the time of said purchase any notice or knowledge concerning the title thereto, except what

appeared by the record as aforesaid." There are also allegations that the appellant, knowing that the respondents were relying upon his said deed to Wm. S. and Benj. R. Ingles, stood by and allowed them to make valuable improvements on the land without giving them any notice of his title or claim to the same. The replication denies all the material allegations containing new matter, set up in the answer.

The issues and questions in this suit as summed up in appellant's brief are:

1. Are the respondents estopped to deny that Felix G. and Geo. P. Dorris were, after the deed to them from Day, the equitable owners of the land in controversy?

2. Is the right of the appellant barred by lapse of time?

3. Does the deed of the appellant to Ben. R. and Wm. S. Ingles estop the appellant from asserting the title he afterwards acquired upon the death of his son, Felix G. Dorris?

4. Can the respondents under the pleadings and proofs claim the rights of purchasers for value without notice?

5. Does the fact that the respondents put improvements on the land estop the appellant, he being shown to have known nothing of it until after they put on?

All of these questions are very ably discussed in the brief of appellant; but as the third proposition is the only one which was seriously urged on behalf of respondents, we deem it unnecessary to consider the others. That proposition is as follows: Does the deed of appellant to B. R. and W. S. Ingles estop him from asserting the title he afterwards acquired upon the death of his son, Felix G. Dorris? It is urged on behalf of appellant that the rule is well settled that a mere simple quitclaim of the right, title and interest of the grantor, does not estop him from asserting an after acquired title, which is undoubtedly correct; but that is not the only question presented here. Appellant had two minor children, George P. and Felix G. Dorris, the former being nine years of age and the latter six at the time when the lot in question was conveyed to them. Appellant not only negotiated the trade for the lot but furnished the

consideration from his own means, and caused it to be conveyed by Day and wife to his said minor children.

About one year after this lot had been conveyed to these minor children of appellant, he having conceived the idea that he had some kind of ownership in the property until they should attain their majority, sold the same for its full value to B. R. and W. S. Ingles, and having so sold it, appellant and wife duly conveyed the same to them by good and sufficient deed, which was duly placed upon the record. It is claimed however by appellant that the conditions of the title were fully understood by the Ingles at the time of their purchase, he having explained to them that he only claimed the right to control the property until his said children should attain their majority. But the Ingles having since died, their evidence can not now be obtained upon this question. It looks a little singular that if appellant only claimed the right to hold the land until his minor children should attain their majority, why he should deem it necessary to have his wife join with him in the deed to bar her right of dower, when it was impossible for her to have any such right under his theory.

Thus, when we view the act of the appellant in the light of the evidence in selling his supposed right to the lot and executing the deed in his own name, which was identical with that of his son, we think it was a circumstance which was very likely to deceive subsequent purchasers, and that the act of the appellant in executing a deed which might so deceive, was such an act or such negligence on his part as ought now to estop him from asserting the after-acquired title as against innocent purchasers. The least that could have been required of him by common prudence, under the circumstances, was to have signed his own name as Felix G. Dorris, senior, and that of his son as Felix G. Dorris, junior, so that third parties could have had the means of knowing which one of them had executed the paper.

Under the circumstances as presented in this case we think the circuit court did right in dismissing the suit with costs.

The decree of the court below is affirmed with costs.

E. A. PARKER, Respondent, v. D. B. MONTEITH, Appellant.

COMPLAINT—ALLEGATION, SUFFICIENCY OF.—Where the complaint in an action for seduction alleges "that one F. P., the daughter of the plaintiff, was, etc.," it sufficiently avers that F. P. is the daughter of the plaintiff.

SEDUCTION—GOOD CHARACTER, PROOF OF.—In such an action it is competent for the plaintiff to prove the good character of his own family and also the good character and standing of the defendant's family.

PROOF—FLIGHT OF DEFENDANT IN ACTION FOR SEDUCTION.—The plaintiff may also prove that the defendant, when charged with the seduction of his daughter, left his residence and was apprehended in a distant part of the state.

IDEM—PROMISE TO MARRY.—He may also prove that the defendant promised to marry his daughter, and by means of such promise succeeded in seducing her.

BILL OF EXCEPTIONS—TESTIMONY SHOWN BY.—When the bill of exceptions does not set forth all the testimony given on the trial, this court will not reverse a judgment where the instruction given to the jury would have been correct upon any state of the evidence which might have been properly before the court and jury.

APPEAL from Linn County. The facts are stated in the opinion of the court.

John Burnett and R. S. Strahan, for appellant:

The second and third assignments of error are based on the theory that the complaint is insufficient, in not alleging Flora Parker was the daughter of the plaintiff. This allegation is necessary and material, and it must be directly made—the fact pleaded in issuable form. (2 Greenl. Ev. sec. 571; 2 Estee's Pl. 101 and 104; 16 La. Ann. 180.)

Flora Parker's statements and declarations to Sarah Parker as to her feelings or the state of her health were not competent for any purpose. (*Bacon v. Inhabitants of Charlton,* 7 Cush. 586.) It was not competent to prove the general standing and reputation of the plaintiff or that of his family in society. It was also incompetent and improper for the court to permit the plaintiff to prove the standing of the defendant's family in the community. It was not competent to ask concerning defendant's general character. (1 Greenl. Ev. 54.) And it was also incompetent and im-

proper for the court to permit the plaintiff to prove by the witness Humphrey that he went after the defendant about that time to arrest him for the offense of seducing Flora Parker. (2 Black. Com. 386-7.)

The definition of seduction given by the court to the jury is not correct. It was not proper for the plaintiff to prove or for the jury to consider whether there was a promise of marriage made or not. None is alleged. If it was incompetent to prove it the court ought not to have commented on that phase of the case. (Hilliard on Rem. for Torts, 542, sec. 10; *Gillet v. Mead,* 7 Wend. 194.) If the instruction is not admissible on any state of the evidence, the giving of such instructions is error. (*Keating v. State,* 44 Ind. 449.) It is hardly necessary to cite the elementary rule that the evidence must correspond with the allegations and be confined to the issue. (1 Greenl. Ev. sec. 51.) And this is the rule of the statute as well. (Civ. Code, sec. 694.) But its application was entirely relaxed in this case, and the defendant sought to be made responsible for the standing not of himself, but that of his family, in the community. If such a rule as this is tolerated there can be no certainty in judicial proceedings whatever.

The complaint does not allege any damages caused by the acts of the defendant. This he must do in order to sustain a judgment for damages. (*Bohall v. Diller,* 41 Cal. 532; 4 N. Y. 504.) Admitting immaterial evidence is ground for a new trial. (See 9 Barb. 619; 10 B. Mon. 16; 21 Pick. 142; 19 Wend. 232.)

Wm. Strong, W. G. Piper, J. K. Weatherford and J. M. Thompson, for respondent:

The exceptions to evidence showing that Flora Parker was the daughter of plaintiff can not be of any force unless the court shall hold the complaint bad because it does not more directly aver that she was the daughter, etc. It may be defectively stated and still be deficient on demurrer, because the complaint does not state facts sufficient to constitute a cause of action. Complaint in this case describes her as the daughter of the plaintiff. The answer, in direct terms,

admits that she was the daughter of plaintiff by denying any knowledge or information sufficient to form a belief "as to whether one Flora Parker, the daughter of the plaintiff, was of the age of seventeen years at the time mentioned in the complaint." (Code, secs. 83, 104; 2 Greenl. on Ev. sec. 571; *Allen v. Patterson,* 3 Seldon, 476; *Mack v. City of Salem,* 6 Or. 278.) Where the mental or bodily feelings of an individual are material to be proved, the usual expression of such feelings made at the time in question, or of a sick person in relation to the malady with which he or she is afflicted, is original evidence. (1 Greenl. Ev. sec. 102; *State v. Howard,* 32 Vt. 380.)

The character and standing of plaintiff's and defendant's families in the community is competent evidence to show that the parent was justified in allowing that degree of intimacy which is tolerated between the sexes in good families, and is also competent for plaintiff to give such facts in evidence on questions of damages, and it certainly could not prejudice the defendant in this case. (*Wilson v. Sprowl,* 3 Pa. 49; *White v. Merton,* 7 Ill. 250; 2 Hilliard on Torts, 517.) Plaintiff entitled to compensation for the dishonor of his family. (21 Wend. 79; 2 Greenl. Ev. 251.)

The fact of defendant's flight when accused is a fact admissible as a circumstance to prove guilt. The rules of evidence are the same in civil and criminal cases in reference to admissions, acts or declarations of parties by conduct. (1 Greenl. Ev. secs. 65, 170.) An attempt to escape, if shown, lends a strong presumption of guilt; so with flight, to which no proper motive can be assigned. (Wharton's Crim. Law. sec. 714; 3 Phillips on Ev., notes 223, 225 and 285.)

There was no error in the instruction of the court below instructing the jury, defining seduction "a promise of marriage by defendant made to Flora Parker, or any influence exerted by him over her—such as gaining her affections or acquiring influence over her, or persuading her, which had a tendency to draw her from the path of virtue, would be sufficient, if followed by illicit intercourse, to constitute seduction,

if the jury believe she was thereby constrained to yield to his desires."

It matters not what promises or arts were used by the defendant if thereby Flora Parker was led astray and induced to surrender her virtue, and do what she would not otherwise have done, it is seduction. Continued attentions to a female for several months, followed by an improper intercourse, is sufficient evidence to warrant the inference of seduction, and in an action by a father for the seduction of his daughter, it is not necessary to prove that the defendant used any arts or false promises to accomplish his purposes; if the seduction has been accomplished, whether by deception or solicitation, the action may be maintained. (*State v. Groom,* 10 Iowa, 308; *Clark v. Fitch,* 2 Wend. 459.)

It is sufficient if defendant accomplished his purpose by a conditional promise of marriage. (26 N. Y. 203.) It is not necessary that the promise be valid or binding. (2 Hill. on Torts, p. 517, sec. 10.) It would have the effect to increase the damages if the defendant promised to marry, and by that means succeeded in debauching plaintiff's daughter. (21 Ind. 98; 13 Gratt. Va. 573.)

By the Court, KELLY, C. J.:

This was an action brought by respondent against the appellant for the seduction of his daughter. The complaint alleges substantially: "That at the time, hereafter mentioned, one Flora Parker, the daughter of the plaintiff, was of the age of seventeen years. That on or about the —— day of June, 1876, and at divers times since, in the county and state aforesaid, the said defendant, well knowing the said Flora Parker to be the daughter of the plaintiff, then and there wrongfully and unlawfully contriving and intending to injure, disgrace, and distress, and wound the feelings of the plaintiff and deprive him of her service and assistance, and of the society and comfort of his said daughter, and to dishonor the plaintiff and his family, did wickedly, willfully and maliciously, and without the privity or consent of the plaintiff, entice and persuade the said Flora Parker to have illicit intercourse with him, the said defendant, and the said

defendant did then and there debauch and criminally know her. That by reason of the premises the said Flora Parker became pregnant and sick with child, and has remained so for the period of about five months last past. That during that time she was unable to perform the duties of her service, and now is unable to perform such service, and plaintiff has been thereby deprived of the service of his said daughter; and was obliged and actually did expend large sums of money for medicines, and was put to a great amount of trouble and expense in her said pregnancy and sickness, and that he was otherwise and still is greatly injured to his damage in the sum of ten thousand dollars."

The answer contains a specific denial of all the material allegations in the complaint.

Before the answer was filed the defendant moved the court to require the plaintiff to make his complaint more specific by stating the amount of money he expended for medicine for his daughter; and how much trouble and expense he had been put to by reason of her alleged pregnancy. The court overruled the motion, and this ruling is now assigned as error by the appellant.

The plaintiff having failed to specify the amounts of money expended, by giving the items of the account, all the court could do in the premises was to preclude him from giving evidence thereof. (Civ. Code, sec. 82.)

As it does not appear from the bill of exceptions that any evidence was offered on the trial to prove the expenditure of any money for medicine, etc., no error was committed by the court.

The next two assignments will be considered together. They are as follows: That the court erred in permitting plaintiff's counsel to ask Flora Parker this question: "Are you the daughter of the plaintiff?" and in receiving her answer thereto that she was; that the court erred in permitting the plaintiff's counsel to ask him this question: "Is Flora Parker your daughter?" and in permitting him to answer the same that she was.

Both of these alleged errors are based on the theory that

the complaint is insufficient in this that it does not allege that Flora Parker was the daughter of the plaintiff.

We think the complaint sufficiently avers that Flora Parker is the daughter of the plaintiff. The allegation is: "That at the time hereinafter mentioned one Flora Parker, the daughter of the plaintiff, was," etc. This is in effect the same as if it stated "that Flora Parker, who is the daughter of plaintiff," etc. In the grammatical construction of the sentence these two words are understood, and their omission in the allegation is a mere ellipsis, which does not destroy its meaning or its effect. There was no error in either of these rulings by the court.

The next assignment is, that the court erred in permitting the counsel of plaintiff to ask Sarah Parker, the wife of plaintiff, this question: "What did Flora Parker tell you as to her feelings or the state of her health at the time?" and her reply that she had felt no motion. There is an allegation in the complaint that Flora Parker was then pregnant, and we think the question of the mother and the answer of her daughter as to her condition and state of health under the circumstances, were proper to go before the jury as original evidence. It comes within the rule laid down in *Aveson v. Lord Kinnaird,* 6 East, 188; 1 Greenl. Ev. sec. 102.

The next two exceptions were taken to the rulings of the court in permitting a witness to give evidence as to the good character and standing of the families of both plaintiff and defendant in the community in which they lived.

We think the respondent had a right to show the good character of his own family, for the seduction of one member of it lessened the social standing of all; and the jury were justified in awarding them compensation for the destruction of his domestic peace as well as the disgrace cast upon his family. (*McAulay v. Birkhead,* 13 Iredell, 28; *Kendrick v. McCrary,* 11 Geo. 603.)

Nor do we consider that the court erred in permitting the witness to testify as to the good character and standing of appellant's family. It was competent for the respondent to show that while it was his duty to be watchful over the

morals of his daughter, he was nevertheless justified in permitting that degree of social intimacy between her and the appellant which is always allowable between the different sexes in good families, but which would not have been tolerated had he belonged to a family which was low or degraded.

The next assignment is that the court erred in permitting the respondent to ask the deputy sheriff this question: "State whether you went after the defendant to arrest him for the offense of seducing Flora Parker, and where you found him?" and in permitting the witness to answer that he "arrested him on the beach, between Umpqua and Empire City." The object of this testimony was to show that when the charge of seduction was preferred against the appellant he was making an effort to escape. In criminal cases the flight of the accused, to which no proper motive can be assigned, is considered as some evidence of his guilt; and we do not see why the same rule should not apply in civil actions, which are *quasi* criminal in their character.

The last assignment of error is that the court erred in charging the jury as follows: "A promise of marriage by the defendant, made to Flora Parker, or any influence exerted by him over her, such as gaining her affections or acquiring influence over her, or persuading her, which had a tendency to draw her from the path of virtue, would be sufficient, if followed by illicit intercourse, to constitute seduction, if the jury believe that she was thereby constrained to yield to his desire."

It does not appear by the bill of exceptions whether any evidence was offered or admitted to prove a promise of marriage made by the appellant to Flora Parker. The presumption is, however, that such evidence was received, otherwise the court would not have referred to it in the charge to the jury, and if so, was it properly admitted?

The courts of New York have decided that in an action by a father for the seduction of his daughter, evidence can not be given that the defendant made a promise of marriage to her, for if this were permitted, damages for a breach of

promise of marriage might be recovered in the action for seduction. (*Foster v. Scofield*, 1 Johns. 297; *Gillet v. Mead*, 7 Wend. 193.)

Although in that state it is competent to show that the defendant paid the daughter such attentions as are usual when the addresses are of an honorable character. (*Brownwell v. McEwen*, 5 Denio, 367.)

In Pennsylvania, Virginia and Indiana, the courts have decided differently, and in those states it is held that in an action by a father for the seduction of his daughter he may prove that the defendant promised to marry the daughter, and by that means succeeded in debauching her. The father, however, is not entitled to recover in such action any part of the damages which belong to the daughter by reason of the breach of the contract of marriage. (*Phelin v. Kenderdine*, 20 Pa. St. 354; *White v. Campbell*, 13 Gratt. 572; *Lee v. Hefley*, 21 Ind. 49.)

It seems to be now settled in this country that such evidence is admissible. (2 Greenl. Ev., sec. 579; 2 Hil. on Torts, 517, sec. 10.)

And we think it would be proper in such an action as this for the plaintiff to prove that the defendant promised to marry his daughter, when by reasons of such promise he succeeded in seducing her. It is urged by the appellant that as no promise of marriage is alleged in the complaint to have been made, no evidence to prove it was admissible on the trial. This proposition we regard as untenable, for evidence of a promise to marry could only be offered as one of the means by which the seduction was accomplished, and it is not allowable to set forth the evidence in a pleading.

The record in this case does not disclose the fact whether any testimony was offered on the trial tending to prove that the appellant promised to marry Flora Parker, and we have but an isolated sentence from the charge of the court, taken from the context, which ought to have been included in the bill of exceptions. We are therefore left to infer that evidence of this kind was offered and admitted by the court, otherwise no allusion would have been made to it in the charge to the jury. When an instruction is given by the

court and the record does not set forth all the testimony given at the trial, the rule is that if upon any state of the evidence which might have been properly before the court and jury, the instruction would have been correct, it will not be reversed by the appellate court. "But if upon no state of the evidence which can be supposed to have been before the court and jury would the charge have been correct, the giving of the erroneous charge will be a cause for reversal." (*Keating v. The State,* 44 Ind. 450.) Tested by this rule the charge of the court to the jury was not erroneous and the judgment is affirmed.

HIRAM BROWN et al., Respondents, v. MARY O. BROWN et al., Appellants.

WILL—EXECUTORS AND TRUSTEES—POWERS TO SELL REAL ESTATE. — Where a testator devised his real estate to trustees to pay his debts and to hold the residue in trust for the benefit of an incorporated town, the trustees, who were also the executors of the will, had an implied power to sell sufficient land to pay the debts where the will contained no express power for that purpose.

MUNICIPAL CORPORATION—MAY TAKE UNDER WILL.—A testator devised real property to trustees, to be held by them in perpetuity for the benefit of the town of Astoria, with power to manage the same in their discretion: *Held,* that the will was not void as to such devise on the ground that it created a perpetuity.

WILL—ORDER TO SELL NOT REQUIRED, WHEN.—Real property having been devised to trustees to be held by them for the purpose of paying the testator's debts, and the residue for other purposes, the legal title was vested in them, and they had power to sell the land for money to pay the debts, without an order of the probate court; nor was it necessary that such sale should be confirmed by that court.

SETTING ASIDE WILL—EFFECT OF, ON ACTS DONE UNDER.—Where a will was duly admitted to probate, by the probate court, and letters testamentary were issued to the executors named therein, and such will was afterwards set aside on account of the insanity of the testator; all acts done by the executors in the due course of administration, before the revocation of the letters testamentary, are deemed and held to be valid.

APPEAL from Clatsop county. The facts are stated in the opinion.

Robb & Fulton, for appellants:

A power given to manage property does not authorize its sale; but even if such authority is implied, the statute interferes for the protection of heirs and creditors, and provides the manner in which the sale shall be conducted and reported to the court. (Civ. Code, 328, secs. 1109, 1123.) The California statute on the same subject is very similar, and the supreme court of that state held in a case where the will expressly directed a sale, that the sale must be reported to and confirmed by the probate court. (*Pekins v. Gridley*, 50 Cal. 97.)

The devise is in trust: 1. To pay the debts of the testator. 2. To hold the residue in perpetuity for the benefit of the town of Astoria. The first trust is void, for the reason that a devise of property in trust to pay debts simply is void, the law having already provided for the same thing. In the language of Lord Chancellor Talbot, in the case of *Hazelwood v. Pope*, 3 P. Wms. 324, and quoted with approval in *Lewis v. Bacon*, 3 Hen. and M. 103, "it is like giving lands to the heir, which is void." (Hill on Trustees, 484.)

The second devise is void because it creates a perpetuity. It comes exactly within the definition of perpetuity given by the law writers, and which they say "the law abhors." We do not think that it can be maintained that the will is void because creating a perpetuity. All we claim is that the devise is void upon that ground, and that the town of Astoria takes nothing. It had no power under its charter to take this devise. (Laws, 1872, p. 189; 7 N. Y. 272.) Therefore, the trust estate fails, and the fee vests in the heirs. Hustler and Aiken are "to hold" the residue in "perpetuity" for the benefit of the town of Astoria. This of course stops alienation, for the trustees, after the debts are paid, clearly can not sell or convey the legal title. They are "to hold" the lands in perpetuity. "The judges of the courts of common law have for many centuries established it as a rule that the real property shall in no case be rendered perpetually unalienable by the act of the proprietors, or, as it is usually expressed, that perpetuities shall not be allowed." (Greenl. Cruise, Dig. Title 32, c. 24, sec. 1.) But even if it did not create a perpetuity, the case is no better for the plaintiffs, for the reason that if

the devise is not void as creating a perpetuity, the Statute of Uses, 27 Henry VIII. immediately vests the fee in the town of Astoria. (2 Blackstone, 332 *et seq.*; 4 Kent, 294, 299; Perry on Trusts, secs. 7, 298, 308, 312, 313, 316, 317 320; Wash. on Real Property, secs. 44, 45; Hill on Trustees, 344 *et seq.*; 2 Blackstone, 332; 4 Kent, 294, 298; Redfield on Wills, 531; Greenl. Cruise, Dig. Title 12, c. 1.)

We are unable to find any Oregon statute regulating Uses and Trusts, and hence argue that the Statute of Uses is a part of the common law of Oregon. "It is also the established doctrine that English statutes passed before the immigration of our ancestors and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." (Sedgwick Stat. and Const. Law, 8, and cases cited also, 18; 1 Kent, 473, 513.) The authorities are all agreed that the statute, where in force, executes the use in such cases as the one before us, so that whether this devise is void as creating a perpetuity or the statute executes the use in favor of the town of Astoria, the second trust fails.

It would seem that the rule laid down in what Chancellor Kent calls "the great case of *Coster v. Lorillard*," 14 Wend. 265, applies. The principal trusts created by the will being adjudged void, and thus the main intent and object of the testator defeated, it was held that certain life estates, in particular lands given by a codicil, were also void, and that the whole estate passed to the heirs at law. The testator, by the terms of the will, appointed Hustler and Aikin his executors, and requested them as executors to manage his estate. The only object of the devise to them was for the benefit of the town. That was the purpose of the devise, and that purpose failing, the whole devise fails. (*Harris v. Clark*, 7 N. Y. 242.)

In this country the rule is, as we think, as applied to this case, that the fee vests at once upon the will being probated either in the heirs, in case the second devise is void, or in the town of Astoria, subject of course to the debts, and the trustees take no estate in the land.

In *Popham v. Banfield,* 1 Vern. 79, a testator devised lands to trustees for the payment of debts, and after his debts were paid, then in trust for the use and benefit of A. and his heirs male, and it was held that the legal estate was executed by the statute of uses in A., and the court seems to have been of opinion that no legal estate vested in the trustees.

Hill, in his work on Trustees, refers to this case among others, and says, as the result of an examination of the English cases, "Where there was a devise of real estate to persons without words of limitation in trust to pay debts, annuities or legacies, and no sale was expressly directed, it does not appear to have been settled whether the trustees would take the inheritance, or chattel interest, for a term of years." The author further says: "Therefore, if there be a devise to trustees without any words of limitation, * * and if, from the amount or nature of the payments to be made, as well as the general scope of the trust, the payments may well be discharged by an annual perception of the rents and profits, and no sale or other anticipation of the income is necessary for that purpose; the authorities, without exception, establish that the trustees will only take a term of years sufficient for raising the required money, and no estate of inheritance will vest in them. And the fact of the devise being to the persons who are appointed executors, would seem to be in favor of this construction." (Hill on Trustees, 243, 246.)

From an examination of the cases cited by this author it appears that where the devise is in trust to pay debts, and, as in this case, no power of sale is given in express terms, it is an unsettled question whether the fee is vested in the trustees so they can sell and convey, or whether they must content themselves with applying the rents and profits to the payment of the debts.

The English authorities seem to hold, and certainly the American authorities do hold, that there is a distinction between a deed of trust *inter vivos* to pay debts and a devise to pay debts. The reason for the distinction will presently appear. If the will in the case at bar had devised the property to the trustees with directions to sell the realty and pay

the debts out of it, the authorities hold that their sale would pass the title.

The New York statute especially authorizes such a disposition by will, but the will must contain a direct power of sale, and it will probably be found that all the American cases are under statutes providing for such disposition by will. But that is not this case. The devise is to the executors in trust to pay the debts of the testator; nothing further is said, and we have been unable to find a single American case where the will did no more than the one before us. It is a devise in trust to pay debts without words of limitation, and without containing a power of sale. In England only the personal estate was liable for the debts of the deceased. The realty went to the heirs or devisees discharged of the debts. Hence English courts of equity have taken jurisdiction of devises of realty to pay debts of deceased "to prevent men sinning in their graves." (Perry on Trusts, sec. 557.) In this country, by statute, the reallty is placed upon the same footing as to the liability for debts of the deceased as the personalty, and hence the same rules would apply here to devise of realty in trust to pay debts as would apply to devises of personalty in England. (Civ. Code, p. 331, sec. 1125; Perry on Trusts, secs. 557, 558, 559.)

What is the English rule as to devises of personalty in trusts to pay debts? "It is therefore now conclusively established that a trust by will for the payment of the testator's debts out of his personal estate has no legal operation. A trust, therefore, for the payment of debts, so far as it forms the subject of discussion in the present work, can be created by will only with regard to the real estate of the testator. (Hill on Trustees, 344.) The reason of course is because the law places the property in the hands of the executors, in trust, to pay debts. "It is like giving lands to the heir, which is void. (*Hazelwood v. Pope*, 3 P. Wms. 324.)

Perry on Trusts, sec. 559, after speaking of the English law, says: "In the United States both real and personal property are liable for the debts of a deceased person, and no valid trust can be created by will for the payment of debts in either personal or real estate."

It is a familiar rule that when a valid trust is created the Statute of Limitations does not run against the *cestui que trust*, who, in the case at bar, would be the creditors. But our courts have frequently held (on account of both real and personal property being, by law, assets in the hands of the executor for the payment of debts) that an attempt to create a trust in a will to pay debts did not excuse the creditor from presenting his claim in the probate court, the same as if the will had not attempted to create a trust. (*Carrington v. Manning*, 13 Ala, 625; Perry on Trusts, 559.) If the will, taken as a whole, is considered, is it not plain that it was the intention of the testator to vest his property in the devisees for the benefit of the town of Astoria? If the testator failed in carrying out his intention in that behalf, as he certainly did, then Hustler and Aiken take nothing under the will except as executors. The will appoints them as executors, waives their giving bonds, and directs them to manage the estate in their discretion. Power is not given them as trustees to manage the estates, but as executors. (Story's Eq. Jur., secs. 1060, 1863.) In other words, while the estate is in the probate court it is to be managed by the executors, who, under the law, must pay the debts out of it. After the debts are paid and the estate settled up, then the trustees hold the residue in trust for the town of Astoria. It is not until the debts are paid that they take as trustees.

The Civil Code (sec. 723) provides as follows: "In case of a judgment, decree or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title of the thing, the will or administration, or the condition or relation of the person."

Admitting the will of Cyrus Olney to probate was a decree *in rem*, and no other court has jurisdiction to inquire into the correctness of its action. (*State v. McGlynn*, 20 Cal. 233, and cases cited; 28 Ala. 590; 2 Greenl. Ev. sec. 672.) The decree of the same court setting aside the will

was equally a decree *in rem*, and is conclusive as to the condition of Cyrus Olney at the time of his death.

The county court has jurisdiction to set a will aside. (*Hubbard v. Hubbard*, decided at the present term of this court; Civ. Code, p. 319, sec. 1061; Redfield on Wills, part 11, p. 56; 3 Greenl. Ev. sec. 672; 9 Iowa, 1 Id. 201; *California v. McLaughlin*, 20 Cal. 233; *Fitch v. Miller*, 20 Id. 352; Story's Eq. Jur., secs. 184, 1445, 1449.)

Geo. H. Durham and H. Y. Thompson, and Dolph, Bronaugh & Dolph & Simon, and Thayer & Williams, for respondents:

The first proposition urged in the argument upon the trial of the cause in the court below, by counsel for appellants, was that the proceedings of the county court in admitting to probate the will of the late Cyrus Olney were without jurisdiction and void, because no notice of their pendency had been given to the alleged heirs of the testator. Under the statutes of Oregon, and the uniform practice which has grown up thereunder, no such notice is required.

The probate of a will is deemed and treated by the statute as an *ex parte* and not as an adversary proceeding, hence no provision is made for giving notice. Again, it is universally held by the courts, and our statute is framed upon this idea, that "the probate of a will under any circumstances is a proceeding *in rem*. It operates upon the thing itself; it defines and, in a great degree, creates its status. The status thus defined adheres to it as a fixture." (*Derland and James v. Harrington's Heirs*, 29 Ala. 95; *In re Hunter's Will*, 6 Ohio, 499; *In re Hathaway's Will*, 4 Id. 388; *Lessee of Hall v. Ashby and Craven*, 9 Id. 96; *State v. McGlynn and Butler*, 20 Cal. 234; *Crippen v. Dexter*, 13 Gray, 330; Civ. Code, sec. 723.)

It is also urged that the lands in controversy were sold by the executors to the plaintiffs without the specific order of the county court, or its subsequent confirmation, and that the sales are therefore void. This objection is untenable when it is borne in mind that the executors were also the devisees named in the will; the legal title of record was in them. They had a power coupled with an interest. They,

therefore, had undoubted authority to sell the devised lands, independent of any order of the probate court. (*In re Delany Estate*, 49 Cal. 76; *Hogan v. Wyman*, 2 Or. 304.) For the same reason it was unnecessary for the executors to report their sales to the county court for purposes of confirmation.

The supreme court of this state has already disposed of this question in the case of *Hogan v. Wyman, supra*, where it is also stated that the proceedings of trustees under a will in the execution of the trusts, would have been without the jurisdiction of the probate court.

It is further claimed by appellants that the decree of the county court, made in a proceeding instituted in that court for the purpose of avoiding the former probate of the will of Olney and its cancellation, on the ground of Olney's alleged insanity at the time of its execution renders null and void all the acts of the executors and trustees under the will. And this, too, notwithstanding it is not claimed that the plaintiffs or any of them were parties to said proceeding, and notwithstanding the further fact that the county court in assuming to thus act as a court of equity, disregarded the plain rule of practice and law, requiring some testimony to be taken in support of the bill, and attempted to render a decree for want of answer. It is respectfully urged by respondents that the county court had no power or jurisdiction to set aside a former probate of a will.

By section 12, of article VII, of the state constitution, it is provided that county courts shall have, among other things, the jurisdiction pertaining to probate courts, together with such other powers and duties, within prescribed limits, as may be provided by law.

The legislature, in section 869, of the civil code, has undertaken to define the power of the county court, by saying that such court shall have exclusive jurisdiction in the first instance, to take proof of wills, and to do other things specifically enumerated, thereby excluding the idea that such court has any other powers, as a probate court, which are not mentioned.

Then, in the first instance, the county court may take proof of wills, and in doing so has exclusive jurisdiction. But it is not provided that said court may afterwards, after the lapse of years, vacate its former decrees, and the particular specification and enumeration of its powers, as has been seen, excludes the idea of the existence of any such inherent power. An appeal lies, under our statutes, from the decision of our county court in probate matters, or a review may be had; but to vacate the formal admission to probate of a will, and to annul the will, is in our system granted exclusively to the circuit courts of the state.

Section 9, of article II, of the constitution, grants to these courts all judicial power and jurisdiction not exclusively vested elsewhere. It has already been shown, by the statute defining the powers and duties of the county courts, that the jurisdiction under consideration has not been vested in them. In this state it is therefore part of the original chancery jurisdiction of the circuit courts. (*McCarty v. McCarty*, 8 Bush. 504.)

But were it to be held otherwise, the subsequent decree of the county court vacating the former probate of will, could not bind purchasers thereunder, who were not parties to those proceedings. Such purchasers must have their day in court. Nor would the pretended decree, annulling the will, relied upon by appellants, invalidate a sale made under the will before the probate thereof was set aside. (*Sheppard v. Rhodes et al.*, 6 Ill. 301; *Benson v. Rice*, 2 Nott & McCord, 557; *Moore v. Tanner*, 5 T. B. Mon. 48; *Foulke v. Zimmerman*, 14 Wall. 113; 2 Smith's Leading Cases, 699; 3 Redfield on Wills, 3 ed. 120.)

A familiar illustration of the principle contended for by respondents, is found in the unquestioned doctrine that third persons, who purchase lands under unreversed decrees or judgments, where there is no stay of proceedings, are unaffected in their titles by the subsequent reversal of such decrees or judgments. (Freeman on Judgments, sec. 484, and cases cited.)

The case of *Benson v. Rice, supra*, is exactly in point upon the facts. The court there held that, where lands had been

sold by the executor, and the will under which he had acted was afterwards annulled and administration granted, the title of the purchaser under the executor was undisturbed by the subsequent proceedings.

In *Faulke v. Zimmerman,* supra, the plaintiff as the heir of one Elizabeth Clew, brought ejectment to recover certain lands in New Orleans, of which said Elizabeth died seised. The defendant claimed title as a purchaser from John F. Clew, the husband of Elizabeth, under a will of said Elizabeth, probated in the proper court in New Orleans, which will declared him to be her sole heir and legatee. The will was made in New York, and was probated in Louisiana on the strength of an order of the surrogate of New York admitting it there, as her will, and the record of the surrogate court in which the will was probated in New Orleans, showed that an appeal had been taken from the order establishing the will. Yet the supreme court of the United States held that a purchaser from a devisee of such will in Louisiana, while the order of the Louisiana court establishing it remained in force, was an innocent purchaser, and was not affected by a subsequent order setting aside the will, to which he was not a party.

In *Roderigas v. East River Savings Institution,* 63 N. Y. 460, the court of appeals carry the doctrine even farther than has been claimed by the respondents. In that case, the question was whether payment to an administrator duly appointed by the proper court, of a person supposed to be dead, but who was living at the time, as it subsequently appeared, is valid and conclusive against an administrator appointed after the actual decease of the intestate. And notwithstanding the fact that the surrogate court of New York is, unlike our probate court, a court of inferior and limited jurisdiction, it was held that its decision on the question of its jurisdiction is conclusive until reversed, and protects its officers and all other innocent persons who act on the faith of such decision. It was therefore held that the payment in question was a valid discharge and could not be disturbed by the second administrator. The will of the late Judge Olney was duly admitted to probate; the lands

in controversy were sold by his devisees in trust, for the payment of his honest debts. They were sold for their full value to innocent purchasers in good faith. These purchasers were not bound to look further back than the decree of the county court admitting the will to probate. (*Florentine v. Barton*, 2 Wall. 210.)

By the Court, KELLY, C. J.:

This is a suit to quiet the title to certain lands of which the respondents claim to be the owners in fee-simple. The material facts in the case are substantially as follows: Cyrus Olney, a resident of Clatsop county in his life-time, and at the time of his death, was seised in fee of certain lands in that county, including those described in the complaint. On the eleventh day of December, 1870, he made his last will, which is as follows:

"Last will of Cyrus Olney of Astoria, in the county of Clatsop, state of Oregon:

"1. I bequeath and devise all my personal property, and real estate that is capable of being disposed of by will to Jackson G. Hustler and Henry S. Aiken, in trust, first, to pay all my debts; and secondly, to hold the residue in perpetuity, for the benefit of the town of Astoria, in the county of Clatsop and state of Oregon.

"2. I appoint the above named trustees to be executors of this will, and request that no bonds be required of them as such executors.

"3. I desire that my executors shall manage my estate, in their discretion, as my representatives.

"Signed and sealed this eleventh day of December, 1870.

"CYRUS OLNEY. [SEAL.]"

This will was presented by the executors therein named to the probate court of Clatsop county, and duly admitted to probate on the second day of January, 1871, and letters testamentary issued to Hustler and Aiken as executors of the will. At the time of his death the testator was largely indebted, and the executors proceeded to sell portions of the real estate devised to them in trust to pay this indebted-

ness. In 1871 the lands in controversy were sold by them for this purpose, and conveyed to the respondents by deeds executed by Hustler and Aiken as trustees, and executors of the will of Cyrus Olney, deceased. The sales were made without any order of the probate court, and were never confirmed by that court. In December, 1874, the heirs at law of Olney filed a petition in the probate court of Clatsop county, praying that court to set aside his will on the ground that the testator was not of sound mind when he made it, and for the further reason that the will created a perpetuity. At the April term, in 1875, of that court, an order was made setting aside the will upon the following grounds: 1. Because it created a perpetuity and was therefore void upon its face; 2. Because Cyrus Olney, at the time said will was executed, was insane and not capable of making a will.

The probate court at the same time revoked the letters testamentary which had previously been issued to Hustler and Aiken. The appellants, who are the heirs at law of Olney, now claiming that they are the owners in fee of the property in dispute, this suit was brought by the respondents to quiet their title to the same.

The defenses set up by the appellants are: 1. The executors had no authority or power to sell the lands devised; 2. The will of Olney created a perpetuity and was therefore void; 3. The sale of the real estate by the executor is void because no order was made by the probate court authorizing it; and the sale was not confirmed by that court; 4. The will of Olney having been declared null and void by the probate court, all sales of property made under it were thereby annulled; 5. Fraud and collusion between Hiram Brown, one of the respondents, and the executors of the will, whereby he purchased part of the property for less than its value.

On the trial of the case it was stipulated by the parties that the insanity of the testator should not be interposed as a defense in this suit. As their first objection to the validity of the sale made by the executors, appellants insist that the will gave them no power to sell the land in con-

troversy. Although not given in express terms, we think the power is clearly implied, and that under the clause which gave them authority to manage the estate of the testator in their discretion, it was his intention that the land should be sold in order to carry into effect the provisions contained in the will. The property was devised, first to pay all debts of the testator. They could not be paid without money, and this could only be obtained by a sale of a portion of his property so left in trust.

Gathered from the whole will we think this was the intention of Judge Olney when he made his will, and it is always the duty of courts to carry into effect the intentions of a testator, unless by doing so it would contravene some policy of the law. No precise form of words is requisite to create a power of sale. Powers are made declarations of trust, and any words, however informal, which show an intention to create such a power will be sufficient for the purpose. Thus trustees will take a power of sale by implication under a trust for the payment of debts; for such a power is necessary to the due execution of the trust. (Hill on Trustees, 471 (marginal); 2 Perry on Trusts, sec. 766.)

The next defense interposed by appellants is that the will of Olney created a perpetuity and it is therefore void. It is true the devise is to the trustees to hold the residue of the testator's property, after paying his debts, in perpetuity, but it does not necessarily follow that the land was to remain unsold, if in the discretionary powers of the trustees they deemed it best in the management of the trust to sell the land and apply the proceeds to any public improvements needed by the town of Astoria. The property or the proceeds arising from a sale, undoubtedly were intended to be given to that town, and we see no legal objection to the validity of the will on this account. The rule that a trust in perpetuity can not be created by devise does not apply to cases of this kind. A trust created for charitable or public uses is not subject to the same limitations, as those of a private nature, but may continue for an indefinite length of time, or in perpetuity. (1 Perry on Trusts, sec. 384; 2 Dillon on Muni. Corp., sec. 431; *Girard Will Case,* 2

Howard, 127; *McDonough Will Case,* 15 Id. 367; *Philadelphia v. Girard's Heirs,* 45 Pa. 9.)

At the time the will was made the charter of the town of Astoria gave it authority to "purchase, hold and receive property, real and personal, within said town, for public buildings, school purposes and town improvements." Also to "purchase, receive and hold property within and beyond the limits of the town, to be used for burial purposes, and for the reception of persons affected with contagious diseases, and for workhouses and houses of correction, and for the construction of water-works to supply the town with fresh water; and to lease, sell, and dispose of the same for the benefit of the town." (Act of January 17, 1856, art. 1, sec. 2.)

If the devise had been made directly to the town of Astoria we think it would have been valid in law. It was equally so when devised to Hustler and Aiken, in trust for the benefit of the town.

The third point in the defense is that the sale of the real estate to respondents was void, because no order was made by the probate court authorizing such sale, nor was it confirmed by the court. In support of this view, counsel for appellant refer to section 1223, page 330, of the civil code, which is as follows: "When the testator shall make provision in his will for the sale or disposition of all or any particular portion of his estate, for the payment of funeral charges, expenses of administration, or of claims against the estate, the property so appropriated may be sold or disposed of as directed by the executor, or administrator with the will annexed, without an order of the court therefor; but he shall be bound to conduct the sale, and make a return thereof in all respects as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he shall be governed by such directions in such respects." This section has reference to cases where the will gives the power of sale to the executor without any interest in the land devised, and in such cases the land belongs to and the title is in the devisee, subject to administration and of course to

the supervision and control of the probate court in regard to the confirmation of the sale. In the case under consideration it is altogether different. By the will the legal title to the real estate was vested in the trustees, and they had complete control of it, subject of course to be held accountable to the *cestui que trust* in a court of equity for any abuse of their power. The fee in the land was in them. They had a power coupled with an interest and could sell the property for the payment of the debts without any order of the probate court; nor had that court any authority to confirm or disapprove of any sale over which the law gave it no control. It was so decided by this court in the case of *Hogan v. Wyman,* 2 Or. 302, and to the same effect in the decision of the supreme court in 49 Cal. 76.

The fourth point relied on by the appellants as a defense is that the will having been declared void by the probate court, the sale of the land to the respondents was thereby annulled. We hold the law to be otherwise. The probate court had exclusive jurisdiction of the subject-matter in regard to the probate of what purported to be the will of Cyrus Olney. It was duly proved to be his will before that court, and letters testamentary were issued thereon, and until these proceedings were annulled the validity of the will could not be collaterally drawn in question by any one, nor by any other court. Administration of the estate under it could be conducted and enforced, as under any other will duly proved. Such being the case all acts done in the due course of administration, while the will remained unannulled, and the letters testamentary were unrevoked, must be held entirely valid. (3 Redfield on Wills, 120; *Roderigas v. East River Savings Institution,* 63 N. Y. 460; *Foulke v. Zimmerman,* 14 Wall. 113.)

The only remaining defense interposed by the appellants, is that at the time Hiram Brown, one of the respondents, became a purchaser of the real estate described in the complaint, there was collusion between him and the executors of the will, whereby he purchased the property for less than its value. This defense of fraud in the sale by the executors is confined to the real estate purchased by respond-

ent, Hiram Brown, on the sixth day of November, 1871, for ten thousand dollars. The appellants allege that this sum was far less than its value at the time of the sale, and therefore a presumption of fraud arises from the inadequacy of the price paid for the same. The testimony taken was mainly confined to proving what was the value of block 55 included in that purchase. W. W. Parker, a witness called by appellants, testified that the lots valued by him separately, were when his deposition was taken, January, 1878, worth in the aggregate, with the improvements thereon, the sum of thirty-one thousand four hundred dollars, and that eight thousand dollars worth of improvements were put on the property since the sale in 1871. He did not state in his testimony what was the value at the time of sale.

C. A. McGuire, in behalf of appellants, testified that the present value, January, 1878, of the lots in block 55, with the improvements thereon, was twenty-five to thirty thousand dollars. He was not asked and did not say how much they were worth when sold to respondent, Hiram Brown, but on cross-examination said that the property had appreciated a good deal since the sale.

L. K. Warren, in behalf of appellants, estimated the lots to be worth two thousand dollars each, or fourteen thousand dollars taken together, on the sixth of November, 1871, when they were sold.

John West, as witness for the appellants, testified that the reputed value of the lots in question was then, January, 1878, about eighteen thousand dollars.

This was all the evidence offered by appellants to prove what the lots in that block were worth. The witnesses on behalf of respondents testified as to the value of the lots in block 55 at the time they were sold as follows:

Captain George Flavel says they were well worth ten thousand dollars, and that if they had been sold separately they might have brought more, but he was not certain.

John Hobson says they were worth at that time, in his judgment, about eight thousand dollars, and that they were well sold at ten thousand dollars.

Henry Miller says that the cash value was about eight thousand dollars.

J. G. Hustler, one of the executors, says the lots in block 55 sold for ten thousand dollars, and this was, he thinks, a pretty good price.

This is all the evidence before us in regard to the value of the property, and the only witness on behalf of the appellants who testified as to what it was worth when respondent Brown became the purchaser is D. K. Warren, who places it at two thousand dollars a lot, or fourteen thousand dollars in the aggregate. All the other witnesses of appellants testify as to what the lots and improvements on them were worth in January, 1878, but say nothing about their value in November, 1871. As they have risen considerably in value since then, and additional improvements been put upon the lots, the evidence of these witnesses becomes practically of no value in determining what the lots were really worth when they were purchased by Brown. We must therefore necessarily resort to the testimony of those witnesses who do state what they were worth at the time, and none of them, except Mr. Warren, place it over ten thousand dollars. It is urged by appellants that instead of the whole block being sold entire, the lots should have been sold separately, as they would then have brought in the aggregate a better price. But when we take into consideration the fact that the property was incumbered with two mortgages to the state of Oregon and one to John West, given by the testator in his life-time, and which amounted at the time of sale, with interest, to five thousand eight hundred and thirteen dollars, it may be questionable whether a better price could have been obtained by selling them separately. The surviving executor, J. G. Hustler, testifies that the sale to Brown was fair and without any collusion with him; and, taking the whole testimony together, we find nothing to contradict his statement, nor to establish the charge of fraud. We consider that there was no error in the proceedings of the court below, and its decree is affirmed.

NATHAN A. BROWN, Respondent, v. MARY LORD et al., Appellants.

SPECIFIC PERFORMANCE—BOUNDARIES OF LAND.—A court of equity will not decree the specific performance of a parol contract for the sale of land, unless such contract is explicit in its terms; nor unless the the boundaries of the land are clearly defined.

PART PERFORMANCE—POSSESSION.—Where possession is relied on as an act of part performance of a parol contract, in order to take the case out of the operation of the statute requiring contracts in relation to the sale of lands to be in writing, such possession must be visible, notorious and exclusive on the part of the vendee, and must have been taken under and in pursuance of the parol agreement.

APPEAL from Yamhill County. The facts are stated in the opinion.

E. C. Bradshaw and J. C. Moreland, for appellants:

To entitle a party to a decree of specific performance upon a parol contract, the proof must be clear and satisfactory, so as to establish the contract to the entire satisfaction of the court, leaving no room for reasonable doubt, a mere preponderance of the proof will not suffice. (*Newson v. Greenwood,* 4 Or. 119; *Odell v. Morin,* 5 Id. 96; *Proudfoot v. Wightman,* 78 Ill. 553; *Williamson v. Williamson,* 4 Iowa, 279; *Wright v. Wright,* 31 Mich. 380; *Woods v. Farman,* 10 Watts (Pa.) 195; *Minturn v. Baylis,* 33 Cal. 129.)

When a contract for sale of lands is only supported by the testimony of the plaintiff, corroborated by admissions of the owner of the land, and is positively denied by the answer, specific performance will not be decreed. (*Wilmer v. Farris,* 40 Iowa, 309.) The plaintiff, who seeks to enforce a specific performance, must make out a stronger case than he who resists the decree; and greater latitude will be allowed in resisting than in making out a case. (Willard's Eq. Jur. 267; Story's Eq. Jur., sec. 769; *Casey v. Holmes,* 10 Ala. 776.)

The evidence of a parol sale of lands between parents and children must be very clear to avoid the statute; and all the acts necessary to perfect a right under such contract must have especial reference to it, and to nothing else. (*Cox v.*

Cox, 26 Pa. St. 375; 1 John's Ch. 131, 149; 1 Leading Cases, Eq. 732 *et seq.*; *Phillips v. Thompson*, 1 Johns. Ch. 131; *bourn*, 4 Md. 459; *Mahana v. Blunt*, 20 Iowa, 142; *Moore v. Beard v. Linthicum*, 1 Md. Ch. Dec. 345; *Mundorf v. Kil-Small*, 19 Pa. St. 461; *Johnston v. Clancy*, Blackf. 99.) It is not enough that the act of part performance relied on be evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement set out in the complaint.

McCain & Fenton and H. Hurley, for respondent:

If a contract could have been enforced between the original parties, it will be decreed, to be enforced between their personal representatives, and all claiming under them. (Willard's Equity, 269; 5 Johns. Ch. 261.) Part performance of a parol contract takes it out of the statute of frauds, and entitles the party to its specific performance. (Willard's Equity, 283-5; Civ. Code 264, sec. 772; 5 Kansas, 402; 45 N. Y. 416; 4 Com. (N. Y.) 403; 2 American Leading Cases, 755-60; 6 Paige, 288; 1 Story's Equity, sec. 761; 4 Sand. Ch. 72.)

A party is entitled to specific performance when his legal remedy is inadequate; when without it, great injury will be done, and when the contract is just, founded on an adequate consideration, and is executed on his part. (1 Story's Equity, Tit. Spec. Per.; 6 Johns. Ch. 222; 3 Cowen, 456.) The authorities even go further than we claim in the case at bar, and hold that a parol gift of land, partly executed, will be enforced. (8 Paige, 600; 2 Sand. Ch. 17; 2 Story's Eq., sec. 761.)

A parol agreement between father and son, that if the son will enter upon a certain tract of land and improve it, the father will make the son a deed to the same, and in pursuance of said agreement, the son enters upon the land, occupies and improves it, is sustained by a sufficient consideration, and is not within the statute of frauds. (5 Kansas, 402; 43 N. Y., 35; 4 Paige, 305; Willard's Eq., 263; 4 Johns. Ch. 497.) Where a donee has made improvements, a consideration always arises. (1 Story's Eq.

sec. 753, n. 1.) The acts which constitute part performance, are possession under the contract, reliance upon the faith of the agreement, payment of the consideration, or its tender. Complete execution of the contract by the vendee is all that he can do, and even possession alone, without payment, has been held sufficient to take the contract out of the statute of frauds. (1 Story's Eq., sec. 759-60-61.) The testimony of one competent witness, not contradicted, proving the facts alleged, will sustain the decree, and the court will not reverse if, upon an inspection of the whole record, the judgment was right, even though the court below may have erred in its rulings upon the admission of testimony. The error then becomes immaterial. (Civ. Code, 246; sec. 671.)

By the Court, KELLY, C. J.:

This is a suit in equity to enforce the specific performance of a parol contract for the sale of lands, alleged to have been made by James H. Brown, senior, the father of respondent, who died intestate May 30, 1875. The appellants are daughters and heirs in law of the said James H. Brown, and their husbands, who were joined with them as defendants in the suit. The material portions of the complaint are substantially as follows: That at the death of James H. Brown, senior, he was the owner of the lands described in the complaint known as the west one half of his donation land claim, in Yamhill County, Oregon, and containing three hundred and twenty-one and one half acres. That he also owned at his death another large and valuable tract of land in said county. That his estate has been administered, and finally settled, and his administrators discharged. That on or about January 20, 1872, at Yamhill County, Oregon, the decedent, in consideration of the natural love and affection he bore the respondent as his son, and in consideration of the agreement of respondent then and there made, that he would remain with said James H. Brown and care for him and the said S. W. Brown, respondent's mother, during the natural life of said James H. Brown, senior, the said James H. Brown,

senior, gave the respondent this tract of land, and placed him in possession thereof, and then and there agreed to convey the same to him by a good and sufficient deed, whenever he desired him to so do. That the respondent, in pursuance of his said agreement, did remain with his father from that date until his death, and cared for and supported him and respondent's mother during the natural life of James H. Brown, senior, and has ever since cared for and supported and does now care for and support her.

That at said date, in pursuance of said agreement, he entered into possession of said tract of land, and did thereafter, during the whole of the life-time of his father, occupy and hold possession of the same, with the knowledge and assent of his father, under said agreement, and made extensive and valuable improvements thereon. That he has ever since the date of said agreement been and now is in possession of said lands. That on May 30, 1875, James H. Brown, senior, was taken violently ill, and died suddenly on that day, without having made a deed to respondent for these lands, though always intending and desiring to do so.

The material portions of the complaint are denied.

The court below rendered a decree for a specific performance of the contract, from which an appeal is taken. The following is the substance of the testimony which we consider material to the issue between the parties:

Nathan A. Brown, the respondent, testified substantially as follows: That the land in controversy is the west half of the donation land claim of James H. Brown, his father, who had resided on it for many years prior to the twentieth day of January, 1872; that all his children except the respondent, who was the youngest of seven, had married and gone from their father's home; that on the twentieth day of January, 1872, when he was twenty-four years of age, he spoke to his father about going away from home and renting a piece of land, when his father replied that he was getting old, and if respondent would stay with him during his life-time, take care of him and his mother while they lived, and look after and take care of the stock on the place, he would give him the land—the west half of the donation claim on

which he lived; that he could go on and break up what land he wanted to from that time on; that respondent then accepted his father's proposition, went on and broke up ground, hauled rails and fenced it, built a large cattle shed, looked after and fed his father's stock on the place when it was necessary, and stayed with and took care of his father and mother during his life, and has supported his mother at the old homestead since his father's death; that he has had the possession and control of the land in controversy since January 20, 1872, and made improvements on it worth between eight hundred and nine hundred dollars; that his father promised to give him a deed of the land at any time he would request it, but that he did not get the deed because he was too careless and negligent to ask for it, and did not expect his father to die so suddenly.

On cross-examination he testified that his father resided on the land after the contract, the same as before, but he (respondent) had control of it; that his father's horses, cattle and hogs were still kept on the place the same as before; that his father gave in the land to the assessor for taxation, although respondent paid the taxes; that when the agreement was made with his father in January, 1872, no one was present except his father and himself.

The testimony of Mrs. S. A. Brown, the mother of respondent, so far as material, is substantially as follows: That in 1872 her husband told Nathan that he had stayed with and worked for his father and mother and he should have the land for taking care of them; that he was to live with and take care of them during life; that Nathan had possession and control of the premises after 1872; that her husband had often told Nathan that he would give him a deed, and said so a few days before his death; that the reason why the deed for the land was not made was that it was not surveyed to suit them.

Joseph E. Brown, a brother of respondent, testified in his behalf, that on the twenty-eighth day of November, 1873, he had a conversation with his father, when in speaking of the land in controversy, he said that he intended that land for Nathan, but said he wanted to reserve forty acres where the

house stands. When he asked his father why he reserved the forty acres, he replied that possibly Nathan might marry an unruly woman, and they could not live together. That he intended to reserve the house and barn and forty acres of land as long as he lived. That witness could not say who had possession and control of the premises, but that Nathan worked the land since the spring of 1873. That he built a granary and straw shed on the same, but knew of no other improvements made by him except that he broke up about six acres of sod land; that since he came back from California in the spring of 1873, he has lived within less than one half a mile from his father's place and that his father continued in possession and control of the premises in controversy until his death. The granary spoken of was put up since his father's death, and the shed before, but could not say whether they were on the forty acres or not, as the forty acres were never run off.

Charles Stewart and William D. Parker, testified that in July, 1871, they were working together for James H. Brown, when he said in their presence that he calculated to give Nathan the home place.

W. Millsup testified that in the fall before he died, James H. Brown said to Henry Lamson and himself, when they got to the line of his donation claim, that he intended to give that to Nathan, pointing to the lines.

H. W. Lamson testified that in riding in company with Mr. Millsup and James H. Brown, when they got to the west line of Joseph's land, Mr. Brown said he intended to give the balance of the home place to Nathan. This was the fall before he died.

Nathan Hussey testified that James H. Brown told him he intended the home place for Nathan. (No time is given when this statement was made.)

Luke Booth testified that in 1874, James H. Brown, senior, remarked in his shop that he intended the home place for Nathan, and in the spring of 1875, he told him to charge some work he was doing to Nathan, as he had the place.

The foregoing is the substance of the evidence on part of the respondent so far as it is material in this case.

William Savage, one of the appellants, testified in substance as follows: That in the fall of 1873, he had a conversation with James H. Brown, senior, in regard to a division of his real estate among his sons. That in this division, as it was detailed to him by his father-in-law, Mr. Brown, the respondent Nathan was to have the east half of the west half of the donation land claim of James H. Brown, and also a piece off the Faulconer and Ransdall places to make his equal with the other sons. That since 1869, when James H. Brown returned from Walla Walla, he resided on, and had possession of the land in controversy until his death. That Nathan A. Brown worked upon it the same as he did before 1872, that is, there was no change from 1872 until the death of his father, in his possession or control from what there had been prior to that time. That James H. Brown had an abundance of property of his own and supported the family himself, and that he and his wife took care of themselves. That he had cattle, horses, sheep and hogs on the place, and frequently sold some stock for money with which the family groceries and other provisions were purchased. That Mr. Brown often told him that he thought his daughters were entitled to as much property as his sons, and that he aimed to give them an equal share.

T. P. Stephens, being recalled, said that he supposed James H. Brown, senior, had the possession of the premises described in the complaint since 1872; that he never knew anything to the contrary; that when he wanted anything off the place from October, 1874, till the time of his death he always went to him, for he supposed him to be the proprietor of the place.

H. W. Lamson, being recalled, testified that he knew the land in controversy before and since 1872, and that he knew of no change in the possession of the property since 1872 till the death of Mr. Brown.

Section 771 of the civil code of this state provides that: "No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property can be created, transferred or declared otherwise than by operation of law or by a convey-

ance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Section 722, following, declares that "the last section shall not be construed * * * to affect the power of a court to compel specific performance of an agreement in relation to such property."

The English statute of frauds and perjuries passed during the reign of Charles II has been generally re-enacted in the different states in the Union, and in their essential features they are similar to the statute of Oregon above quoted. There, as here, the object had in view was, as the very title of the English act of parliament indicates, to prevent the fraudulent setting up of pretended agreements, and then supporting them by perjury. But besides this direct object, there is a manifest policy in requiring all contracts touching lands to be reduced to writing, since otherwise from the imperfection of memory or from the honest mistakes of witnesses, after a great lapse of time, it must frequently happen either that the specific contract is incapable of exact proof, or that it is unintentionally varied from the precise original terms. The requirements of the statute are so reasonable and so easily complied with, and the security of land titles against the testimony of false or forgetful witnesses so important that it would seem there ought to have been no exception to the rule of declaring absolutely void every agreement not made in accordance with its provisions.

Mr. Justice Story says: "It must be admitted that the exceptions thus allowed do greatly trench upon the policy and objects of the statute of frauds; and, perhaps, there might have been as much wisdom originally in leaving the statute to its full operation without any attempt to create exceptions, even in cases where the statute would enable the party to protect himself from a performance of his contract through a meditated fraud. For, even admitting that such cases might occur, they would become more and more rare as the statute became better understood; and

a partial evil ought not to be permitted to control a general convenience." (1 Story Eq. Jur., sec. 765.)

Many distinguished judges both in England and the United States have within the last fifty years expressed similar opinions, and placed on record their regrets that the statute of frauds had been departed from so widely, and their convictions that more evils have resulted from such departures than they have remedied. "And considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the statute of frauds farther then they were compelled to do by former decisions." (1 Story Eq. Jur., sec. 166.)

These expressions of opinion should be heeded and well considered by this court, and especially so, since by our laws a party to a suit can be a witness in his own behalf, and offer his own testimony, as was done in the case under consideration, to substantiate, not only the parol agreement itself, but also every material fact to prove a performance of all the conditions of the contract on his part.

This court held in the case of *Odell v. Morin*, 5 Or. 96, which was a suit for the specific performance of a parol contract for the sale of land, that "the contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it."

The contract in this case, as set forth in the complaint, is, that on or about the twentieth day of January, 1873, in consideration of the agreement that respondent would remain with James H. Brown, his father, and care for him and his mother during the life-time of said James H. Brown, he, the father, gave to respondent the west half of his donation claim, being the land in controversy, and placed him in possession of it, and agreed to convey the same to him by a deed, when respondent should desire him to do so. The respondent further alleges in the complaint that in pursuance of this agreement he did remain with his father from

the twentieth of January, 1873, until his death, and cared for and supported him and respondent's mother during the life of his father, and since then he has cared for and supported his mother. He also alleges that ever since the date of the agreement he has been in the possession of said lands. The only evidence in the case to prove the making of the agreement is that of the respondent himself, who says it was made on the twentieth day of January, 1873, when he and his father were alone. He is, however, corroborated by his mother in this, that she says her husband told Nathan, the respondent, in 1872, that he should have the lands for taking care of them; that he often told him that he would give him a deed for it, but the deed was not made because it was not surveyed to suit them. The latter part of this testimony is imporant in this respect, that it shows some survey was necessary to designate the land which he intended for the respondent. And taken in connection with Joseph E. Brown's evidence that his father stated to him on the twenty-eighth of November, 1873, that he intended to reserve forty acres where the house stands, it satisfies us that a survey was intended to set off a portion of the west half of the donation claim, which was not to be conveyed to respondent. The testimony of Joseph E. Brown, is clear, explicit, and pointed. He was a disinterested witness called by the respondent, and when he asked his father why he reserved forty acres from the land which the respondent claims, the old gentleman replied that Nathan might marry an unruly woman and they could not live together. This shows the prudent foresight of James H. Brown, senior, and his determination to retain his homestead while he lived. William Savage testifies that in the fall of 1873 Mr. Brown, senior, told him that he only intended to give the eastern half of the land in controversy to the respondent, clearly showing that he intended to retain his dwelling-house for himself. All this evidence is inconsistent with the theory that James H. Brown, senior, had given the land to the respondent on the twentieth of January, 1873, or at any time.

Then we have the testimony of Millsup, Lamson, Hussey and Booth, detailing conversations which they had with Mr.

Brown, senior, from the time of the alleged contract until near the time of his death; and all of them say that the father of respondent said he intended to give the home place to Nathan, not that he had given it as claimed by respondent. By what means he intended to give the land to the respondent, whether by deed or by a will, is not disclosed. It is sufficient to say that the weight of the testimony is against the contract as alleged in the complaint, although we are satisfied that it was the intention of James H. Brown to give the west half of his donation claim to the respondent, but not in pursuance of any alleged agreement with his son, by which he was to give up the possession and control of his homestead.

Even if we assume that the alleged parol agreement was sufficiently established, still we think the respondent has failed to show such acts of performance or part performance of his part of it as will take the case out of the operation of the statute. The respondent testifies that he took possession of the premises when he made the contract with his father in January, 1873. In this he is corroborated by his mother, but the preponderance of the testimony is decidedly the other way, and goes to show that James H. Brown was as much in the possession of the premises after as he was before the month of January, 1873. Owing to the infirmities of age, he no doubt entrusted the care of the property to the respondent more towards the close of his life than he did in former years. To entitle the respondent to a decree for the specific performance of the alleged contract he should establish by the weight of testimony that he took possession of the premises under the contract, and that such possession was distinct, visible and exclusive. The supreme court of Indiana, in a case brought to enforce the specific performance of a parol contract for the sale of land, say: "The great leading principle by which courts are governed is that there must be some act of performance done that is palpable and evident to the senses of all—an act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding or belief of witnesses; such

as absolute and visible possession of the premises, the actual building of houses or the making of other lasting improvements." But even these acts of part performance must be done with a direct view of the agreement being performed and be such acts as could be done in no other view, or the agreement will not be taken out of the statute. (*Johnson v. Gloncy,* 4 Blackford, 98 and 99.)

A specific performance of a parol contract for the sale of real estate by one partner to another will not be enforced where the only change of possession is the withdrawal of the vendor and the continuance of the vendee in possession, because the latter does not take possession under the contract. (*Wilmer v. Farris,* 40 Iowa, 309.) The continuance in possession by a tenant can not be deemed such a part performance or taking of possession under a contract of purchase as to take the case out of the statute of frauds. The possession must unequivocally refer to and result from the agreement. (*Mahana v. Blunt,* 20 Iowa, 142; 1 Story's Eq. Jur., sec. 763.) And where a son is in possession of land claiming it under a parol agreement with his father, the proof of such possession must be direct, positive, express and unambiguous.

In deciding a case of this kind the supreme court of Pennsylvania says: "We may notice still another principle of law that is applied very beneficially to restrain the exceptions to the statute of frauds, and which is of special importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of family relation. It is so usual and natural for children to work for their parents, even after they arrive at age, that the law implies no contract in such cases; and it is so natural for parents to help their children by giving them use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. The very nature of the relation, therefore, requires the contract to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express and unambiguous. The terms must be clearly

defined, and all the acts necessary for its validity must have especial reference to it and nothing else. The importance of this rule is very apparent, for it requires but a glance over the cases of this class to discover how sad has been the experience of the courts in family disputes growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness." (*Poorman v. Kilgore,* 26 Pa. St. 372.)

As we have already said, the preponderance of testimony shows that there was no apparent visible change in the possession of the premises by James H. Brown after the twentieth day of January, 1872. He, to all appearances, exercised as much authority and control after as he did before the alleged contract. He maintained and supported himself and his wife out of his own means, and no one could detect any change in the condition of his affairs which would lead him to suppose that the old gentleman had ceased to be the owner of the house in which he had lived so long. We think the possession of the premises by the respondent under the alleged parol agreement is not sufficient to take this case out of the operation of the statute.

Concerning the permanent improvement which respondent says he put upon the premises we will quote a few sentences from another decision of the supreme court of Pennsylvania, in a case somewhat like the one under consideration. It expresses our own views. "In the very nature of these family transactions, such improvements are not evidence of a gift of the land; and no matter how unjustly a father may seem afterwards to have acted to his son, or how unfortunate it may be for him that his father died without carrying out his intentions, we cannot correct the mischief by giving the son the land. Mischief though it be, it is slight and temporary compared with the evils which would be caused to families if the law should hold out inducements to litigation as a means of correcting such parental errors." (*Cox v. Cox,* 26 Pa. St. 384.)

And although in the division of his estate it was the intention of James H. Brown to give the land in controversy to the respondent either by a deed or by an intended will, yet having failed to carry his intentions into effect, this court can not do it for him.

The decree of the court below is reversed and the complaint dismissed.

W. D. RENSHAW, Appellant, v. MARY TAYLOR et al.

PARTIES TO SUIT—REPRESENTATIVES OF DECEASED PERSON. — Where a suit of foreclosure was brought against the executors of the estate of a deceased mortgagor: *Held*, that the executors represent the estate of the decedent so far as the same vests in them for the creditors and heirs; but that, the title descending to the heirs, the executors do not have the same estate in the land that the deceased had and that the heirs are necessary parties in the foreclosure suit.

SUBSTITUTE AGREEMENT—DEFAULT.—The parties to a foreclosure suit, during the pendency of the same, entered into an agreement by which the mortgagee agreed to take a less sum than that due in consideration of the present payment of a part due under the new agreement and of the costs of the foreclosure and of an agreement to pay the balance at a stated time. It was agreed that the old mortgage should stand as a security for the debt. The suit was dismissed without prejudice. The mortgagor made default after the first payment, held that the new agreement was substituted for the old and that the mortgagor's liability must be determined by it.

DECREE—CLAIM NOT ESTABLISHED BY.—A decree of foreclosure in a suit where the heirs of the mortgagor were not made parties, will not be taken as establishing the mortgagor's claim against the estate; but will be treated as wholly void.

MORTGAGOR—ESTOPPED TO DENY LEGALITY OF POSSESSION.—A mortgagor in possession will not be allowed to answer to a claim for rents and profits that his possession was not lawful.

APPEAL from Benton County.

In August, 1856, the appellant sold Stephen Taylor certain stock, for which Taylor agreed to pay the proceeds of three thousand seven hundred and twenty-five dollars of Oregon war scrip, or one thousand five hundred dollars in lawful money in case the scrip was not paid within two years from that date. Taylor and one McClure executed to the appellant a bond as security for the performance of this

contract, and to secure the bond Taylor executed a mortgage upon the land in question. Taylor failed to perform the conditions of the bond and mortgage, and in March, 1863, the appellant brought suit to foreclose the mortgage.

Afterwards, in November, 1865, while the foreclosure suit was pending, the appellant and Taylor made an agreement, by which the appellant received thirty-one ounces of gold, estimated at four hundred and sixty dollars, and Taylor agreed to pay five hundred dollars in greenbacks before June 1, 1866, and such further sum before July first of the same year as was required to make up the difference between the value of the thirty-one ounces of gold and one thousand dollars, together with the attorneys' fees and costs in the foreclosure suit, in full satisfaction and discharge of the bond and mortgage. The mortgage was to remain as security for Taylor's performance of the new agreement.

The suit was under this agreement dismissed without prejudice. The gold dust assayed four hundred and twenty-six dollars. Taylor made no further payment, and died intestate in 1867.

James Taylor and John D. Walton became administrators of the estate, and thereafter the appellant caused his claim against Stephen Taylor, deceased, to be presented to the administrators for settlement, by whom it was rejected.

The appellant thereupon sued to foreclose his mortgage. The heirs of Stephen Taylor were not joined with the administrators in the suit. A decree of foreclosure was had for two thousand four hundred and eighty-five dollars, the amount due upon the bond and mortgage under the original agreement, and the property was sold to the appellant for one thousand five hundred and fifty dollars. The sale was duly confirmed.

This suit was brought against the heirs of Stephen Taylor to quiet the appellant's title. It was also prayed that if it should be held that the interests of such heirs had not been foreclosed in the former suit, that a foreclosure be decreed in this suit. After a reference the court found that there was due the appellant on the bond and mortgage, and for taxes paid, the sum of two thousand three hundred and

thirteen dollars and eighty-four cents, and allowed the rent to reduce this sum to nine hundred and sixty-four dollars and four cents, and gave a final decree for that sum.

The findings and decree were upon the substituted agreement of 1865. The appellant appeals therefrom.

R. S. Strahan and John Burnett, for appellant:

Counsel for respondent insist that this mortgage is a "claim" within the meaning of sections 1101 and 1102, and that no suit can be maintained to foreclose the same unless it be first presented to the administrators and be by them rejected. There are several objections to this theory. 1. Sections 1129 and 1130 of the code provide for the sale of mortgaged premises, without the mortgage being presented as a claim, and without notice to any one. The proceeding under those sections would be *in rem.*; 2. This is not "an action" against an executor or administrator, but a suit. (Code, secs. 373 and 374.)

And when persons other than executors or administrators may be parties, by reason of the acts of their ancestors, there is no law requiring the claim or cause of action to be presented to an executor or administrator before such persons can be sued. (Code, secs. 373, 374; *Schadt v. Heppe,* 45 Cal. 433; *Christy v. Dana,* 42 Id. 175; 21 Id. 25.)

But we claim that these heirs were neither necessary nor proper parties to a suit to foreclose a mortgage upon real property. Sections 1129 and 1130 of the code make ample provision to secure the rights of heirs. If they do not avail themselves of those sections, then section 468 of the code authorizes just such a foreclosure as is in question here. Its language is too explicit to admit of construction: "All causes of suit by one person against another, however arising, survive to the personal representatives of the former and against the personal representatives of the latter."

This bond and mortgage is a "cause of suit" which survived against the personal representatives of Stephen Taylor, deceased. This view would entitle the plaintiff to a decree quieting his title. Under a statute by which the personal representative of a deceased person succeeds to the

lands as well as the personal property, for the purpose of administration the executor or administrator becomes a necessary party in the foreclosure of a mortgage in place of the heir. (*Harwood v. Moge,* 8 Cal. 580.)

W. W. Thayer, for appellant:

The mortgage is simply a personal charge upon the property. The property does not descend to the heirs as at common law, "by single operation of law," but it descends to them, "subject to the possession of the executor or administrator, and to be applied to the satisfaction of claims against the estate." (See sec. 1160, Civ. Code, p. 337.) And not until the administration is completed are the heirs entitled to the possession. (Sec. 1088 Id., p. 324.) It would certainly be a great hardship in case of collateral heirs to require the mortgagee to look them up and make them parties. The effect of such a decree, in case it is held that the heirs are necessary parties, is not easily determined. In *Sheldon v. Bird,* 2 Root, Conn. 509, it was held that a decree in such a case was no bar to the heirs redeeming. In New York it is held that the executor may be joined in the bill for the purpose of holding him liable in case of a deficiency. (9 Paige, 90.) So in California, where the bill prays a deficiency in the mortgage debt, the administrator must be made a party. (9 Cal. 123.) If in such a case the mortgagee desired to make the mortgage debt a claim against the estate for any deficiency, after exhausting the mortgaged property, he would have made the representatives of the mortgagor parties, otherwise he could only expect to extinguish the heirs' interest, which under our statute as we have seen, is very uncertain indeed, and the interest or right of such representatives, which we have also seen extends to the use of the property during administration, could be barred in no other way. The solution of the question depends upon a correct determination of the amount of interest the heirs have in the property during administration. This, we submit, depends entirely upon the condition of the estate. If it is insolvent, as in the case at bar, then the heirs had no interest, for it must be applied in satisfaction of the debts.

On the contrary, had there been no debts they would have had a full and complete title, subject, of course to a deprivation of possession for some period of time in case administration is had.

Under this view, ought the respondents to be allowed to assert any title to the land in suit? Equitably they have no title to it whatever. An honest effort has been made to apply it in extinguishment of the claim against the ancestors, and their attempt to take advantage of the circumstances of their not having been joined as parties to the proceeding is unconscionable. If they want the estate they should certainly disencumber it. The decree against the administrators establish the amount of the claim, and the circuit court had no right to ignore it.

John Kelsay and J. W. Rayburn, for respondents:

The claim of appellants must have been presented to the administrators of the estate of Taylor for allowance or rejection before he could maintain an action upon it, or have foreclosed said mortgage at any time after the death of Taylor. (Civ. Code 421, secs. 1099, 1100-2; 27 Cal. 353; 1 Or. 324; 46 Cal. 161, 233.)

If the claim were presented and rejected he had two remedies—one at law on the contract to enforce the payment of the money agreed to be paid by July 1, 1861, (Code, 1864, p. 242, secs. 373-4; Id. 1864, p. 425, sec. 1103; 34 Cal. 226.) Or he might have instituted a suit in equity to establish his claim and foreclose said mortgage. (Civ. Code, p. 251, sec. 410.)

The heirs should have been made parties to the foreclosure suit mentioned in the complaint. (Civ. Code, p. 244, sec. 380; 2 Hill. on Mort. p. 168, sec. 85; Id. p. 170, sec. 170; 2 Barb. Chan. 176; 13 Ill. 503; 14 Id. 218; 12 Kan. 228; 65 Maine, 352; 9 Barb. 378; 4 Blackford, 379; 2 Van Sant. Pl. 75; Story Eq. Pl. secs. 175, 182, 196, 417, 509, 544; 4 Kent's Com. 228; 9 Kansas, 228; 27 Arkansas, 235.)

Having gone into equity, and his claim having been rejected, as he claims by the administrators of said estate, he,

in addition to said administrators, should have made the heirs of Taylor parties to said suit, and by so doing he could have established his claim, and at the same time have foreclosed his mortgage, as the heirs are the owners of the real estate, subject to the possession of the administrators and the payment of claims. (Civ. Code, p. 439, sec. 1160.)

The mortgagee has only a specific lien, similar in character to a general lien of a judgment and the title to the lands is in mortgagor, or his heirs. (4 Or. 110, 222; 46 Cal. 234.) It is sought to charge a specific parcel of the estate with this debt and mortgage. The creditors and heirs are interested in having the claim presented and established before sale. The mortgaged premises may be worth more than the amount of the mortgage and it may be to the advantage of the estate to satisfy the mortgage out of other funds and thus prevent a forced sale. (Civ. Code, p. 431, secs. 1129, 1130; 46 Cal. 232.)

The heirs have a right to an accounting before the sale of mortgaged property. (46 Cal. 154, 233; 13 Ill. 503; 14 Id. 218; 9 Kan. 228; 12 Id. 223; 3 Mich. 331; 1 Ohio St. 373; U. S. Digest 1875, pp. 507, 723, secs. 92, 144.)

The only effect of this foreclosure suit and the sale under it was to assign the mortgage to the purchaser. (25 N. Y. 320; 12 Wis. 581; 14 Id. 213.)

A mortgagee in possession is bound to account for the rents actually received. But taking possession he imposes upon himself the duty of a provident owner, and he is bound to recover what such an owner would, with reasonable diligence, have received. (4 Or. 295; 4 Kent, 166; 28 Cal. 309; 1 Hill. on Mort. p. 439—444, sec. 5; 2 Equity, Leading Cases, 2010.)

The mortgagee has only a temporary possession of the real property. (2 Or. 338; 4 Id. 330.)

By the Court, BOISE, J.:

In the pleadings issue is made as to the validity of the decree of foreclosure obtained by the appellant against James Taylor and John D. Walton, the administrators of Stephen Taylor, deceased. It is claimed that this decree,

which is set out in the complaint, in substance is valid, and operates to foreclose the rights of the heirs of Stephen Taylor to the land in question, who were not made parties to that suit. The determination of this question depends on the construction of sec. 463, p. 206 of the code, which provides: "That all causes of suit by one person against another, however arising, survive to the personal representatives of the former and against the personal representatives of the latter. When the cause of suit survives, as herein provided, the executors or administrators may maintain a suit in equity thereon against the party against whom the cause of suit accrued, or, after his death, against his personal representatives. Independent of this statute, the heirs should have been made parties, for the lands of the ancestor descending to them by operation of law they have an estate in them which they have a right to protect, and by the law, as now settled in this state, the mortgagor is the owner of the fee subject to the lien of the mortgagee." (4 Or. 105.) And it is the settled law that the heir of the mortgagor should be a party unless the statute just referred to changes the rule.

We will now proceed to consider what construction should be given to this language of the statute. To give it a literal construction, it would mean that if there be a suit which one party may maintain against another, he may maintain the same suit against his executor. This language does not necessarily exclude heirs. To foreclose a mortgage a party must sue the mortgagor, and must also make persons having a lien subsequent to the lien of the mortgagee parties. (Code, 411.) This is to give subsequent lien-holders an opportunity to redeem the land; and there is the same necessity for making heirs parties, for they also have the right to redeem. Section 380 of the code seems to contemplate that all persons who are to be affected by the decree should be made parties. No person should be deprived of his estate by a decree to which he is not made a party and who has not had his day in court. (Story's Eq. Pleadings, secs. 196, 415, 175; 2 Hill on Mort. 168, 170; 2 Van Santvoord, 75, 76.)

It was not the intention of the statute to do more than provide that the executor should represent the estate of his decedent, so far as the same vested in him as trustee for the creditors and heirs, but the title descending to the heir, the executor does not represent the land or have in it the same estate that the deceased had. The executor and heir are both vested with interests in the land which they respectively represent and the sum of these interests is equal to the estate which was in and represented by the deceased. This view may be taken of the statute and be consistent with the provisions of section 380 and of the well established practice of courts of equity in such cases.

In order to bind the heirs of Stephen Taylor in the suit of foreclosure named in the complaint, it was necessary that they should have been made parties, and that not having been done, their interest in the land was not foreclosed. It is claimed by the appellant that if said decree does not foreclose their interest in the land it is a valid and binding decree, so far as to establish the amount of appellant's claim against the estate of Stephen Taylor.

To this proposition several objections are made by the respondents: 1. It is claimed by the respondents that the claim was not properly presented to the administrators. The claim, as presented embraced the original debt of one thousand five hundred dollars and interest, less a credit of four hundred and thirty dollars, paid in gold dust. In presenting this claim the appellant has disregarded the settlement made by the parties, which is indorsed on the bond, and claimed by the respondents to have been substituted for the debt named in the bond which the mortgage was given to secure.

We will first consider the question of the validity of this new agreement. A suit was pending to foreclose this mortgage and enforce the obligation named in the bond, which suit was discontinued on the execution of this new agreement, which is indorsed on the bond, and is as follows:

"Received of Stephen Taylor, Bristow & Co's receipt for thirty-one ounces of gold dust, sent by them to be assayed,

and proceeds of same, estimated at about four hundred and sixty dollars, when paid, to be credited on this bond. And I hereby agree, on settlement this day made, to accept one thousand dollars in gold coin (including said proceeds of dust) and five hundred dollars in greenbacks, both to be paid as below mentioned, in full satisfaction of the within bond and mortgage. I am to discontinue the suit now pending in Benton county; the old mortgage to continue in security for said payments.

W. D. RENSHAW.

"November 2, 1865.

"I hereby agree, on settlement of this bond as above, to pay said Renshaw five hundred dollars, greenbacks, on or before Jan. 1, 1866, and also to pay in gold coin whatever said proceeds of dust lacked of making one thousand dollars, say about five hundred and forty dollars, more or less, on or before July 1, 1866, with ten per cent. interest thereon, and I am to pay costs of said suit and attorney's fees.

STEPHEN TAYLOR."

"November 2, 1865.

We think this agreement shows a sufficient consideration to support it. It was the settlement of a pending suit whereby the appellant must have thought he was securing to himself an advantage by getting a part of his debt and being relieved from this liability to pay the costs of the suit and the fees of his attorney incurred in prosecuting the same. This agreement was fully performed at the time and expressly substituted for the bond, and then became the agreement of the parties and binding on them. It was an agreement to take a less sum than that secured by the bond, in this, that interest was not included in it, but it was a part of the same debt for the cattle and horses.

The appellant's claim presented to the administrators for allowance included this unpaid balance with interest. This was simply claiming of the administrators more than was due appellant from the estate, and in such a case the administrator should have allowed what was still due on this claim for cattle according to the new agreement. A question is made as to whether any claim was presented, but the

evidence shows that it was presented and rejected, and that the decree named in the complaint was not void for want of proper presentation of the claim to the administrators.

The appellant after the rejection of his claim, could bring an action against the administrators and establish this claim, or he could foreclose the mortgage. The latter is what he attempted to do against the administrators alone. This we hold he could not do without joining the heirs, if there were any, and as the presumption is that there are heirs unless the contrary appears, we think the complaint was subject to a demurrer that it did not state facts sufficient to constitute a cause of suit, and showed that there was no jurisdiction in equity to grant the relief prayed for. We conclude, therefore, that the decree in that suit was wholly void which seems to have been the conclusion of the learned judge who tried this case in the circuit court.

That court proceeded to decree a foreclosure of the mortgage and ordered that the premises be sold to pay the amount still due thereon, taking said new agreement as settling the amount, which was correct as before stated.

The case was referred to a referee to ascertain the amount due on the mortgage under this new agreement, and also the amount of rents and profits received by the appellant since he had been in possession of the premises under the sale on the decree referred to in the complaint.

It is claimed by the appellant that the court had no authority to make such a reference. He had such a right for the reason that it appeared in the pleadings that appellant went into the possession and had retained it. Where the plaintiff, who is a mortgagee, makes this admission in his complaint, it is a confession that he has received the rents and profits, and ought to account for them to be applied to extinguish the mortgage debt. It is proper for the court to appoint a referee to take such account and find the amount of the rents and profits, which ought to be applied towards the extinguishment of the mortgage debt.

There is considerable discrepancy in the testimony of the witnesses as to the amounts of the rents and profits, showing that persons have different opinions as to the value of the

premises. In such cases where the amount has been ascertained by an intelligent referee who has had ample opportunity to judge in the premises, the court should defer something to his judgment; and unless the same is manifestly erroneous accept his findings as conclusive; for having heard the witnesses he can better determine the value of the testimony.

There is another question made by the appellant which is this: It is claimed that as under our statute the executor has the possession of the real property of his decedent, the rents and profits go to the executor or administrator and not to extinguish the mortgage debt. In this case the appellant has sued to foreclose his mortgage and acknowledges that he is in possession and has been for a long time. The administrators are not parties. The suit is between the appellant and the heirs.

The appellant being in possession, will not be allowed to say to his own advantage that his possession was other than lawful under the mortgage. It has been held by this court in *Roberts v. Sutherlin,* that a mortgagee in possession, with the consent of the mortgagor, after condition broken may maintain such possession until the payment is made. In this case, having received the rents and profits they should go to extinguish the debt. (4 Kent 166; 28 Cal. 309; 1 Hill. on Mortgages, 439.) It can be no disadvantage to the estate which is represented by the administrator, that the debt is in part canceled by the rents and profits in the possession of appellant. The appellant having already received a part of his debt secured by the mortgage has no claim for more than is due him, or to have the land condemned to be sold for a lien that has already been discharged.

Decree affirmed with costs.

LUNG LOUIS & CO., Respondents, v. S. H. BROWN et al., Appellant.

LIQUIDATED DAMAGES—PENALTY.—Where in a written contract to cut a certain number of cords of wood by a given time it was stipulated that in case the wood was not all cut by the time named in the contract, the laborer should forfeit five cents per cord on what wood he had cut: *Held*, that such stipulation fixes the measure of damages to be paid by the party failing to cut the wood.

PLEADINGS—ANSWER—GENERAL DENIAL.—The general denial in the answer that the defendant promised to pay the reasonable value of work performed raised no issue to be tried by a jury. When the defendant admits that the work was performed for the defendant; for when work is done by one person for another at his request, there is an implied promise to pay, which will prevail unless avoided by some special agreement.

APPEAL from Multnomah County.

This was an action by the respondents to recover the alleged reasonable value of services for cutting two thousand two hundred cords of wood. The value of the services is alleged to be eighty-five cents per cord for the wood cut or one thousand eight hundred and seventy dollars for the whole, of which eight hundred and fifty-seven dollars and twenty-five cents is admitted to have been paid, leaving a balance claimed of one thousand and twelve dollars and seventy-five cents.

The appellants deny that more than two thousand and fifty cords were cut, and they allege that such wood was cut under a written agreement by which it was agreed in effect that the respondents would cut three thousand five hundred cords of wood on or before May 20, 1878; that the appellants were to pay therefor eighty-five cents per cord; that the wood was to be corded by the respondents at the end of each month, and thereafter upon the tenth of the ensuing month seventy-five cents per cord should be paid therefor, and upon the tenth of June, 1878, the remaining ten cents per cord for every cord cut should be paid. It was further stipulated as follows: "But in case the said parties of the first part shall fail to cut the full amount of three thousand five hundred cords as aforesaid, and cord up the same on or before the twentieth day of May, 1878,

the parties of the first part shall forfeit to the said parties of the second part the sum of five cents per cord for every cord then cut and received, and the said parties of the second part are hereby authorized to retain the same out of said last payment."

The appellants for a further defense alleged matters of special damage to themselves by reason of the respondents' failure to cut the amount of wood contracted for to the amount of one thousand three hundred and twenty dollars, for which sum they prayed judgment.

The respondents demurred to this further defense and the demurrer was sustained; whereupon the respondents had judgment upon the pleadings for seven hundred and eighty-two dollars and seventy-five cents, that being the sum due for the wood admitted to have been cut less the agreed forfeiture of five cents per cord.

From this judgment the appeal is taken.

Catlin, Killin & Nicholas, for appellants.

Northup & Gilbert, for respondents.

By the Court, BOISE, J.:

This cause was tried on the pleadings in a motion for judgment. The questions are: 1. Was the separate answer of the appellants setting up damages resulting from the failure of respondents to cut all the wood contracted for within the specified time, a good defense, either in form or substance? 2. In case said answer was no defense, was there still an issue which the appellants had a right to submit to a jury? The allegation in the complaint that the appellants promised and agreed to pay respondents, the reasonable value of the labor being denied in the answer, but it not being denied but that the respondents cut the wood, a promise to pay the reasonable value would be implied unless the special contract avoids that implication, and as the special contract is before us we think its construction will solve both these questions.

A time is fixed in the contract by the parties when the work shall commence and when it shall be completed. There is no intimation in it that the respondents on fail-

ing to do the whole work by the twentieth of May shall be allowed further time. But, on the contrary, the reservation of ten cents per cord out of the monthly payments, and the stipulation that on the tenth of June, in case of failure, five cents per cord on all that is then cut shall be forfeited, plainly indicates that the parties intended when they made the contract that a final settlement should be made on the tenth of June, and that the contract should be then finally terminated. If the parties had intended that there should be any other forfeiture, we must presume that they would have specified it; for the rule is that where the parties have specified in their contract the damages to be paid in case of failure that all damages not specified are excluded.

We think the contract therefore fixed the amount of damages at five cents per cord, and that the appellants can claim no more than that, therefore their separate answer which sets up other damages is no defense.

It is also claimed that as the appellants denied that they agreed to pay the reasonable value of the services for cutting the wood, this raises an issue of fact which the appellants have a right to try.

Where the defendant denies the work, and then sets up a defense in which he acknowledges that the service was performed, it is not necessary that this admitted fact should be proved. If a particular fact is admitted on the record by a party it is a solemn admission, and the party is bound by it, and it is not necessary to call witnesses to prove it.

The fact that the respondents had cut the wood was before the court, stated in the contract and was admitted, and the whole question was as to whether the appellant could claim other damages than those alleged in the contract. The conract, as we view it, was broken by the respondents, but the parties had stipulated in the contract what damages were to be paid for the breach, and these damages were liquidated and before the court, and were properly adjusted in the judgment.

The judgment of the circuit court is affirmed with costs, and disbursements.

LADD and BUSH, Appellants, v C. M. CARTWRIGHT, Respondent.

CORPORATION—LIABILITY OF ASSIGNEE OF UNPAID STOCK.—Under the constitution, the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid. All sales of stock in a corporation transfer all rights therein to the purchaser, who thereby becomes liable for the payment of any unpaid balance due or to become due thereon when duly demanded by the directors of the corporation.

IDEM—LIABILITY OF ASSIGNOR.—If the sale be voluntary, the seller is not discharged from liability to existing creditors for such unpaid balance, unless the same be duly paid by such purchaser. The liability, however, of such seller is contingent and does not become absolute until there is a failure to pay such balance by the purchaser after the same has been duly demanded by the proper officers of the corporation.

IDEM—EQUITY SENT IN PROPER REMEDY.—The creditors of a corporation can not proceed in the first instance against a stockholder upon his individual liability without first having shown that he has exhausted his remedy against the corporation. The remedy of a creditor of a corporation against a stockholder upon his individual liability is in equity where the rights of the corporation, the stockholders, and all the creditors may be adjusted in one suit.

APPEAL from Marion County.

On the twentieth of April, 1873, the Pioneer Oil Company, a private corporation was indebted to the appellants in the sum of forty-four thousand five hundred dollars. On that day the respondent voluntarily sold one hundred and forty shares of the stock of the corporation of which he was the owner.

At the time of such sale there was unpaid upon each of the shares sold the sum of seventy dollars, on the one hundred and forty shares the sum of nine thousand eight hundred dollars, of which there remained unpaid at the commencement of the action sixty dollars per share, or upon all the shares eight thousand four hundred dollars.

This action was brought to recover from Cartwright, the seller of the stock, this unpaid balance.

The court sustained a demurrer to the complaint alleging these facts and the respondent had judgment, whereupon this appeal was brought.

W. W. Thayer and J. A. Stratton, for appellants:

The constitution of this state, article XI, section 2, declares that, "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid and no more." Section 14 of title 1, chapter 7, Miscalleneous Laws, Civ. Code, page 527, "in relation to the formation of private corporations," is as follows: "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser." Under this section of the constitution, and the section of the statute quoted, does the liability of the stockholder continue after the sale of his stock? The obligation was incurred as soon as the debt was contracted and continues until payment. (*Corning v. McCullough,* 1 N. Y. 47.)

The personal liability of the stockholder is immediate and absolute, and the stockholders are answerable to creditors of the company as original and principal debtors. (*Conklin v. Furman,* 57 Barbour, 484, 487.) Those who deal with corporations, bestow their labor or part with their money on the credit of those who are known to be stockholders. (*Moss v. Oakley,* 2 Hill, 265, 270.) It will not be pretended that the debtor in this case, more than in any other case has, or ought to have, the power to shift his liability to any one less able to bear it, or utterly worthless, so as to cheat the creditor out of his labor or his money. The nature of the liability is that of contract. (*Corning v. McCullough,* 1 N. Y. 59.) Debt is the proper form of action against the stockholder for a debt contracted by the company. (*Simonson v. Spencer* 15 Wend., 548; *Bank of Poughkeepsie v. Ibbotson,* 24 Wend. 478, 479.) The liability is several, not joint. (Id.)

The remedy of the creditor against the stockholder is ade-

quate and complete at law and not in equity. (*Bank of Poughkeepsie v. Ibbotson,* 24 Wend. 478, 479; *Paine v. Stewart,* 33 Conn. 516, and note.) The complaint in this case alleges the facts; that the corporation was indebted to plaintiffs, and that the defendant was a stockholder. We claim that those facts under the constitution and the statute in accordance with it render the defendant liable. His liability does not depend on the insolvency of the corporation, and that fact need not be alleged. (*Perkins v. Church,* 31 Barb. 84; *Paine v. Stewart,* 33 Conn. 516, and note; *Alibone v. Hager,* 46 Pa. 48; *McCarthy v. Lovashe,* in Supreme Court of Illinois, reported in Chicago Legal News, July 13, 1878; *Tibbals v. Libby,* decided in same courts June 21, 1878, and reported in the Central Law Journal of September 6, 1878.)

Rufus Mallory, and Tilmon Ford, for respondent:

The respondent would not be liable if his stock had been sold under execution. See section 14 of chapter 7, page 527 of the General Laws of Oregon, which reads as follows:

Sec. 14. "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person for whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

The last clause of this section negatives the idea that one who has sold his stock and ceased to be a stockholder in a corporation, is liable at all to existing creditors of the corporation, under the constitution, or the first clause of this section. We think it also clear from the last clause of the section, that a seller of stock can only be proceeded against by existing creditors of the corporation for the amount of the "unpaid balance due * * * on such stock." If there is an "unpaid balance to become due on such stock," and creditors do not wish to trouble the corporation with debts "due" by it to them, they must wait until "such unpaid balance" becomes due, and see if the same be not "duly paid by such purchaser," before asking the "seller" to pay it.

The complaint does not show that there is any part of the eight thousand four hundred dollars sued for due on the stock sold by the respondent; and in this we think the complaint fatally defective. The complaint in an action or suit by a creditor or creditors of a corporation, against a seller of its stock, must show:

1. That the balance claimed is due upon the stock;

2. That such proceedings have been had against the purchaser thereof as to make it his duty to pay it;

3. That the purchaser is then in default, or has not duly paid;

4. We also contend that even if there was an "unpaid balance due" on the stock sold by respondent, that appellants could not, under this section, maintain an action at law against him therefor. There is no privity of contract between the creditors and stockholders of a corporation.

The proper remedy of a creditor of the Pioneer Oil Company, under this section, is by a suit in equity, in which all the creditors should join, or one or more of them should sue for the benefit of all; and the suit should be against the company and all the stockholders, unless it be impracticable to bring them all before the court, or some other sufficient reason for omitting any of them, be shown. (14 Wis. 762; 10 Metcalf, 525; 8 Cush. 93; 13 Wis. 57; 23 Pick. 112.)

By the Court, PRIM, J.:

The respondent was not an original subscriber of stock in this corporation, nor was he the holder of any stock therein at the time when this action was commenced; but it is sought to maintain this action against him upon the ground that he was the owner of one hundred and forty shares of its stock by purchase on and from April 20 until April 23, 1873, at which said last mentioned date he made a voluntary sale of the same, and that at said date the said corporation was indebted to appellants in the sum of forty-four thousand five hundred dollars for money before that time loaned and paid for said corporation, which sum, it is alleged, was due and

unpaid at the time when this action was commenced; and that upon each of said shares there remains an unpaid balance of sixty dollars, amounting in the aggregate to eight thousand four hundred dollars, and for which amount appellants demand judgment in part satisfaction for the said debt due them from said corporation.

In this state there is a general law under which private corporations may be formed and organized for the purpose of carrying on any lawful enterprise, business or pursuit. When the capital stock of such corporation is subscribed it may be fully organized by electing a set of directors, who become the trustees of its assets and property, for the use and benefit of its stockholders and creditors. Whenever required by the directors, it becomes the legal duty of the stockholders to pay to the treasurer of the corporation the amount of their stock subscribed, or whatever percentage thereof may be required, which constitutes its assets, to be used in the transaction of its business and in the payment of its debts.

Article XI, section 2 of the constitution provides that "the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of such corporation to the amount of their stock subscribed and unpaid, and no more."

By this clause the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid. Whenever the full amount of their stock is paid into the corporation they are discharged from any further personal liability to its creditors.

Section 14 of title 1, chapter 7, Miscellaneous Laws, code, p. 527, "in relation to the formation of private corporations," is as follows: "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

Under this section the owner and holder of stock may sell and transfer all his rights therein to another, who thereby becomes liable for "the payment of any unpaid balance due or to become due on such stock; but if such sale is a voluntary one the seller is not discharged from his liability to existing creditors for the amount of any unpaid balance, unless the same be duly paid by such purchaser."

Thus it will be seen that while it is the legal duty of such purchaser to meet and respond to any calls duly made by directors of the corporation against the stock purchased by him, for any unpaid balance due or to become due thereon, the liability of the seller to existing creditors of the corporation is not discharged unless the same is duly paid by such purchaser. As to existing creditors, the liability of the seller appears to be a contingent one, and only becomes absolute upon the failure of the purchaser to pay any balance due or to become due thereon when required by the directors of the corporation; or, in other words, under this provision of the statute as to this class of creditors, the seller is made to occupy the relation of surety or guarantor to the purchaser.

Thus, we apprehend that it is not sufficient to constitute a cause of action against a stockholder who has made a voluntary sale of his stock to aver that there is an unpaid balance due or to become due upon said stock which has not been paid, but it should be further averred that said unpaid balance, although duly demanded or required by the properly authorized officers of the corporation to be paid, remains unpaid.

In this respect the complaint is defective and insufficient to constitute an action against respondent, for the reason that it fails to show that a demand had been duly made upon the purchasers of said stock by the directors of the corporation to pay the balance remaining unpaid upon the stock purchased of respondent.

But again, can a creditor of a corporation proceed in the first instance against a stockholder upon his individual lia-

bility without first having shown that he has exhausted his remedy against the corporation? We think not.

The contracts being made with the corporation, there is no privity of contract between creditors and stockholders. A stockholder is not presumed to be familiar with the dealings of the corporation. A demand might be presented to him for payment which had already been paid, or against which the corporation is entitled to credits or offsets. And if an action at law can be maintained by a creditor against a stockholder, in the first instance, he may be subjected to the cost and expense of several actions at once by different creditors of the corporation.

But in the absence of any special and direct legislation as to how the individual liability of a stockholder may be enforced, we think it would be unreasonable as well as unjust to place any such construction upon the constitutional and legislative provisions heretofore referred to. For all that appears in the complaint to the contrary it may be that this corporation is not only engaged in carrying on its ordinary business for which it was organized, but entirely solvent and ready to pay off this demand of appellants upon presentation. No judgment is shown to have been obtained against the corporation and a want of sufficient assets out of which it might be satisfied. Not even an application for its payment is alleged to have been made to the corporation.

The next question presented for our consideration is whether the individual liability of a stockholder to existing creditors of the corporation may be enforced by an action at law, or whether a suit in equity must be resorted to. It is insisted by counsel for appellants that the remedy is at law, and to maintain the proposition, *Corning v. McCullough,* 1 Com. 47; *Simonson v. Spencer et al.,* 15 Wend. 548; and the *Bank of Poughkeepsie v. Abbotson,* 24 Wend. 472, are cited. We have examined those cases and find that the statutes under which they were maintained are very different from ours. In *Corning v. McCullough,* the act of incorporation provides "that the stockholders * * * shall be jointly, severally and personally liable for the payment of all debts and demands contracted by the corporation, and that any person hav-

ing any demand against such corporation may sue any stockholder or director in any court having cognizance thereof." In *Simonson v. Spencer*, the language of the act is: "And any person having any demand against the said corporation may sue any stockholder singly, or any two or more stockholders jointly, and recover in any court having cognizance thereof." But upon the other hand, we find that there are many cases in which it has been held that the remedy is in equity, where the rights of the corporation, the stockholders and creditors can all be adjusted in one suit upon the principles of equality and justice. And as the views presented in those cases recommend themselves to our consideration as the most reasonable and appropriate we have concluded to adopt them. The following authorities sustain this proposition: (19 Johns. 484; 8 Cow. 395; 20 Wall. 520; 14 Wis. 762; 1 Hopk. 305; 23 Pick. 112.) In the last authority above referred to it was held that an action at law could not be maintained.

The court says: "If actions at law will lie, suits may be multiplied to an indefinite extent. Each bill holder or other creditor must have his separate suit, and each stockholder must be sued separately. Again, suits between stockholders to adjust their contributions would be interminable. If a creditor's demand be larger than the amount of stock owned by any one, he must have several suits against several individuals on the same cause of action or lose a part of his demand. If any one stockholder owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits.

It may happen and probably has happened in this instance that a bank owes more than the amount of its whole capital. In such case there must either be a *pro rata* division among the creditors of what may be recovered, which would be impracticable in suits at law, or those who sue first must recover the whole of their debts, leaving others totally remediless, which would be palpably unjust. The evils and inconveniences of attempting to enforce this section by suits at common law would be incalculable, and such remedy would be in-

adequate, vexatious and mischievous. The only proper means of giving effect to this provision is by a process in equity, and this, of all cases which can arise, seems to call most loudly for a chancery jurisdiction.

To a bill in equity all persons, however numerous, might be made parties; and all the relative and conflicting claims of the many creditors and stockholders settled, and their proportionate rights to recover and liabilities to contribute adjudged in a single suit. We are all therefore of opinion that this case comes within the equity jurisdiction of the court, and that an action at law will not lie.

Being of opinion that the views expressed in the case above are correct, we adopt them as applicable to this case.

The decree of the court below dismissing the complaint with costs is affirmed.

JOHN MINTO, Respondent, v. WILLIAM DELANEY, Appellant.

NAVIGABLE STREAM—BOUNDARY OF RIPARIAN OWNER.—Where a navigable river was meandered in making the public surveys, and the United States has granted the land bounded by the meander line, the grantee takes the river. The stream and not the meander line is the true boundary of the riparian owner.

IDEM—ACCRETIONS.—Accretions to such land belong to the riparian owner, and can not be selected as swamp and overflowed land.

APPLICATION TO PURCHASE—CLOUD UPON TITLE.—An application filed in the office of the secretary of state to purchase such accretions, as swamp and overflowed land, is a mere nullity and casts no cloud on the title of the riparian owner.

APPEAL from Marion County. The facts are stated in the opinion.

Knight & Lord, for appellant:

The alleged cloud upon respondent's title to the land which he claims to own by accretion, is an application by the appellant, filed in the office of the secretary of state, of the state of Oregon, on or about the eighteenth day of March, 1872, for the purchase of said land from the state of Oregon, as swamp

and overflowed land. This casts no cloud on the respondent's title, if he has any.

Under the law of 1870, providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon, it is made the duty of the board of commissioners for the sale of school and university lands, in case the office of commissioner of lands is not created by law, to appoint suitable persons to select in the field all the swamp and overflowed lands within this state, and to describe each tract, either by legal subdivisions or by actual survey, and make returns of the same to the board. When the selection of these lands in any county is completed, the board are to make out maps and descriptions thereof in duplicate, one copy to be kept in their office and the other to be filed in the office of the county clerk of the county in which the lands may be located. The county clerk then sends to the board his official certificate of the date of their filing in his office. The board is then to give public notice in some newspaper published in the county, if there be one, if not, then in some newspaper he may select in an adjoining county, for four weeks, of said completion, approval and filing.

Any of the persons enumerated in section 3 of said act may become an applicant for the purchase of any of said lands by filing his application therefor, describing the same by the actual survey, or if no survey has been made, then by other artificial or natural landmarks. Within ninety days after the public notice as aforesaid, twenty per centum of the purchase-money shall be paid by the applicant to the board. After these preliminary steps by the state to secure a patent to these lands, the state's listing and segregation, must, under the laws of the United States, be approved and adopted by the proper officers of the United States government before patent to these lands can issue to the state.

Now it does not appear from the complaint that the agents of the state ever selected this land as swamp land, or that it was ever returned to the board, or that the board ever approved such selection, or made any maps of the same, or

filed any description of the land in the office of the county clerk of Marion county, or have on file in their office any description of this land, or that the applicant has paid any part of the purchase-money, or that the government of the United States has ever approved any selection of this land by the state, if it was ever selected.

Nothing appears from the complaint that the state has or claims any right to this land as swamp and overflowed. It is a bare possibility that the state may select this as swamp land and secure a patent to the same. Here, then, is nothing but a bare application by a stranger to purchase land from another stranger who has not, nor claims to have, any muniments of title to the land so far as the complaint shows. Such a paper does not, under section 500 of the code, constitute such an adverse claim, estate or interest in real property, as casts any cloud upon title. "The true test by which the question, whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist, otherwise not." (*Pickley v. Higgins,* 15 Cal. 127, cited and approved in *Curtis v. Sutter,* 15 Id. 264; *Lick v. Ray,* 43 Id. 84-88; *Cox v. Cliff,* 2 Comstock, 122.)

"It is not enough that the deed which is sought to be set aside may, possibly, be a cloud on the plaintiff's title, but it must clearly appear that the claim set up under such deed is, in fact, in hostility to the plaintiff's title." (*Hartman v. Reed,* 50 Cal. 491.) "Equity will not interfere where an act *in pais* is complained of as a cloud on title where the act itself does not, without concurring facts and circumstances proved *aliunde,* establish any interest in or title to the premises." (3 Daily (N. Y.), 75.)

"In order to induce a court of chancery to order a writing to be canceled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to the plaintiff's." (115 Mass. 94.)

"To constitute a cloud upon the title of lands, there must be some color of title shown in the defendant. The conveyance of land by the grantor, who sets up no title whatever, does not cast any cloud over the title of the true owner." (51 Mo. 60.)

"The doctrine of the common law as to the navigability of waters, has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or indeed, any test at all of the navigability of waters. Those rivers must be regarded as public navigable rivers in law, which are navigable in fact, and they are navigable in fact when they are used or susceptible of being used in their ordinary conditions as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (*The Daniel Ball,* 10 Wall. 557; 3 Or. 455.)

The Willamette river being navigable in fact, is therefore navigable in law, and the common law consequences of navigability attach to the legal navigability of that river, and its bed and shores to high-water mark belong to the state. (*Pollard's Lessee v. Hagan,* 3 How. 219, re-examined and confirmed in *Goodlittle v. Kibble,* 9 Id. 471; 3 Iowa, 1; 32 Id. 106.)

Riparian proprietors on navigable rivers own the fee of the soil to high water-mark and no further. (*Chapman v. Kimball,* 9 Conn. 40, and cases above cited.) Public grants are construed strictly, and nothing can be taken by implication. A grantee of the United States government can not take in fee any land beyond the lines of the original survey where those lines are made the boundaries of his grant. (1 Black. 204; 5 Wend. 444, 460, 464.)

J. A. Stratton, for respondent:

The meander lines of a tract of land bounded by a river, as marked on the plats and surveys of the United States, constitute, as between persons claiming under the United States the boundary of the river. Every grantee of the United States whose land is bounded on any side by the meander line of a stream is to that extent a riparian proprietor, and en-

titled to all the incidents of such ownership at the common law. (10 Peters. 716; 3 Scammon, 522; *Bates v. Ill. Central R. R. Co.*, 1 Black. 208; *Railroad v. Schurmier*, 7 Wall. 273; *Yates v. Milwaukee*, 10 Id. 497.)

But if the rule were otherwise, then the plaintiff would take to low-water mark, whether within or beyond the meanders. (*Railroad v. Schurmier, ubi supra*, and 20 Minn. 82; 1 Black. 32; 13 N. Y. 296; 23 Wall. 64; 28 Penn. 206.) Such land is not comprehended within the meaning of the act in relation to tide and overflowed land. (Laws of 1872, p. 129 *et seq.*; 40 Cal. 471.) A suit will lie to determine such a claim as is set up by defendants. (1 Story Eq. Jur., p. 709, sec. 711 a; 21 Conn. 488; 18 N. Y. 515; 2 Black. 445; 50 Miss. 367; 42 Ind. 49; 34 Vt. 485; 10 Nev. 376.)

By the Court, KELLY, C. J.:

The respondent, who was the plaintiff in the court below, is the owner of a tract of land in Marion county, described in the complaint as lot No. 5 in section 27, and lots 2 and 4 in section 28 of township 7, south range 3 west of the Willamette meridian, the same being a portion of a larger tract of land originally granted by the United States to O. M. Pringle, under the act of congress known as the Oregon Donation Law, approved September 27, 1850. Since the land was granted to Pringle the Willamette river has changed the boundaries of the tract owned by respondent, so that they do not now conform to the descriptions in the original surveys and plats of the United States. The river has encroached upon and washed away some portions, while there have been gradual accretions to other parts of the land. These accretions are claimed by the respondent by virtue of his ownership of the adjacent land.

In his complaint the respondent alleges that he is the owner and in possession of this alluvion. He further alleges that the appellant, on or about the fifteenth day of March, 1872, filed in the office of the secretary of state for the state of Oregon an application to purchase these accretions to his lands from the state of Oregon as overflowed or tide lands, and that he claims the right under that application to enter upon and use them.

He avers that this claim of the appellant is a cloud upon his title, and asks that it may be removed by a decree declaring that the appellant has no interest whatever in these accretions to his land.

The answer of appellant denies the right of respondent to this alluvion, and among other denials and averments says, "That said land lies between high and low water of the Willamette river, and that the most of said land was so situated at the time of the survey of said island by the United States."

To this portion of appellant's answer there was a demurrer by respondent, which was sustained by the court below. The plat of original surveys shows that when the meander line was run, a small portion of land was left between it and the water of the Willamette river, and it was to this land that the accretions, referred to in the pleadings, were added. And the question is whether the meander line as it was actually run, or the meandered stream, is to be considered the true boundary of the lots mentioned in the complaint. Whatever doubts may heretofore have been entertained upon this subject, they were removed by the decision of the supreme court of the United States in the case of the *Railroad Company v. Schurmier,* 7 Wall. 272.

In that decision the court says that: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line, as actually run on the land, is the boundary."

Adopting this construction in regard to grants of the public lands, we hold that the river, and not the meander line, was the boundary of the lots owned by the respondent.

The evidence shows that several acres have been gradually added to the lots since the original surveys were made, by

the accretion of gravel, sand and loam washed by the floods from the upper portion of the Pringle island and from the opposite shore of the river. This alluvion the respondent claims belongs to him as a riparian owner, and this court so decides.

It is a well established principle that formations by slow and gradual accretion belong to the owner of the land when made by a stream forming his boundary and opposite thereto. (11 Ohio, 314.) But it is insisted by the appellant that his application to purchase the accretions to respondent's land, filed in the office of the secretary of state on the eighteenth day of March, 1872, does not cast a cloud on the respondent's title such as requires the interposition of a court of equity to have removed, and that therefore these proceedings ought to be dismissed.

Section 500, on page 212 of the civil code, provides that "any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

Courts of equity have long exercised the right to remove a cloud from the title of a person in possession of real property where there is an adverse right or claim which in conscience ought not to be asserted, and this section merely recognizes a well-settled principle of equity practice, which has always prevailed in those courts, of ordering illegal deeds and other written instruments delivered up and canceled. But where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be delivered up or canceled would not seem to apply. (1 Story's Eq. sec. 700 a.)

In *Cox v. Clift*, 2 Comstock, 122, the court of appeals lays down the rule thus: "Whatever opinions may have formerly obtained, it now seems to be established that, whenever it is apparent, from the writing or deed itself, that no danger to the title or interest of the complainant is to be apprehended, a court of equity will not entertain a bill for the cancellation or

delivery of the instrument. Nor is there any reason why a party should be allowed to resort to the expensive remedy of a suit in chancery to procure the relinquishment of a right which it is obvious the defendant never possessed, and against which, if asserted, the complainant had a perfect legal defense written down in the title deeds of his adversary."

In the case of *Nickerson v. Loud,* 115 Mass. 97, Gray, C. J., delivering the opinion, says: "In order to induce a court of chancery to order a writing to be canceled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the air of extrinsic facts may be, some evidence of a right adverse to the plaintiffs." So, also, in the state of Missouri, the supreme court declares that "to constitute a cloud upon the title to lands, some color of title must be shown in the defendant." (*Dunklin County v. Clark,* 51 Mo. 60.)

The supreme court of California, construing a statute quite similar to our own, says the true test is: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed." (*Pixley v. Huggins,* 15 Cal. 133.)

Applying the test laid down by the courts in these several states to the case under consideration, we are at a loss to see how in any way the claim of appellant can be a cloud upon the title of respondent. All there is of it is an application filed by the appellant in the office of the secretary of state to purchase as swamp and overflowed lands certain lands, mostly alluvion, which lie between the river and the meander line of the lots in the Pringle donation claim, now owned by the respondent. We have already stated that the river and not the meander line is the boundary of these lots, and as a necessary consequence there is no land to which the appellants' application can attach. Where a river is designated in a patent as the boundary of a tract, the legal deduction is that no land was left between the tract and the river which could lawfully

be granted to another. And it being legally impossible for the state to select as swamp and overflowed land that which is specified in the application, it follows as a matter of course that the application itself amounts to nothing, and must be treated as a nullity. The case of *Taylor v. Underhill*, 40 Cal. 471, is in many respects similar to this one. Taylor surveyed and claimed as swamp and overflowed land the sloping bank and lands covered by high tide of the Sacramento river, and obtained a certificate of purchase from the state. Underhill, the riparian owner, brought an action to restrain him from obtaining a patent for the strip of land in front of his (Underhill's) land, and to remove the cloud upon it. After hearing the case, the court below dismissed the plaintiff's bill, and this judgment was affirmed by the supreme court. Temple, J., delivering the opinion of the court, says: "It (the court below) found that the land in controversy is below high-water mark, and that the tide ebbs and flows over it; and as a conclusion of law, that neither party could purchase the land as swamp and overflowed land. The certificate of purchase was therefore void, and his patent, if he obtained one, would also be void, and no injury could result to plaintiff from defendant's claim.

"Upon the facts found in this case there can be no doubt but that the certificate of purchase was improperly issued to the defendant, and if those findings are true, it is somewhat surprising that he has been able to proceed so far with his application as to obtain his certificate. It could not have been intended in authorizing the sale of swamp and overflowed land to enable persons to obtain titles to lands under the navigable waters which are incapable of being reclaimed for agricultural purposes, and which could not be utilized without materially interfering with navigation. While, however, the attorney for plaintiff admits that the patent which the defendant may obtain would be invalid when these facts should be made to appear, he claims that it would not be void upon its face, but it would require evidence *dehors* the patent to show its nullity, and therefore its possession would be injurious to the plaintiff.

"We think the plaintiff is correct as to the effect of the patent, but we do not see upon what principle the court will give him relief. The claim of the defendant is not a cloud upon his title. There is no claim to any portion of his land."

The court affirmed the judgment and dismissed the bill, and yet in asking the interposition of a court of equity to remove a cloud from plaintiff's title, that case was a far stronger one than this. There a certificate of purchase was issued. Here there was none and never can be.

The respondent has a perfect title to the land in controversy, and is in possession of it; and there is no way by which his adversary can obtain a standing in court to disturb that possession or assail the title. It follows as a necessary consequence that this suit ought not to have been brought to remove a cloud from a title where none existed.

The decree is reversed and the complaint dismissed.

Mr. Justice BOISE having tried this case in the court below, did not sit in the hearing on appeal.—[Reporter.]

WILLIAM BARR, Respondent, v. J. H. MITCHELL, Appellant.

PROMISSORY NOTE—MAKER OF, WHAT CONSTITUTES.—Where a third person writes his name in blank on the back of a non-negotiable note before the same is delivered to the payee, he becomes liable as a maker of the note, and the payee may write over such signature a promise to pay the money named within to the payee.

APPEAL from Multnomah County.

This is an action against one Silvers and J. H. Mitchell, the appellant, upon a promissory note. The note is as follows:

"Portland, September 11, 1873.

"One year after date, for value received, I promise to pay William Barr six thousand one hundred and sixty-five dollars and fifty cents in United States gold coin, with interest from date at eight per cent. per annum. Interest payable in like

gold coin. I reserve the right to use the said money one or two years longer if I see fit.

"C. S. SILVERS."

It is alleged on the part of the respondent that before the delivery of the note to him, Mitchell indorsed it by writing his name on its back; that Silvers elected to keep said money until the full period of three years from the date of the note; that the note was presented to Silvers for payment on the fourteenth of September, 1876, and notice of demand and non-payment given to Mitchell.

Silvers did not appear in the action. The appellant, Mitchell, answered, denying that he indorsed the note, or wrote his name on the back thereof before the delivery to respondent, and alleging that he did write his name upon the back of said note, but not until long after it had been executed by Silvers and by him delivered to respondent, and not until long after the money for which said note was given, and which was the sole consideration thereof, had been delivered to Silvers by respondent. That such writing of his name on said note and said alleged indorsement by him, Mitchell, was without any consideration whatever, and was not a promise otherwise than for the payment of the debt of another, and that no note or memorandum in writing expressing a consideration had been subscribed by him; and further, that no notice of the non-payment of the note was given to him, Mitchell, within a reasonable time after the making of the note, nor at all until the twenty-fifth day of September, 1876; nor was the same known to him, Mitchell, until that date.

The respondent in reply, alleges that on the date the note was given, Silvers was indebted to respondent in the sum of six thousand one hundred and sixty-five dollars and fifty cents in United States gold coin, which was due; that said money was worth at the time one per cent. a month interest and the note was made and delivered for the purpose of procuring an extension of the time for paying the said debt due from Silvers to the respondent.

The jury found for the plaintiff the sum of seven thou-

sand five hundred and ninety dollars and fourteen cents gold coin.

A motion for a new trial was overruled, and on August 30, 1877, judgment was entered in accordance with the verdict, against both defendants, for the sum of seven thousand five hundred and ninety dollars and fourteen cents, and seventeen dollars and twenty-five cents costs and disbursements, from which judgment this appeal is taken.

Dolph, Bronaugh, and Dolph & Simon, for appellant:

At most, Mitchell's liability did not exceed that of a guarantor, and if he was liable to that extent he has been discharged by the delay and neglect of Barr in demanding payment of Silvers, and notifying him, Mitchell of nonpayment. The best modern authority as settled by the highest courts of the greatest commercial states of this Union, favors the abolition of many former distinctions, and the reduction of the liability of all persons who indorse any note in bank to the common standard of responsibility of indorsers technically so-called.

Parsons, in his work on Notes and Bills, vol. 2, p. 119, 120, says: "There is much diversity of opinion among the courts of the different states as to the nature of the contract to be implied from the blank indorsement of one not a party to the bill or note when the paper is negotiable, and the indorsement is made before its delivery to the payee. In some states one indorsing in such manner is *prima facie* regarded as a guarantor, in others as an indorser, and in others as a joint promisor or surety. But in most of the states the effect of such an indorsement is held to depend upon the intention of the parties which may be ascertained by parol evidence. In Massachusetts, however, the presumption is said to be conclusive that the party indorsing in this manner intends to become liable as an original promisor." The same author says (p. 123):, "In New York the later cases seem to go to the extent of holding that as a party indorsing in blank is conclusively presumed to be liable only as an indorser in the full legal sense of the term, and, whatever may have been the intent, his engagement can not be controverted into a guaranty,

or any other or different contract whatever." (*Cottrell v. Conklin*, 4 Duer, 50; *Coulter v. Richmond*, 59 N. Y. 481.)

On the qeustion of notice to a guarantor, Parsons says: "But, on the other hand, he may, having shown a consideration, hold the guarantor, without proof of presentment or demand or notice, unless the guarantor can show negligence in the holder, and actual loss sustained by the guarantor from the want of such presentment, demand or notice." Such we take to be the decided weight of authority, although the citations in our notes will show that the authorities are not in harmony on this point. (2 Par. on Notes and Bills, 137, 138, and note c.; *Moakley v. Riggs*, 19 Johns. 69; *Kies v. Tifft*, 1 Cowen, 98; 19 Wend. 202; *Whitton v. Mears*, 11 Met. 563; *Gamage v. Hutchins*, 23 Maine, 565; *Lewis v. Brewster*, 2 McLean, 21; Id. 569.)

In Ohio the distinction taken between the liability of accommodation indorsers of negotiable and non-negotiable paper is, that the former are liable as joint makers, while the latter are liable only as guarantors and are held entitled to notice of non-payment by the maker. Of the first class are the cases of *Bright v. Carpenter*, 9 Ohio, 139; *Robinson v. Abell*, 17 Id. 36; *Gale v. Van Arman*, 18 Id. 336.

In Missouri, Delaware, Vermont, North Carolina, Minnesota, Rhode Island and Pennsylvania an accommodation indorser is held liable as maker, regardless of the character of the note as to negotiability, while in Illinois and Kansas his liability is said to be that of a guarantor. (60 Mo. 297; 4 Houst. (Del.) 284; 41 Vt. 471; 63 N. C. 191; 11 Minn. 410; 40 Pa. 278; 51 Ill. 434; 2 Kansas, 496.)

In California an accommodation indorser before delivery of a note, whether negotiable or otherwise, is held to be liable only as a guarantor and to be entitled to demand and notice as an indorser. (*Brady v. Reynolds*, 13 Cal. 31; *Reeves v. Howe*, 16 Id. 152; *Ford v. Hendricks*, 34 Id. 673; *Jones v. Goodwin*, 39 Id. 493.)

Now, it is an almost universal rule that if A., by letter to B., agrees to become responsible as guarantor for C., provided B. shall give him credit, the liability of A. does not

attach if the credit be given, unless he be duly notified of the acceptable of his guaranty.

Why should not the same rule be applied here? So far as the extension of time on this note beyond the date when it became due on its face is concerned, Mitchell's part of that contract did not amount to more than a letter of credit, saying to Barr if you choose to extend time to Silvers for "one or two years longer," after this note falls due, I guarantee the payment of the note. Whether Barr would elect so to do, Mitchell could no more know what Barr might elect to do than in ordinary cases where a letter of credit is given by A. to C., addressed to B., by which A. agrees to guarantee the payment for goods if B. will furnish them to C., can A. know what B. might decide to do. In each case the matter is prospective, contingent and dependent upon the choice of the party to whom the guarantee is tendered. Why then should Mitchell's liability be different or greater when he said to Barr, if you choose to lend this sum, six thousand one hundred and sixty-five dollars and fifty cents, to Silvers, for one or two years longer after September 11, 1874, I guarantee its payment by him, than would his liability have been if instead he had said to Barr if you choose, on September 11, 1874, to sell Silvers a bill of goods of the value of six thousand dollars, I guarantee that he will pay for them in one or two years thereafter.

Yet, as above stated, the authorities are almost uniform in holding that in the latter case no liability would attach to Mitchell if the goods were sold by Barr to Silvers on the faith of such letter, unless Mitchell were duly notified that his guarantee had been accepted. (*Douglass v. Reynolds,* 7 Peters, 113; *Clark v. Russell,* 7 Cranch, 69, 92; *Adams v. Jones,* 12 Peters, 497; *Rapelye v. Bailey,* 3 Conn. 438; *Craft v. Isham,* 13 Id. 28; *Oakes v. Weller,* 13 Vt. 106; *Mussey v. Rayner,* 22 Pick. 223; *Taylor v. Wetmore,* 10 Ohio, 490; *Rankin v. Childs,* 9 Mo. 674; *Howe v. Nickels,* 22 Me. 175.)

Silvers did not contract that he would keep the money one or two years longer after this note became due, and much less can it be said that there was any contract on Barr's part to permit him so to do. The whole matter was left in uncer-

tainty. Mitchell had the right to suppose the note had been paid by Silvers at maturity, unless he were, within a reasonable time thereafter notified to the contrary by the holder.

But if Mitchell should be regarded as a maker and joint promisor with Silvers in the execution of this note originally, what was his position after September 11, 1874, according to the terms of his contract and the allegations of the complaint? As already remarked, there was no contract between Barr and Silvers that the latter would use, or that the former would permit him to use the money after the note should become due. There must be mutuality in all agreements to render them binding. Barr was not bound by that memorandum to allow Silvers the use of the money longer than the note should fall due, because Silvers was not bound to keep it longer. If, when this note became due, September 11, 1874, Barr chose to consent with Silvers, either by express or implied agreement, that the latter might use the money "one or two years longer," this was a new agreement to which Mitchell was not a party, and the substitution of this arrangement for the contract created by the note, entirely released Mitchell from all liability for the money. If it should be answered that Mitchell, by his indorsement contracted with reference to the contingency that such further arrangement might be concluded between Silvers and Barr, at the maturity of this note, we reply that such fact did not make him a party to the new arrangement when perfected. This was not a mere extension of time for the payment of the money by virtue of simple forbearance on the part of the payee toward the maker.

Suppose that Mitchell and Silvers had appeared as joint makers of this note upon its face, and the memorandum contained in the note had read "we reserve the right to use the money one or two years longer if we see fit;" and when the note fell due Barr had contracted with Silvers to allow him to use the money for the further two years, without Mitchell's knowledge or consent, would not the latter have been thereby released? It certainly would seem so. And is not the case at bar stronger in point of reason for Mitchell's release than such supposed case?

Catlin, Killin & Nicholas, and Thayer & Williams, attorneys for plaintiff:

The contract of indorsement can not be entered into in case of a non-negotiable note. (2 Pars. on Bills and Promissory Notes, 125; *Griswold v. Slocum,* 10 Barb. 402; *Haughton v. Ely,* 26 Wis. 181.)

By signing his name on the back of such a note, Mitchell evidently contemplated some liability. He signed for a purpose; a purpose was accomplished. Contracts will be held to mean something if possible. The authorities hold that such signing is an absolute guaranty that the money will be paid at all events, or an original promise to pay. The majority of them hold that he is an original promisor or jointmaker; all holding that he is not entitled to demand and notice. (Pars. on Bills and Notes, 125; Edwards on Bills and Notes, 167, 230, 273, 649; Story on Bills and Notes, secs. 60, 202; *Josselyn v. Ames,* 3 Mass. 274; *Seymour v. Van Slyck,* 8 Wend. 405, 408, 422; *Griswold v. Slocum,* 10 Barb. 402; *Richard v. Warring,* 40 N. Y. (1 Keys) 576; *Cromwell v. Hewitt,* Id. (1 Hand.) 491; *Long v. S. and H.,* 3 Iowa, 266; *Wilson v. R. and V.,* Id. 450; *Hall v. Monohan,* 6 Id. 216; *Houghton v. Ely,* 7 Am. 52, 64; 2 Hill, 83.)

He is held liable as a maker or guarantor. There can be but one acceptor; a second acceptor is regarded as a guarantor of the acceptor. He guarantees payment to the payee, and him only. (Pars. on Notes and Bills, 125.) The indorsing of a non-negotiable bill is equivalent to drawing a bill against the drawee in favor of the indorsee. (Story on Bills, sec. 60.) He is treated as a new drawer. (Id. sec. 202.)

In *Josselyn v. Ames,* 3 Mass. 274, the holder of a non-negotiable note had written a guaranty over the indorsement The court allowed that to be erased and a promise to pay written over it.

In *Seymour v. Van Slyck,* 8 Wend. 422, it was held to be a direct and positive undertaking to pay the note, and not a

conditional one to pay if the maker does not, upon demand after notice.

In *Griswold v. Slocum,* 10 Barb. 402, the defendant had indorsed a non-negotiable note as security before delivery. He was held liable as maker or guarantor, and that demand and notice were not necessary.

In *Long v. Smyser and Hawthorne,* 3 Iowa, 266, it was held that the holder of such paper may write over the indorsement a waiver of demand and notice. He may sue without first demanding payment of the maker, and without notice of non-payment to the indorser.

In *Wilson v. Ralph and Van Schaick,* 3 Iowa, 450, it is held that such indorser is liable to suit without demand upon the maker and notice of non-payment.

In *Hall v. Monahan,* 6 Iowa, 216, it is held not necessary for the plaintiff to show diligence; and the want thereof is no defense. The indorser stands in the relation of principal, and not surety.

In *Richards v. Waring,* 40 N. Y. 576, the action was upon a note, of which the following is a copy:

"One year after date we promise to pay Plat Richards eight hundred dollars, with interest, value received.

"JAMES E. WARRING.
"JAMES B. CHAPMAN.

"Amsterdam, April 1, 1857."

Signed on the back "Geo. O. Warring."

It was found by the referee that Geo. O. Warring signed his name on the back of the note before it was delivered to to Plat Richards. Held, that Geo. O. Warring was a maker of the note, an original party to the instrument. A writing is presumed to be truly dated. (Code of Civil Procedure, sec. 766.) And that a promissory note or bill of exchange was given or endorsed for a sufficient consideration. (Id.) It is to be presumed that the signature was appended to a paper at the date thereof. In *Kamm v. Holland,* 2 Or. 59, it is held that courts of this state will follow the New York rule in commercial matters. The surrender of an old note, satisfaction of an old debt or forbearance to sue, is a valuable con-

sideration. (Story on Bills and Notes, sec. 183; 1 Parsons on Bills and Notes, 175; 3 Mass. 274.)

By the Court, BOISE, J.:

The first material matter to be decided in coming to a proper understanding of this cause is to determine the nature of the written instrument on which this action is founded. It is contended by the appellant that the words in this instrument, "I reserve the right to use the said money one or two years longer if I see fit," created as to Mitchell a contingent liability, and was not a part of the note, but was an addition thereto in the nature of a letter of credit. Our construction of this instrument is that it is a non-negotiable promissory note, due three years from date with the right in the maker to pay the same at the expiration of any time after one year from the date. This construction must dispose of all the numerous questions raised in the case, except one which is: What is the liability of a person, other than the payee who writes his name on the back of a non-negotiable note before the same is delivered to the payee? Is he a maker, a guarantor, or an indorser, and is he entitled to demand and notice of non-payment in order to fix his liability? In the case of *Kamm v. Holland,* 2 Or. 59, this court decided that one who writes his name on the back of a negotiable note before delivery is to be treated as an indorser and is entitled to demand and notice. In that case it was contended that Holland, who had written his name on the note before it was delivered, was a maker and not an indorser, and many respectable authorities were cited to support this position. In deciding the case the court say: "We might decide the question either way, and have an abundance of authority for so doing." In that case the court followed the rule as established in the state of New York. But in that state a different rule is established as to the liability of one who thus puts his name on a non-negotiable note, and he is not entitled to demand and notice, but is held liable as a maker or guarantor. (*Griswold et al. v. Slocum,* 10 Barb. 402.)

In Story on Promissory Notes, the general rule is laid

down that where one makes a blank indorsement on a non-negotiable note at the time the note is made, such indorser is liable as an original promisor or maker of the note, and the payee is at liberty to write over the blank signature the words: "For value received I promise to pay the money within named" to B., the payee. This would in effect make him liable as maker. This is also the rule as stated in Parsons on Notes and Bills, vol. 2, p. 125, where the author says: "In those states where the rule is adopted that a 'third person' indorsing paper in blank before delivery of it to the payee, is liable as an indorser only. It is not applied in case the paper be not negotiable, inasmuch as a legal indorsement can only be made on negotiable paper; but an indorser in such case is held liable as a maker or grantor," and in such a case is not entitled to demand and notice. We think the rule is, as established by the authorities, that when a person writes his name in blank on the back of a non-negotiable note, before the same is delivered to the payee he is liable as a maker. There was no error in the trial of this cause in the circuit court, and the judgment will be affirmed with costs.

JAMES M. MOORE, Respondent, v. THE WILLAMETTE TRANSPORTATION AND LOCKS COMPANY, Appellant.

RIPARIAN RIGHTS—EXTEND LATERALLY INTO STREAM.—Rocks and shoals lying along the margins of navigable rivers, above tide-water, belong to the riparian owner. Riparian rights extend laterally from the shore, and not up or down the stream.

INCONSISTENT DEFENSES IN REAL ACTIONS.—In a real action the defendant may plead as a defense that he is the owner in fee of the premises, and, also, that the ownership is in some person other than himself or the plaintiff.

APPEAL from Clackamas County.

The respondent brought this action to recover the possession of the undivided seven fifteenths of the tract of land described in the complaint.

The appellant sets up three defenses:

1. That it is the owner in fee-simple of the premises and of every portion thereof.

2. That appellant is the owner in fee-simple of the undivided one third of one fourth, and William P. Doland is the owner in fee-simple of the undivided one third of one fourth, and James K. Kelley is the owner in fee-simple of the undivided one third of one fourth of the whole of said premises, being the whole of the interest which the said James M. Moore had in said premises, between the eleventh day of March, 1861, and the sixth day of August, 1870.

3. A plea of the statute of limitations.

Additional facts are stated in the opinion.

Hill, Durham and Thompson, for appellant.

W. Carey Johnson and E. L. Eastham, for respondent.

By the Court, BOISE, J.:

The property in dispute is a reef of rocks, on which the breakwater of the appellant is built, which extends up the river from the island just above the falls of the Willamette river at what is known as Linn city; which breakwater serves to turn water to the locks of the appellant. The evidence tends to show that there is at ordinary stages of water in the river a channel between this reef and the shore, and also a channel between the reef and the island owned by the appellant. This island is owned by appellant, and claimed by it through mesne conveyances from Robert Moore, the ancestor of the respondent, who received the patent embracing this island from the United states, and consequently both parties claim title from this common source. The deed to the premises, including this island, does not include this reef of rocks. But the appellant claims that it is appurtenant to the island. The circuit court held that these rocks in the river were appurtenant to the main land, and that riparian rights extend laterally, and not up the river. This view is correct, and accords with the opinion of this court, as expressed in the case of *Minto v. Delany,* decided at this term, where it is held that the river, and

not the meander line, is the boundary of lands laying along the Willamette river, and that accretions formed on the shore by the gradual receding of the water belong to the riparian owner. The evidence shows that this reef of rocks is near the shore, and at low water can be approached from the shore, and the riparian owner would have to pass it to reach the river channel of the stream. In all such cases the lands and rocks along the shore belong to the owner of the adjoining land.

Another question in this case arises on that part of the appellant's separate answer which alleges that defendant is the owner in fee-simple of the undivided one third of one fourth, and William P. Doland is the owner in fee-simple of the undivided one third of one fourth, and James K. Kelley is the owner in fee-simple of the undivided one third of one fourth of the whole of said premises, being the whole of the interest which the said James M. Moore had in said premises, between the eleventh day of March, 1861, and the sixth day of August, 1870.

It appears from the documentary evidence before the court which was used on the trial in the court below, that Kelley, Doland and D. P. Thompson were the owners in common of three fifteenths of this property, and that before the bringing of this action, Thompson had sold his interest to the appellant, who held the same at the commencement of this action, and that said Kelley and Doland were each still holding one fifteenth. The court withdrew the evidence of the ownership of Kelley and Doland from the consideration of the jury, and charged the jury, that the plaintiff, James M. Moore, was entitled to recover of the defendant whatever interest Kelley and Doland held in the land.

To this ruling of the court the appellant excepted. The legality of this ruling must be determined by the construction to be given to section 316 of the code, where it is provided: "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the pos-

session shall be set forth with the certainty and particularity required in a complaint." These are all substantive, separate defenses, and if one is pleaded it must be pleaded separately.

A defendant under the code, section 72, may plead any or all of them in the same answer. It is claimed by counsel for the respondent, that the appellant having plead that he was the owner of the entire estate, can not also plead that he is the owner of one undivided part thereof, and Kelley and Doland owners also. That the two pleas are inconsistent. It is true that both pleas can not be literally true, neither is it true in a case of slander, where the defendant alleges that he never spoke the defamatory words, and that the words alleged to be spoken are true. But this is now allowed, and such apparently inconsistent pleading is certainly as proper in defenses in real actions as in cases of torts. A defendant may be mistaken as to his legal title, and if that fails he may maintain his possession by any of the separate defenses named in the statute.

It is also claimed that if this defense is available, in order for the appellant to avail himself of it, it must show that it has possession under some lease or license from Kelley and Doland. If the defense that the title and right of possession are in another person than the respondent or appellant is a substantive defense, it can be proved to defeat the right of the plaintiff to recover, who in ejectment must recover on the strength of his own title. Whatever defeats his right to possession, defeats the action. It is also further claimed that the appellant is not injured by this judgment, for appellant is not thereby deprived of his interest in the property.

If connected with this action there was a claim for mesne profits, the appellant would be liable to pay to the respondent the rents and profits of the two fifteenths which belong to Kelly and Doland, and *prima facie* as the judgment now stands such rents and profits belong to respondent as against appellant for the judgment, that he is the owner and entitled to the possession of these two fifteenths carries with it the rents and profits if demanded. If the appellant

was now sued by the respondent for these mesne profits, we do not decide whether or not appellant might show as a partial defense this estate of Kelley and Doland. Let that be as it may, this judgment establishes a wrong proportion of ownership as between the respondent and appellant, and is certainly as much injury to appellant as it would have been had appellant plead ownership of the whole property in another and been denied by the court the right to prove it.

We think the appellant in this case should have been allowed to prove the alleged ownership of Kelley and Doland, and that the holding and instruction of the circuit court was error.

The judgment of the circuit court is reversed, and a new trial ordered.

JAMES M. MOORE, Plaintiff and Appellant, v. THE WILLAMETTE TRANSPORTATION AND LOCKS COMPANY, Defendant and Respondent.

PROBATE OF WILLS—PETITION FOR.—A petition praying the probate of a will under the provisions of statutes of Oregon Territory, in 1857, will not be held defective, if it appear from the petition, affidavit of the subscribing witnesses to the will and the will itself, all taken together, that the testator was a resident of the county at the time of his death, and that the probate court had jurisdiction of the case.

IDEM—VERIFICATION—WAIVER OF OBJECTION.—A petition to the probate court for the appointment of an administrator *de bonis non* which is not verified is not, therefore, void, and if no objection is taken to it by motion to strike out or otherwise, any objection to it for want of verification will be waived.

PETITION—FILING, WHAT CONSTITUTES.—A petition which is marked filed in the usual form by the clerk, but which is found in the records of the court, and has been acted on by the court, will be deemed to have been filed unless the contrary is made to appear.

SHERIFF'S DEED—WHO MUST EXECUTE.—A sheriff's deed may be executed by the sheriff who is in office at the time the deed is due, after the time of redemption has expired.

CORPORATION—POWER OF STOCKHOLDERS.—The stockholders of a corporation may authorize and direct the sale of the property of the corporation on its dissolution, and direct the manner in which the sale shall be made.

IDEM—DEED OF CONVEYANCE, WHEN SUFFICIENT.—The deed of a corporation sealed with its seal and subscribed by its president and secre-

tary, declaring that they subscribe it for the corporation, will convey the title to the land described in it.

APPEAL from Clackamas County.

This is an action by the appellant for the recovery of certain lands occupied by part of the canal and locks around the Willamette Falls, opposite Oregon city, in Clackamas county, he claiming the undivided seven fifteenths thereof. The land in dispute is a part of the donation claim of Robert Moore, deceased, the father of the appellant. It is claimed by the appellant that the said Robert disposed of the land in dispute by his will so that one fifth was given to his son, Robert M. Moore; and one fifth to his daughter, Jane Painter; one fifth to his daughter, Margaret Mildred Moore; one fifth to his grandson, Robert Moore, junior, son of the plaintiff; and one fifth to R. C. Crawford, trustee, with power to sell after ten years from the death of said Robert Moore. Robert Moore, junior, died intestate and unmarried and without issue before May, 1869; Margaret Mildred Moore died in February, 1871, intestate, without issue and a *feme sole*. R. C. Crawford, trustee, sold and conveyed his one fifth to plaintiff in 1878, before the commencement of this action. The appellant claims that he acquired one fifteenth of the property through Margaret Mildred Moore, and three fifteenths through Robert Moore, junior, by descent, and three fifteenths from Crawford, trustee.

It is claimed on the part of the respondents:

1. That in September, 1857, the will of Robert Moore, deceased, was admitted to probate; that thereafter the executors in the will were removed, and George A. Pease was appointed administrator *de bonis non*, with the will annexed; that Pease duly sold the land in dispute at administrator's sale, to pay the debts of the estate and the expenses of administration; that James M. Moore, the appellant became the purchaser thereof at such administrator's sale; that the interest of Moore thus acquired, passed one third to one W. P. Dolan, and two thirds to the respondent, through an execution sale against the appellant to D. P. Thompson,

James K. Kelley and Dolan, and by mesne conveyances from Kelley and Thompson to the respondent.

2. That the land was, in a proper proceeding, bought by the Willamette Falls Canal and Locks Company, the grantor of the respondent against Pease and the heirs and devisees of Robert Moore, deceased, duly appropriated to the use of such corporation by a judgment of the circuit court for Clackamas county.

Moore executed a deed to Pease, notwithstanding the judgment-lien, on the day succeeding the conveyance by Pease, as administrator to him. Pease was therefore made a party in the proceedings to condemn.

Upon the trial, Moore objected to proof of the probate of the will in 1857, relied upon by respondent, upon the ground that the county court had no jurisdiction in the matter of the probate; to proof of the conveyance to Kelley, Thompson and Dolan, under the execution sale, on the ground that the deed offered in proof was not executed by the sheriff, who made the sale; to proof of the condemnation of the land, by judgment of the circuit court, on the ground that such court had no jurisdiction as to Margaret Mildred, or Robert junior, and to proof of the conveyance to the respondent by the Willamette Falls Canal and Locks Company, on the ground that the directors of such corporation were not authorized to execute such deed. The point of these objections is more particularly stated in the briefs and argument of counsel, and in the opinion.

The evidence objected to was admitted, and the respondent had judgment, from which this appeal is taken.

W. Carey Johnson and E. L. Eastham, for appellants:

To establish title under the probate proceedings, the respondent offered in evidence a paper, which purports to be a petition for probate, signed by the executors named in the will of Moore, deceased, dated September 4, 1857, and having no marks of filing upon it. They also offered the affidavit of Charles Pope and James K. Kelley, of September 6, 1857, to the effect that they were subscribing witnesses to the will, and saw the deceased sign the will, etc.

The first of these papers purports to have been made before the state of Oregon was admitted into the Union; the other after the admission into the Union. The plaintiff contended below, and still contends, that neither of these papers was sufficient to give the probate or county court jurisdiction of the subject-matter, or of the persons of the heirs, so as to support the subsequent proceedings relating to the proof of Moore's will, and the sale of land to pay his debts. At the time the first petition is dated, probate courts were not courts of general jurisdiction; and jurisdiction must affirmatively appear, or the subsequent proceedings are to be held void. The subsequent unverified statement of J. M. Moore, asking for the appointment of an administrator, did not give the county court any jurisdiction; and the court erred in admitting record of what the county court did in relation to the land sale, after it affirmatively appeared that the county court had no jurisdiction of the subject-matter.

No presumption obtains in favor of the proceedings of a court of limited or inferior jurisdiction, and recitals in journal of proceedings of courts of general jurisdiction which are disputed by other parts of the record, are not to be upheld by any presumptions; and no presumption obtains until after the court is shown to have jurisdiction of the subject-matter, by petition or pleading good on demurrer. (*Fisk v. Kellogg*, 3 Or. 503; *Tustin v. Gaunt*, 4 Id. 305; *Gilmore v. Taylor & Phillips*, 5 Id. 89; Rorer on Judicial Sales, secs. 71, 73; *Whitney v. Porter*, 23 Ill. 448; Freeman on Judgments, secs. 116, 117.)

The record shows that the will was admitted to probate June 19, 1877, upon petition of the Willamette Falls Canal and Locks Co.

The respondent offered the deed from the Willamette Falls Canal and Locks Co., which was admitted. It ought to have been excluded for the reason that it is not signed by the corporation. (Mis. Laws, p. 528, sec. 19.)

The officers of the corporation were not authorized by the directors to make the deed, and the vote of stockholders could not so authorize them. (Angell & Ames on Corp.,

sec. 221; *Bank of U. S. v. Dandridge*, 12 Wheat. 113; *Union T. Corporation v. Jenkins*, 1 Cai.; *Commonwealth v. St. Mary's Church*, 6 S. & R. 508; 2 Cush. 337.)

Hon. M. P. Deady, United States District Judge for Oregon, in a case lately tried before him, held that a corporation was not dissolved by vote of the stockholders, but all they could do was to authorize the directors to do certain acts mentioned in section 19 above cited. (Angell & Ames on Corp., sec. 221, and cases before cited.)

The defendant also introduced, against the plaintiff's objection, a sheriff's deed made by Arthur Warner, sheriff, pursuant to a sale made by John Myers, a former sheriff. Upon this point, Judge Deady also made a late decision holding with us. We refer to Oregon Code, section 986, p. 303. (*Allen v. Trimble*, 4 Bibb, Ky.; *Tuttle v. Jackson*, 6 Wend. 224.)

The last legislative assembly plainly recognized it to be the law that the sheriff who makes the sale shall make the deed, by enacting that hereafter the deed may be made otherwise in certain cases. (Session Laws, 1878, p. 99.)

If the proceeding to appropriate the land in question was a proceeding against the owners of the land, the court did not have jurisdiction of Margaret Mildred, or Robert, junior, under whom plaintiff claims, and no judgment was ever entered against any of the owners, and no compensation was ever paid them. Pease, the only one paid, had no interest. The judgment appropriating was therefore void. (Const. of Oregon, art. 1, sec. 18.) If it was a proceeding against the land, it was necessary to take actual custody of the land, and put it under the control of the court, in order to bind the owners. (Wharton Confl. of Laws, sec. 829; *Pennoyer v. Neff*, 5 Otto; Story Confl. of Laws, Chap. 2; Cooley's Const. Lim. 402-5.)

The findings of the Court are insufficient to sustain the judgment. If a jury had made the same findings of fact, the court could not have entered the judgment. There is no finding of the rights of the parties, either plaintiff or defendant.

Hill, Durham and Thompson, for respondent:

The will of Robert Moore, deceased, was admitted to probate under an act of the legislative assembly of Oregon Territory, passed December 15, 1853. (Laws of 1855, p. 384.)

Section 17 of said act is as follows: "When any will is exhibited to be proven, the court may immediately receive the proof and grant a certificate of probate; or, if such will be rejected, grant a certificate of rejection." A part of the jurisdiction of the probate court was to take the proof of wills, and the statute provides the manner in which the proof shall be taken and the proceedings by which the matter is to be brought before the court. No petition or other statement was required; but, says the statute, "when any will is exhibited to be proven, the court may immediately receive the proof and grant a certificate." The exhibition of the will to the court was the proceeding which gave the court jurisdiction of the subject-matter and authorized it to proceed to probate the will. (2 How. 340; 2 Wall. 210.)

The deed recites the record of a meeting of the stockholders of the W. F. C. & L. Co., called for the purpose of authorizing the disposition of all its property, and also sets out in full a resolution authorizing the sale of the property of the corporation and the execution of deeds for that purpose. It will be observed that this meeting of the stockholders was held for the purpose of transferring all the property, real and personal, of the corporation. Such action could only be taken by the stockholders under the statute, and not by the directors. (Mis. Laws, 528.)

But the deed being regularly executed, it will be presumed that it was done by authority of the directors, if such authority is necessary to the validity of the conveyance. (*Chouquette v. Barada,* 28 Mo. 491; *Flint v. Clinton Co.* 12 N. H. 430; *Bowen v. I. P. C.,* 6 Bosw. 245.)

But we think that as the whole power of disposing of the property of the corporation, is vested in the stockholders whenever that power is to be exercised in disposing of all the property and settling the business, such stockholders may authorize the sale, and such sale may be made by any

one duly authorized as the agent of the corporation for that purpose. In this case, Bernard Goldsmith was the agent authorized to make the sale, and the deed shows that it was so made by him, and that the corporation by its proper officers and under its seal executed the conveyance.

The general rule is, that a corporation may, unless prohibited by its charter, appoint any person an agent for the purpose of transferring or disposing of its property, and no officer of the corporation possesses such exclusive power, unless the same is conferred by charter. (*Mitchell v. Deeds*, 49 Ill. 416; 1 Amer. Cor. Cas. 461.)

It is objected that the judgment-roll in the proceedings to condemn this land was not admissible. The statute provides: "That the complaint shall describe the land sought to be appropriated with convenient certainty. If the defendant, or either of several defendants, is a non-resident of this state, or is unknown, service of the summons may be made by publication, as in ordinary cases." (General Laws of Oregon, p. 534, sec. 43.)

All things required by the statute were regularly done, and Margaretta M. Moore, like all unknown owners, was brought before the court. It ought to be remembered that the proceeding to condemn land is not a proceeding in which it is sought to obtain a personal judgment against the defendants, but is directed against the land, is *in rem*, and no notice to the owner is required, unless the statute provides for it, and then notice need be given only in the manner required by law.

The appellant insists that under section 986 of the code, authorizing the former sheriff to complete the execution of all final process which he has begun to execute, the deed made by the actual or present sheriff is made by an incompetent grantor. The able judge who tried this cause below, has uniformly held that the execution of a sheriff's deed was no part of the completion of final process where execution had been begun; was, in fact, no part of a final process at all.

The difference in opinion between the two courts has necessitated the procuring of deeds by purchasers at ex-

ecution sale where deeds could not be made during the term of the officer making the sale, from the former sheriff and the sheriff in office at the date of the deed.

On principle, as well as public policy, we submit the ruling of the court below should be sustained. The office of sheriff is never vacant; like the king, the office never dies. The deed derives its validity from the office rather than the person of the man who made it; the sheriff can always be found; in short, every consideration of convenience and certainty is in favor of the rule we contend for.

By the Court, BOISE, J.:

It seems, from the statement of the case above set forth, that the appellant is the owner of the land in dispute as claimed, unless he has been divested thereof by legal proceedings, which have been prosecuted against the estate of his father, Robert Moore, and against himself, which proceedings are set forth in the foregoing statement, and the determination of the rights of the parties in this case must depend on the construction to be given to these proceedings. It is also claimed that though these legal proceedings are correct, that still the deed from the Willamette Falls and Locks Company to the defendant is not sufficient in form to convey the title. We will first proceed to consider the proceedings had in the probate court, which are set out in the record:

The first paper to be considered is the petition of D. J. Schnebley and others, requesting the probate court of Clackamas county to admit to probate the will of Robert Moore, the father of the appellant. This paper is marked Exhibit F, and is as follows:

"We, the undersigned, having been appointed executors of the last will and testament of Robert Moore, deceased, request that with the view of carrying into effect said will, letters testamentary be granted by the honorable court in accordance with the provisions of the law.

(Signed) "D. J. SCHNEBLEY,
"R. C. CRAWFORD,
"J. T. APPERSON.

"September 4, 1857."

This paper is not marked filed, and this is made an objection to it. And it is also objected to as not showing that the court had jurisdiction of the subject-matter of the proving of this will.

As to the first objection that it has not written on it the word filed by the clerk, we think that as the paper is found in the possession of the court, among the papers of the case, and is a paper on which the court apparently acted, these facts prove *prima facie* that the paper was properly presented to the court, and was in fact filed, though not so marked.

We will next consider the other objection to this paper; that it does not state facts sufficient to give the court jurisdiction (at that time the probate court had jurisdiction) of the matter of the proving of wills; and all that was necessary in a petition was to show to the court that a case of that nature existed, and required its action.

With this petition, the will sought to be proved, seems, from the record, to have been presented, and also the affidavit of Charles Pope, junior, and James K. Kelley, the subscribing witnesses thereto. These accompanying documents showed that said Robert Moore was an inhabitant of the county, and that he was dead.

The laws of the territory of Oregon, then in force, Stat. 1855, p. 385, secs. 15, 16, 17, provided as follows:

Sec. 15. "The probate court shall take proof of wills."

Sec. 16. "If the testator have a mansion-house—a known place of abode—in any county, his will shall be there proved."

Sec. 17. "When any will is exhibited to be proven, the county court may immediately receive the proof, and grant a certificate of probate; or if such will be rejected, grant a certificate of rejection."

No particular form of petition was then necessary to invoke the action of the court to the probate of a will. All that was necessary was to exhibit the will for probate with such proof as showed that the testator was deceased, and that he had been, at the time of his death, a resident of

the county. All of these things seem to have been shown to the court at the time this will was presented.

We think, therefore, that the probate court had jurisdiction, and that exhibit F was properly admitted. After this probate of the will on August 4, 1863, the appellant filed a petition, which is marked exhibit G, showing to the said probate court that two of the executors of said will, D. J. Schnebley and R. C. Crawford, had removed from the state of Oregon, and that the third, J. T. Apperson, had resigned; and prayed that the letters of said Crawford and Schnebley be revoked, and that a suitable person be appointed administrator *de bonis non*, of said estate. The prayer of which petition was allowed, and George A. Pease was appointed administrator *de bonis non*.

It is now claimed by the appellant that this petition did not give the court jurisdiction to act in the premises. This last named proceeding was enacted while the probate court was acting under our present code (p. 319, secs. 1062, 1063), where it is provided that an application to remove an executor shall be by petition, and upon notice to the executor or administrator, unless the cause for removal be that the executor has removed from the state; in which case no notice is required. No particular form is required for such petition, and all that is necessary to be set out in the petition is to call the attention of the court to the matter complained of, and that is done in this case, and the petition is sufficient in form and substance. But it is claimed that this petition was not sworn to and was therefore void.

We do not think that the affidavit of a party to the truth of a petition or pleading is requisite to give the court jurisdiction. If no objection is taken to a petition or pleading for want of verification, then this defect is waived. Section 81 of the code provides that "A motion to strike out a pleading for want of verification or subscription * * * shall be made within the time for answering such pleading;" which plainly indicates that when such objection is not made the pleading will be allowed to stand notwithstanding such defect.

These pleadings being found to be sufficient, it is not con-

tended but what the sale of the property by Geo. A. Pease, administrator to James M. Moore, was legal and in due form to convey the property thereby to the appellant, who purchased at the sale.

We now come to consider the proceedings by which the respondent claims it obtained this title from the appellant, Moore. This is first through a judgment against him and a sale by the sheriff of the premises to satisfy such judgment, at which sale D. P. Thompson, J. K. Kelley and W. P. Doland were purchasers. The sheriff's deed to these parties was offered in evidence to complete this chain of title to the respondents through mesne conveyances, and was objected to on the ground that the said sheriff's deed was made by Arthur Warner, sheriff of Clackamas county, who was not the sheriff who made the sale, but his successor. The said former sheriff, John Myers, having gone out of office before the deed was made.

Appellants claim that under our statute, p. 303, section 986, the former sheriff, who made the sale was the only officer who could make the deed.

This section of the statute is as follows: "The former sheriff shall return all process, whether before or after judgment or decree, which he has fully executed, and shall complete the execution of all final process which he has begun to execute." Literally construed this section directs the former sheriff to return all process, the execution of which is complete, and which he has still retained in his hands when his term expires, and in case of final process do all official acts necessary to be done before the same can be returned executed. In case of a sale of real property the return is made when the sheriff has made the sale and received the money to apply in satisfaction of the execution. If it be sufficient, he returns it satisfied and states his doings thereon in his return, but his certificate of return does not embrace the confirmation of sale and subsequent proceedings which are necessary to fully complete the transfer of the property sold. When he has made his return he has parted with the process and has no further control over it. On this return the plaintiff in the execution may move to

have the sale confirmed by an order of the court. If the court orders a resale, a new execution must issue which will recite such order, and this new execution would be directed to the sheriff in office at the time it is issued. We can see no good reason why the proceedings concerning redemption and making the sheriff's deed should not be conducted before and performed by the sheriff who is in office at the time.

Such a construction of the statute will establish a rule most convenient to the parties; for the sheriff in office can always be found, as his official duties require his presence in the county, while the former sheriff may die, be disqualified or remove from the county, and render proceedings before him impracticable. We think this statute was not intended to extend the office of the former sheriff beyond the time when he returned the process into court, and that then he ceased to have control over it. The appellant's counsel have referred to the case of *Anthony v. Wessil,* 9 Cal., as supporting this view of the case, and *Drum v. Boring,* 8 Id. and also to the cases of *Allen v. Trimble,* 4 Bibb, 21, and *Tuttle v. Jackson,* 6 Wendell, 224. The California cases are on a statute like ours in many of its provisions, but it does not contain section 293 of our statute on the subject of confirmation of the sale of real property, or any section with like provisions. By the statute of California, the proceedings on the sale remain in the hands of the sheriff until the making of the deed, and are not returned to the court for the purpose of its action on the regularity of the sale, and the ordering a resale in case of irregularity, and therefore the authority is not in point under our statute.

In the other cases cited by counsel, the decisions are placed on the doctrine of the common law where executions were only levied on personal property of which the officer took possession and in which he had a special property by virtue of his levy. The same rule was extended to real estate, and the officer having possession by virtue of the levy on the property must deliver it to complete the sale, and the giving the deed was necessary to convey the title. But under our statute the possession passes to the purchaser by virtue of the certificate, and an order of the

court confirming the sale is a necessary step in conveying title under the sale. This order is to be had on the motion of the plaintiff in the execution, and is in no way under the control of the sheriff. And there is no good reason in theory for holding that the sheriff has not parted with all the interest he acquired in the property by virtue of the levy when he executed his certificate of sale to the purchasers at the execution sale. On a careful examination of the authorities we find that the rule has been adopted in many of the states that the successor of the sheriff—that is, the sheriff who is in office when the deed is made—is the proper person to execute the deed. In *Jackson v. Woodward,* 29 Maine, 266, it is laid down as a general rule that seisin must be shown in the purchasers, by the return of the execution, and it is on this question that the court is to pass when the order is made confirming the sale. And the title is complete in equity in the purchasers from the time he receives the certificate of sale, if the return is regular, and can only be defeated by a redemption, and the deed when executed relates back to the time of the sale. The rule that the successor to the sheriff who made the sale may execute the sheriff's deed is recognized in *Fretwell v. Morrow,* 7 Geo. 264; *Prescott v. Evarts,* 4 Wis. 314, and in *Conger v. Converse,* 9 Iowa 554. In the last case the court, in deciding the question, say: "That the fact that the certificate and deed were signed by different persons was no ground for excluding the certificate. The sheriff in office at the time the certificate is produced and the deed demanded, is the proper officer to make the deed, and not the one who made the sale and whose term of office has expired. The term sheriff applies to the office and not to the person." We think therefore that the sheriff's deed was properly admitted.

It is also claimed by the appellant that the deed from the Willamette Falls Canal and Locks Company to the Willamette Transportation and Locks Company is not sufficient in form to convey the title to this property to the respondent. This deed recites that at a meeting of the stockholders of the Willamette Falls Canal and Locks Company,

"called for the purpose, among other things, of authorizing the disposition of its property," the following resolution was duly passed: "Resolved, That Bernard Goldsmith, the president of the Willamette Falls Canal and Locks Company, be and hereby is authorized and directed to sell to the Willamette Transportation and Locks Company all the property, both real and personal, of said Willamette Falls Canal and Locks Company upon such terms and conditions as he may think expedient; and said Bernard Goldsmith is further authorized and directed to make, execute and deliver all deeds and writings necessary and convenient for the due and proper conveyance and transfer of said property. * * * "

This recital is sufficient in form and substance to vest Goldsmith with authority to transfer the property, provided the stockholders could delegate such power to him. The appellant claims that power to sell the property was in the directors, and not in the stockholders. The proper solution of this question must depend on the construction of sections 9 and 19 of the act of the legislature regulating the formation of private corporations. The statute (p. 524, sec. 9) provides that "From the first meeting of the directors, the powers vested in the corporation are exercised by them or by their officers or agents under their direction, except as otherwise specially provided in this chapter."

Section 19 provides that the stockholders, at a meeting called for that purpose, "may authorize the dissolution of such corporation, and the settling of its business, and disposing of its property, and dividing its capital stock in any manner it may see proper. The resolution of the stock holders above quoted directs the disposition of all its property, and we must infer from its terms that it was a part of proceedings dissolving the corporation and providing for settling its business, and, as the statute provides, that the stockholders by vote shall direct the winding up of its affairs in any manner it may see proper. The stockholders, and not the directors, have the power to direct the manner in which its property shall be disposed of; and there is no conflict in the provisions of these sections, for the directors

exercise the powers of the corporation in cases where the law does not otherwise provide. Section 19 has provided that the stockholders by their vote shall control the final disposition of the property of the corporation. It is also claimed by appellant that this deed is not properly executed. The form of the attestation is:

"In witness whereof the said party of the first part (the Willamette Falls Canal and Locks Co.) has caused its corporate seal to be hereto attached and affixed, and these presents to be subscribed by the president and secretary of said party of the first part, this eighth day of March, 1876.

"B. GOLDSMITH. [SEAL.]

"President of the Willamette Falls Canal and Locks Co.

"JOHN MERRICK. [SEAL.]

"Secretary of the Willamette Falls Canal and Locks Co.

Witnesses. [SEAL OF CORPORATION.]

Though the usual form of executing a conveyance of land by a corporation is to sign the name of the corporation by the president and secretary, and affixing the seal of the corporation, yet the form of execution here used is often adopted and has often been held sufficient. (Angell and Ames on Corp., sec. 225, and authorities there stated.) We think the deed was properly admitted. This view of this part of the case renders it unnecessary to inquire into the proceeding condemning the land for the use of the corporation to build thereon their canal and locks, which was relied on in the circuit court by the respondent as a defense. We will not, therefore, examine the various objections which have been made by the appellant to this proceeding, for we think the judgment of the circuit court should be affirmed for the reasons stated above.

*LEONA MAY GILMORE, an infant, by WILLIAM R. GILMORE, her guardian ad litem, Respondent, v. HIRAM C. BURCH, Appellant.

UNDUE INFLUENCE—BURDEN OF PROOF.—Where one occupies a confidential or fiduciary relation to another, as that of guardian and ward, attorney and client, or the like, where the donee or grantee is supposed to exercise an unusual or commanding influence over the grantor, courts of equity will set aside the conveyance, unless the grantee can show that the transaction was fair and without fraud or undue influence.

IDEM—MARRIAGE CONTRACT, TRANSACTIONS BETWEEN PARTIES TO.—The influence of a man over a woman to whom he is engaged to be married, is presumed to be so great, that in transactions between them the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used.

CURTESY ATTACHES TO EQUITABLE ESTATE.—Where by a decree in equity a deed executed before marriage of the wife's land to the husband is set aside, the original estate as between the parties is restored. The husband's right by the curtesy will not be effected by the conveyance curtesy attaches to an equitable as well as to a legal estate.

RELIEF—PRAYED FOR.—The court in a proper case will grant such relief as a party is in equity and good conscience entitled to, whether such relief has been prayed for or not.

APPEAL from Yamhill County. The facts are stated in the opinion.

J. A. Stratton and Bonham & Ramsey, for appellants:

Undue influence, to avoid a deed or a will, must be of such a nature as to deprive the grantor, or testator, of free agency and render his act obviously more the offspring of the will of others than his own. If it was obtained by honest means, by acts of kindness, attention and persuasion, even if there had been no consideration, it could not be set aside. There must be affirmative evidence of facts from which such influence is to be inferred. It is not sufficient to show that the party benefited had the motive and opportunity to exert such influence. There must be evidence that he did exert it. (*Rutherford v. Morris*, 77 Ill. 397; *Cudney v. Cudney*, 68 N. Y. 148.)

* See 33 Am. Rep. 710.

The testimony of medical experts as to the mental condition of a person is the weakest and most unsatisfactory kind of evidence. (*Rutherford v. Morris,* 77 Ill. 397; 1 Wharton & Stelle's Medical Jurisprudence, 3 ed., secs. 293, 294, 295, 296 and 296 (a.); 1 Redfield on Wills.)

The testimony shows that the defendant paid her in cash three hundred dollars; that he released debts she owed him and paid various debts for her use and benefit, amounting in all to about one thousand four hundred dollars. Marriage is not only a valuable consideration; but it is the highest consideration known to the law. This proposition is well established. (*Bonser v. Miller,* 5 Or. 110.) The payment of the mortgage alone was a sufficient consideration to support the deed even against creditors. (*Miles v. Miles,* 6 Or. 266.)

It is an elementary principle of the law of evidence that fraud will not be presumed, and that a court of equity will not rescind or reform a deed of conveyance for fraud or mistake unless the fraud or mistake be proved beyond a reasonable doubt. (*Lewis v. Lewis,* 4 Or. 177; *Newsome v. Greenwood,* Id. 119; 2 Id. 290; 72 Pa. St. 257.) It is the duty of the court to sustain the fairness of the transaction unless the fraud be clearly proved. (*Husford v. Horned,* 6 Or. 362.)

It may be claimed that the execution of the deed in question should be scrutinized closely, because the relation of intended husband and wife existed between the parties. We do not admit that such a principle of law exists; but if it did, it could not be invoked here, because the agreement to marry and to make the deed were made at the same time and constitute but one agreement. This principle might possibly be invoked as to any new transaction occurring after the relation was created. If the deed was obtained by fraud, then it was voidable and the grantee is held in equity to be the trustee of the grantor, and the equitable estate would remain in her. (Hill on Trustees, 144; 1 Story's Eq. Jur., sec. 1195, 1265.)

In this country, under statutes like ours, seisin in law is sufficient to entitle a husband to curtesy. (4 Kent's Com.

29, 30; 6 Cowen, 494; 38 Me. 356; 8 Jones (N. C.), 297; 24 Miss. 261; 23 Mo. 112; 5 Ohio, St. 307; *Davis v. Mason,* 1 Peters, 505.)

A husband is entitled to curtesy in his wife's equitable estates and uses. (1 Bish. on Law of Married Women, sec. 505; 4 Kent's Com. 22, 30; Tyler on Coverture, 416, 417.) An "equitable seisin" is sufficient to support curtesy in an equity or a use. (1 Bish. on Law of Married Women, sec. 505.) Our statute does not require the wife to be seised alone, but speaks of "the husband and wife being seised in her right." If the deed was fraudulent they were so seised. In that event the equitable estate never passed out of her, and, he being her trustee, his possession would be sufficiently her possession to make them both seised in her right. It is one of the primary maxims of equity jurisprudence that he "who seeks equity must do equity." Hence, when courts of equity rescind deeds of conveyance for fraud or mistake, they always do so on condition that the grantor, or his or her successor or heir, will refund to the grantee the consideration paid for the deed, that the parties may be placed in *statu quo.* (Kerr on Fraud and Mistake, 343-6; *Harding v. Handy,* 11 Wheat. 103; 13 How. (U. S.) 230; 23 Ill. 456; 10 Ohio, 143; 1 Freeman, Ch. 35; 4 Ohio 232; Williard's Eq. 303.) The right of the grantee to show the true consideration for the making of the deed, especially where fraud is charged, is well settled by modern decisions. (6 Wend. 360; 38 N. Y. 263; 23 Cal. 472.)

It is not necessary that the answer should pray for any kind of relief, because, if the allegations of the complaint are not sustained by proof, the court will dismiss the same, and if the deed should be set aside the court would grant the defendant whatever relief he is entitled to in equity and good conscience. (4 Or. 1; 6 Id. 284; Civ. Code, secs. 241, 339.)

Knight & Lord, and Lawson & Sehlbrede, for respondent:

The principle upon which courts of equity have set aside instruments executed between persons occupying fiduciary and confidential relations, has been extended and applied

"to all the variety of relations in which dominion may be exercised by one person over another." A court of equity subjects to the closest scrutiny all transactions between persons occupying any relation of confidence or trust, and if it discover any unconscionable advantage taken, or any undue influence exercised, or the least fraud practiced, it will interpose and grant relief.

In some cases undue influence will be presumed from the nature of the transaction, in others from the situation of the parties themselves. In all cases the burden of proof rests upon the party receiving the benefit, to show that the transaction was fair and honest. (*Huguenin v. Baseley,* 14 Ves. 273, and notes cited in 3 Leading Cases in Eq. 111, 112, 116, 122; 1 Barb. 408; 6 N. Y. 268; 31 Barb. 9.)

"The influence of a man over a woman to whom he is engaged to be married is presumed to be so great, that the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband may have used, but required satisfactory evidence that it has not been used. (11 Beav. 227; 20 Id. 524; cited in 3 Leading Cases in Eq. 120.)

In their notes to *Huguenin v. Baseley,* 3 Leading Cases in Eq. 139, the editors, after citing numerous authorities, say: "It may, therefore, be laid down as a general principle, that inadequacy of consideration, the presence of hard and disadvantageous stipulations, or the mere fact, that a right or advantage has been given or conceded without an equivalent will be a sufficient warrant for the interference of equity; when the weakness of the complaint, or the position held by the respondent make it the duty of the one to take that care of the other, which the latter is unable to take care of himself, although there may be no proof of actual fraud or of the exercise of undue influence." This principle has been adopted in this country. (16 Mass. 348; 13 Ill. 242; 1 Ohio State, 54; 3 Cow. 537; 10 Mo. 325.)

This court will not disturb the findings of fact by the court below any more than it would the verdict of a jury upon a mere difference of opinion as to the weight of the testimony. (12 Ohio, 75; 1 Ohio State, 54.)

The court below, by its decree, set aside the deed made by the respondent's mother to the appellant, and further decreed curtesy to him in the land. The court misapprehending the decision of the Chief Justice Kent, in *Sands v. Codwise,* 4 Johns. 598, supposed that the deed from the respondent's mother to the appellant conveyed to him no estate whatever in the land, that it was void *ab initio.* And, therefore, the respondent's mother at the time of her marriage and during her coverture was seised of an estate of inheritance.

In the case of *Sands v. Codwise,* the conveyance was made to defraud creditors, and the chief justice very properly held, under the statutes of Elizabeth, the deed void as to them. There is no analogy between that case and this. There is a difference between a deed made to defraud creditors and a deed obtained by fraud practiced on the grantor. In the first case, the grantor and grantee are *in pari delicto,* and the grantee will hold as against the grantor; but in the last case, the grantor is an innocent party, and may avoid the deed as against the grantee. (2 Pick. 194.) The deed made by the respondent's mother was voidable only and not void, and she was, therefore, at no time during coverture, seised of an estate of inheritance in the lands conveyed by that deed. (*Somers v. Brewer,* 2 Pick. 183, and cases cited.)

There is no such thing as curtesy in an equitable estate at common law. Courts of equity, it is true, allowed curtesy of trusts and of other interests, which, although mere rights in law were deemed estates in equity. But of these estates, courts of equity never allowed curtesy, unless the wife, during coverture, had the use and benefit of them, that is, enjoyed their rents and profits. (1 Wash. on Real Property, 130; 1 Pet. 508.)

In this case, the respondent's mother had not even a bare right in law to the land; her right was in equity, and she never enjoyed during coverture the rents and profits of the land. "Where a husband, solvent at the time, owing no debts, conveys all his real estate to his wife, the conveyance, though void in law, is valid in equity, and on the death of the wife the husband is not entitled to an estate by the curtesy, but the land descends direct to the heirs of the wife, free from

the lien of any debts contracted by the husband subsequent to the conveyance." In this state there is no dower in equity. (2 Or. 29; 5 Id. 113.)

By the Court, BOISE, J.:

This is a suit in equity brought by the respondent to have annulled a deed made by her mother, Mary A. Monroe, to the appellant on the twenty-third day of January, 1877, for a tract of land in Yamhill county, for alleged fraud and undue influence in obtaining it.

The amended complaint alleges, in substance, that on the twenty-third day of January, Mary A. Monroe, the mother of the plaintiff, was seised as owner in fee-simple of the lands described; that on said date, and for a long time prior thereto, she was very infirm and diseased in mind and body, and was wholly incapable and unfit to properly manage her own business; that at said date her mental and physical condition was such as rendered her unable to guard herself against the imposition, or to resist the importunity or undue influence of the defendant; that the defendant, taking advantage of the mental weakness of the plaintiff's mother, and of her physical infirmities, and with the intention of procuring from her a deed to said lands, sought and obtained the affections of the plaintiff's mother, and engaged himself in marriage with her; that the defendant thereafter seduced her and got her with child; that during their engagement, and prior to their marriage, the defendant frequently inportuned her to make him a deed to said lands, and refused to marry her until she did so; that the plaintiff's mother unable further to resist the demands of the defendant without exposure of her condition, yielded to the solicitations and importunities of the defendant, and made him a deed to said lands on the twenty-third day of January, 1877; that the defendant procured said deed from her by undue influence and without any consideration whatever; that the plaintiff's mother and the defendant intermarried with each other on the twenty-fourth day of January, 1877, one day afer the making of the deed; that the mother of the plaintiff died in August, 1877, intestate; that

the plaintiff is her only child and heir; that the defendant has had the possession of said premises ever since January, 23, 1877, etc.

The answer denies the allegations of mental unsoundness, bodily infirmity, undue influence, importunity, imposition, seduction, want of consideration, etc. It then alleges, in substance, that the defendant and Mary A. Monroe entered into an agreement, whereby the defendant promised to pay off her indebtedness, release a debt which she owed him, pay her three hundred dollars in cash, and intermarry with her; and, in consideration thereof, she promised to intermarry with him, and deed him the land in controversy in this suit. That in accordance wth said agreement, said Mary A. Monroe did on the twenty-third day of January, 1877, deed said lands to the defendant, and on the next day, in accordance with said agreement, they were duly married, and that the defendant, in accordance with said agreement, paid her the said three hundred dollars, released what she owed him and paid her debts, amounting, in all to one thousand four hundred and twelve dollars and ninety-four cents and that the defendant complied in all respects with the conditions of said agreement on his part; that Mary A. Monroe was, at the time of the making of said agreement and the execution of said deed, of sound mind, and fully capable of comprehending all her said acts and the effect thereof; that said agreement and said deed were executed by her of her own free will, and without any fraud or undue influence; that said deed purports to have been executed for the consideration of three thousand five hundred dollars, but that the true consideration therefor was the agreement aforesaid; that at the time of the execution of said deed there was a mortgage on said land for five hundred dollars and interest; and that said deed expressly provides that the grantee should pay and satisfy said mortgage; that he did accordingly pay the same, amounting to five hundred and fifty-three dollars and sixty cents, gold coin; that the defendant is the owner in fee-simple of said lands, etc.

The reply substantially denies all of the allegation of the answer.

The court tried the cause and rendered a decree setting aside the deed, etc. From this decree the defendant appeals.

It is claimed by the respondent that Mary A. Monroe, the mother of respondent, was: 1. Of a weak and infirm mind at the time of the execution of the deed; 2. That the deed was obtained by undue influence.

On the first proposition the testimony is conflicting. The medical experts who are called disagree widely as to the mental condition of said Mary A. Monroe shortly before and about the time of the making of this deed. The testimony of the familiar acquaintances and intimate friends of the said Mary A. preponderates in favor of her being at that time a women of fully average intelligence and as capable as ordinary women to manage her own affairs, and if not constrained by some undue influence, we think she was fully capable of so doing. The evidence fails to show that said Mary A. was ill-treated by the appellant or his family after the marriage. There is no instance of harsh treatment or neglect shown, nor did the said Mary A. complain of the treatment of her husband or his family, but for anything that satisfactorily appears in the evidence she seems to have died esteeming them as friends and relatives.

The second is the main question in the case. Was the appellant at the time of the execution of this deed in such relations with the said Mary A. as to give him undue influence over her; and if so, did he exert such influence in obtaining the deed from her?

As bearing on these questions, the following propositions are established by the evidence and pleadings: 1. That about the first of October, 1876, the appellant and said Mary A. had entered into a contract of marriage; 2. That the time for the consummation of that contract was agreed upon between them, and she made arrangements for the marriage, as so agreed, about the first of October, 1876; but for some reason the appellant did not offer and assent to the marriage at that time, but the contract of marriage

was not abandoned by them, but continued; 3. That during this time the appellant solicited from her a conveyance of this land. Appellant says in his testimony that about six weeks before the marriage a contract was made between himself and said Mary A. that she should deed him this land in consideration that he should pay her debts and marry her.

It also appears that as early as about the first of October, and about the first time fixed for their marriage, said Mary A. became pregnant by the appellant. This conclusively appears from the testimony showing the time of the birth of the child. Whether he had seduced her, or their illicit intercourse had been brought about by equal mutual guilt, when her pregnancy was acknowledged and known to them both, he was in a position to almost compel her to yield to his demands as to her property. The more intelligent and capable she was the more she would dread the exposure of the loss of her virtue, and be willing to make almost any sacrifice of her property to hide her shame. Exposure would not injure him so much as it would her; for though the law may hold the guilt of each party to such transactions equal, still the social fall and degradation of the woman is by far the most complete and most enduring, and the only escape for a woman under such circumstances from overwhelming misfortune is to induce her paramour to marry her. It seems that said Mary A., stimulated by her great anxiety in this matter, was assiduous in urging the appellant to redeem his promise. She seems to have followed him to his own home, and been there pressing him on that subject, when in the hearing of Holcomb he told her he would not marry her until she deeded him this land.

Under the condition in which the parties then were, the appellant had no right to demand of said Mary A. the execution of this deed as an inducement for him to fulfill his promise of marriage. To hesitate to do it was a cruel wrong on his part, for he was under the highest obligations of honor, and the dictates of humanity, to redeem his promise without delay and without reward, for no man should be

allowed to go unpunished who thus dishonors a woman, and then abandons her and his own offspring to infamy. It was the law as given to Moses, that where a man dishonored a woman she should be his wife, and he should not put her away all his days; and though our laws do not compel the marriage, the moral obligation to perform it, when incurred, is no less binding now than then. After her pregnancy became known to said appellant, his relations with said Mary A., and presumed influence over her was such that any disposition of her property to him would be legally subject to suspicion, and liable to be set aside for undue influence, unless he should show that the same was for her benefit, or accomplished with the utmost fairness, and without constraint. The law seems to be well settled that when one accepts a confidential or fiduciary relation to another, as that of guardian and ward, attorney and client, and the like, where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, courts will set aside the conveyance, unless the grantee can show that the transaction was fair, and without fraud or undue influence. It is laid down as a rule that the influence of a man over a woman to whom he is engaged to be married, is presumed to be so great, that the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used to sustain such a conveyance. (3 Leading Cas. in Eq. 119.) The case now before the court is much stronger than one where there was simply a contract of marriage when the conveyance was made, and we think this deed ought to be set aside. We will now consider the terms on which the deed ought to be canceled. It is a rule in equity that he who seeks relief in a court of equity must do equity. In order to arrive at a just conclusion as to the terms on which this conveyance should be canceled, we will have to consider the *statu quo* of the parties at the time when this conveyance was executed. If the conveyance had not been made, then on the marriage the appellant

would have become a tenant by the curtesy in this land, if he survived his wife. He would also have forgiven her what she owed him at the time, and became liable for her debts that were pressed on him during the coverture, but not for those that were not so pressed, although he had received a fortune by his wife. (Tyler on Infancy and Coverture, p. 332, sec. 334.) So that, if he had received an estate by curtesy in this land, the appellant was not liable for the debts of his wife *dum sola*, which were not demanded of him during the coverture. And if he voluntarily paid them, he could not charge them against the reversionary estate of her heir.

We will next consider the question whether appellant is, on cancellation of this deed, entitled to a tenancy by the curtesy in this land.

It is claimed by the respondent's counsel that as this deed was made at the time of the marriage, and was not void, but only voidable, the wife had no estate during her marriage with the appellant to which curtesy could attach. It is true that this deed was only voidable, but when by a decree it is cancelled, the original estate as between the parties is restored, and as between them the cancellation of the deed restores the estate subject to any equities between the parties which may be determined and settled by the decree. Had the deed been absolutely void, no equities could arise out of the transaction, or attach to the land from any act of the grantee while he held the title. While this marriage existed the appellant held the legal title, and his wife was possessed of an equity in it which entitled her to the legal title, and whatever estate he had in the land was in her right, and he is entitled to curtesy in the land, and that curtesy attaches to an equitable as well as a legal estate. (1 Bishop on Law of Married Women, sec. 505.)

It is claimed that this affirmative relief can not be given to the appellant, because he has not prayed for it in his answer. We think no such prayer was necessary, for when by the complaint and the answer all the relations of the parties to this transaction are before the court in setting aside this deed, all the apparent rights of the appellant

should be determined, so that he may be placed in the same position that he would have occupied, as near as may be, had the deed not been made.

As before stated, the appellant could not by a voluntary payment, after the death of his wife, of her debts contracted *dum sola*, charge them against the inheritance which belongs to the heir. And this is the case where such debts were liens on her land in which he has an estate by the curtesy.

The case of *Warren v. Williams, administrator,* 10 Cush. 79, is in point as establishing this principle. In that case the deceased wife of Warren had executed her note and a mortgage on her land to secure it before the marriage. During the marriage, suit was brought against Warren and wife to collect this note, and after the death of the wife Warren suffered a judgment to be taken against him by default, which judgment he paid, and the mortgage was discharged. This was held to be a voluntary payment, and that Warren could not be substituted for the original creditor or mortgagor. In giving the opinion in that case Judge Metcalf says: "In the present case the husband, after the wife's decease, voluntarily incurred the liability to pay her debt, by submitting to a judgment against himself alone. He therefore stands on the same ground as one who pays another's debt or renders service to another without his request, express or implied. Such payment or service is a voluntary curtesy upon which no cause of action accrues. This same question was again brought before the same court in the case of *Warren v. Jennison et al.,* 6 Gray, 559, where it was held that such a payment gave the husband of a deceased wife no claim in equity against the heir. We have disposed of all the questions of importance in this case, and think the decree of the circuit court should be affirmed and the respondent have her costs.

STATE OF OREGON, Respondent, v. JOHN D. WHITNEY and S. A. HIBERT, Appellants.

APPEAL—OBJECTION WAIVED.—An objection that the judge presiding where the judgment appealed from was rendered was not authorized to sit can not be considered in the appellate court, unless it was made in the court below.

RIGHT TO OFFICE CAN NOT BE QUESTIONED COLLATERALLY.—The right of a person to hold the office of judge can not be tried collaterally in a criminal action. The only way of determining that question is by an action to prevent the usurpation of an office as provided for in Title V, of chapter 4, of the Civil Code.

INDICTMENT—GRAND JURY, PROCEEDINGS BEFORE.—An attorney engaged to assist the prosecution was, at the request of the district attorney, present before the grand jury at an examination upon a criminal charge by them: *Held*, that this was not a cause for setting aside the indictment found in such proceeding, nor a ground of reversal of the judgment subsequently rendered.

INDICTMENT FOR MURDER—CRIMINAL LAW—INSTRUCTIONS.—Upon a trial for murder in the first degree, the court charged the jury, that from the evidence there was but little, if any, room to doubt that deceased was deliberately and willfully murdered while riding on horseback on the public highway. The court further charged the jury as follows: "Circumstances have been proven which are claimed to establish the fact that the defendant committed the deed:" *Held*, that these instructions assumed facts which it was the exclusive province of the jury to find and were erroneous; that an admission on the trial that the deceased was killed by a gunshot, at the time and place charged, was not an admission that he was murdered.

IDEM—ADMISSIONS—WHERE NO QUESTION IS MADE AS TO DEGREE OF GUILT.—The plea of not guilty is a continuous denial of every allegation in the indictment, and of every statement of the witnesses, who testify against the defendant, and he does not admit the degree of the crime charged by the omission to make any question as to such degree. But by this it is not meant that where certain facts have been testified to, the court may not say to the jury, that if they believe the testimony to be true, they should find the defendant guilty in the first degree.

Per MR. JUSTICE BOISE, dissenting:

ADMISSIONS—DEFENDANT PRECLUDED FROM DENYING, WHEN.—A judge can assume in his charge that any fact in the case is not disputed, if such is the case, and if a party wishes to dispute this assumption, he is bound to say so to the court at the time, and have the matter corrected, or the fact of the admission settled; and it is not sufficient simply to except to so much of the charge without saying more.

IDEM—CONSTRUCTION.—The words "there is no question as to the degree of the crime," are in effect a statement that the degree of the

homicide is admitted. The admission that deceased was killed at the time and place charged by a gunshot, and the admission that the killing was murder in the first degree made it proper to charge that the deceased had been willfully and deliberately murdered.

APPEAL from Marion County. The facts are stated in the opinion.

Rufus Mallory and J. A. Stratton, for appellant.

J. J. Whitney, District Attorney, and Bonham & Ramsey, for the state.

By the Court, KELLY, C. J.:

The defendant, John D. Whitney, was jointly indicted with S. A. Hibert in the circuit court for Marion County, at the regular term commencing on the twenty-first day of October, 1878, and tried and convicted of murder in the first degree at a special term in November following. On the seventeenth day of October, of the same year, an act of the legislative assembly entitled "an act to provide for the election of supreme and circuit judges in district classes" was approved. The regular term of the court was held by Hon. R. P. Boise, who was judge of the third judicial district before the approval of that act. And the special term was held by Hon. B. F. Harding, who was appointed judge of that district to succeed Judge Boise.

Objection is now made by defendant that after the approval of that act Judge Boise was not authorized to hold the regular term of the court, because he then ceased to be the judge. And that Judge Harding was not authorized to hold the special term, because he was appointed by the governor instead of being elected as required by the constitution of Oregon.

These objections were not made in the court below, and for this reason can not be considered here. Section 226 of the criminal code provides that "an appeal to the supreme court may be taken by the defendant from a judgment on conviction in a circuit court; and upon the appeal, any actual decision of the court, in an intermediate order or proceeding forming part of the judgment-roll as prescribed by section 212, may be reviewed."

Even if objection had been made in the circuit court to either of these judges holding the terms of the court, and exceptions taken to the ruling of the judge, we can not see how the right to hold the office of circuit judge could be tried collaterally in a criminal action. The only mode of determining that question is by an action to prevent the usurpation of an office as provided in title V, of chapter 4, of the civil code.

Before the commencement of the trial the defendant moved the court to set aside the indictment against him, for the reason that during the sitting of the grand jury which found it, a person not authorized by law to be there was present and examined some of the witnesses upon whose testimony the indictment was found. The court overruled the motion to set aside, and the defendant excepted to the ruling.

Section 115 of the criminal code provides that "the indictment must be set aside by the court upon the motion of the defendant in either of the following cases:

"1. When it is not found indorsed and presented as prescribed in chapter 7 of this code.

"2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon."

These, we hold, are the only two cases for which an indictment can be set aside; and as the section prohibiting any person, other than the district attorney from appearing before the grand jury is not in chapter 7, there was no error in the ruling of the court.

Several objections have been taken to the proceedings of the circuit court, which, upon argument, have been presented for our consideration, to wit:

1. The judge of said court (Judge Harding) had no right to sit in said cause, because he was an attorney for defendant before he was appointed a judge.

2. The verdict is insufficient to support the judgment, because it is not entitled of any court.

3. The jury was polled and discharged on Sunday.

4. That an order changing the record in said cause was made in the absence of defendant and his counsel.

It is sufficient for us to say that the record does not show that these matters were considered by the court below, nor any exception taken by the defendant which will authorize this court to review them. Were they properly before us there is nothing in either of these points which would be a cause for reversing the judgment. Certain other objections were taken by defendant to the admission of testimony upon the trial, and duly excepted to, but they have not been argued here, and are therefore considered to be abandoned.

Several exceptions have been taken by the defendant to the charge of the court, delivered to the jury. It is alleged by him that the court assumed certain facts to have been proven on the trial, instead of leaving it to the jury to determine whether they were proven or not. As these assignments of error all involve the same principles they will be considered together.

The court charged the jury among other things as follows:

1. "That Hibert was killed by a gunshot on that day in Marion county is clearly proven by the state and not at all controverted by the defense."

2. "We have no direct evidence as to who did the act, but from the evidence we have, there is but little if any room to doubt that Hibert was deliberately and willfully murdered while riding on horseback on the public highway."

3. "Circumstances have been proven which are claimed to establish the fact that the defendant committed the deed."

4. "Indeed a complete chain, each link a circumstance, and each circumstance proven beyond a reasonable doubt, may be the strongest and most reliable evidence that can de adduced, especially when each fact is proven separately by witnesses to that simple fact."

5. "In this case you have the admitted fact that Hibert was killed by a gunshot, and we have evidence of a man being seen near the place where the body of the murdered

man was found, riding or leading a black or dark-colored horse with a white face, in the evening of the day of the death, and that defendant owned, or had in his possession, before and after the crime was committed, a horse of that color; and that the first and last mentioned horse or horses had shoes on the forefeet. We also have evidence of tracks, of limbs of trees, or brush, having been cut in the vicinity, of a knife being found in possession of defendant at the time of his arrest; of defendant's absence from home on the day of the crime, of what he said and did immediately before leaving, and after his return, and at the time of his arrest."

6. "The evidence tends in some degree to establish one circumstance; that is, that defendant was in the immediate vicinity where Hibert's life was taken, and acting in an unusual manner, or doing as men do not usually."

7. "You have the evidence of a gun brought here for your inspection, having been concealed in the vicinity where the body was found; of that gun being the property of Vallet, and of its disappearance from his house some time before, or about the time of Hibert's death; of the size of the ball the gun carried; of the nature and size of the wound; of the presence of defendant and other persons at and about the house of Vallet the day before Hibert was shot, and the declarations of defendant made before and after the death."

8. "This evidence tends to some degree to prove two other circumstances: 1. That Hibert's death was caused by a shot discharged from that gun; 2. That the gun was taken from Vallet's house by defendant."

It is the exclusive province of the jury to determine questions of fact. They, and they only, have a right to judge of the credibility of witnesses, and the weight and effect of their testimony. And it has always been held to be an erroneous instruction, when the court assumed any controverted fact to be proven, instead of submitting to the jury the question whether or not it has been established by the testimony before them; section 198, on page 145, of the code, provides that:

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."

In the case now under consideration every material fact charged in the indictment was put in issue by the plea of not guilty. And unless clearly admitted to be true by the accused upon his trial, the court had no right to say to the jury, that it was proven, however strong the testimony may have been.

As it appears in the first exception, the court stated to the jury that it was clearly proven by the state that Hibert was killed in Marion county by a gunshot. It was an objectionable instruction to assume that this fact was proven, as it was for the jury to say whether it was or was not. Although objectionable, it probably worked no injury to the defendant, for it appears in the fifth exception that he had admitted the fact that Hibert had been killed by a gunshot. And when this admission was made by him the court had a right to say to the jury that it was an admitted fact that Hibert was killed in that manner. From an inspection of the whole record this seems to be the only admission made by the accused upon his trial in the circuit court. He admitted that Hibert was killed by a gunshot, not that he was murdered, or that the homicide was murder in the first degree. And the court clearly erred when it charged the jury in the language set forth in the second exception, as follows:

"But from the evidence we have, there is but little, if any, room to doubt, that Hibert, was deliberately and willfully murdered while riding on horseback on the public highway."

The admission made by the defendant that Hibert was killed, did not, as already stated, admit anything more than the mere fact that he was slain. It is true that at common law, where a homicide was admitted or proven, it raised a presumption that it was murder. But by our statute it is otherwise: "There shall be some other evidence of malice

than the mere proof of the killing to constitute murder in the first degree." (Crim. Code, sec. 519.)

And it was expressly ruled by this court in the case of *Goodall v. The State of Oregon*, 1 Or. 333, that "it was the evident intention of the legislature, by this statute, to impose on the prosecution some further burden than the mere proof of killing to establish the malice, which under our statute is not to be presumed from the mere proof of killing."

But it is urged on behalf of the state that the instructions set forth in the second exception was not erroneous, because the defendant virtually admitted that Hibert was murdered. And to support this, we are referred to the latter portion of the charge, where the court uses the following language to the jury: "If any crime is proven to have been committed, it is murder in the first degree. There has been no question as to the degree of the crime of murdering Hibert, and so I do not see, that under the evidence, any question as to that can arise. * * * If you find against the defendant, your verdict will be, after giving the title of the action, we the jury, find the defendant guilty."

Admitting it to be true that defendant did not question the degree of the crime, it by no means follows that he admitted it. Not questioning it is by no means equivalent to admitting a fact. He might have sat mute and not controverted any portion of the testimony adduced on the trial, and yet his silence could not be construed into an admission of any fact required to be proven in order to establish his guilt. The plea of not guilty was a continuous denial of every allegation in the indictment and every statement of the witness who testified against him. We hold that even if he did not question the degree of the crime, the defendant admitted nothing by so doing. It follows that in its charge to the jury the court assumed to be true—assumed to be proven, one of the great facts necessary to establish the guilt of the accused. It charged them that murder in the first degree was the only verdict they could give, unless they acquitted the defendant altogether. This

was altogether erroneous. The degree of guilt, as well as the guilt itself, should have been determined by the jury, not assumed by the court.

We do not underake to say that when certain facts have been testified to, the court may not say to the jury that if they believe the testimony to be true, they should find the accused guilty of murder in the first degree.

We hold there was error in the charge of the court below as set forth in the second exception, and for this reason the judgment must be reversed. We therefore deem it unnecessary to pass upon the remaining exceptions taken by the defendant.

The judgment is reversed and a new trial granted.

Mr. JUSTICE BOISE, dissenting:

I agree generally with the views expressed by a majority of the court so far as the same sustains the proceeding in the circuit court, and it is not necessary to review these parts of the case in order to express my views of the law on the two points which a majority of the court hold to be erroneous.

First. That part of the charge of the court is held in error which says: "From the evidence we have there is but little room to doubt that Hibert was deliberately and willfully murdered while riding on horseback on the public highway." If the question of deliberation and the animus with which the killing was done were matters controverted in the case before the jury then this instruction was error, for it expresses to the jury an opinion by the court that certain controverted facts have been established by the evidence. It was in effect a finding by the court of facts which it was the exclusive province of the jury to find, under the direction of the court as to what facts would constitute a deliberate and willful killing.

But if there had been evidence produced in the case tending to establish the facts that the killing was deliberate and willful, and the defendant, or his counsel for him, admitted that these facts were established, and were not controverted, then it was proper for the court to say to the jury that the

facts that Hibert was deliberately and willfully killed were proven and not controverted, which is equivalent to saying that these facts were admitted in the case, and need not be inquired into by the jury. These facts that the killing was willful and deliberate, being established either by proof, or admitted in the trial, would make the crime murder in the first degree, which is defined in the statute as follows: "If any person shall purposely and of deliberate and premeditated malice kill another, such persons shall be deemed guilty of murder in the first degree."

The judge, in his charge, said to the jury: "That Hibert was killed by a gunshot in Marion county is clearly proven by the state and not at all controverted by the defense," and further on in the same charge says: "In this case you have the admitted fact that Hibert was killed by a gunshot." These last quoted parts of the charge, though assigned as error, have been held by the whole court as not erroneous, for the reason that the court told the jury that these facts had been admitted, and as there is nothing in the case before this court to show that such was not the case, this court must presume that the judge stated what was true, and if it was true it was the province of the court to tell the jury what was admitted and what was controverted, in order that they might understand the questions on which they were to pass. Then, we have admitted: 1. That Hibert was killed by a shot from a gun, which is a deadly weapon, and a deliberate killing with a deadly weapon presumes malice. Then, if it be further admitted that the act was willfully and deliberately done, malice will be presumed, and we have all the ingredients of murder in the first degree. But to return to that part of the charge before reported, which a majority of the court hold to be error, where the court says: "From the evidence we have there is but little room to doubt that Hibert was deliberately and willfully murdered while riding on horseback on the public highway." In this part of the charge he does not say that the defendant admits that the killing was willful and deliberate, but in a subsequent part of the same charge, which explains this, the judge says: "If any crime

is proven to have been committed it is murder in the first degree. There has been no question as to the degree of the crime of murdering Hibert, and I do not see that under the evidence any question as to that can arise." This part of the charge was not excepted to, and is therefore admitted to be correct, so far as this case is concerned. I think, from the use of this language, the jury must have understood the judge to say in substance that it was admitted as an established fact on the trial, by the defendant or his counsel, that the killing of Hibert was murder in the first degree, which ultimate fact must include the facts from which it results that the killing was deliberate and willful. And these parts of the charge taken together, it seems to me, express in substance that the killing and degree of the crime were admitted, and that the crime was admitted to be murder in the first degree; and that the jury need not inquire into these admitted facts, and the the only questions they had to consider were those tending to show that the prisoner was the person who committed the crime. The other parts of the charge clearly indicate that the court understood that the facts of the homicide and the degree of the crime were not controverted, for he goes on at length and calls the attention of the jury to the circumstances claimed to be established by the prosecution, tending to show that the prisoner was the guilty party. It is agreed by the whole court that it was the province of the judge to tell the jury in his charge what facts were admitted, and direct their particular attention to the facts controverted, so that the jury should retire with a distinct idea of the questions they were called on to consider and pass upon.

The only question is, did Judge Harding say to the jury that the degree of the crime was admitted? A majority of the court think the expression that this fact was not controverted is not equivalent to an admission. I think it is. Not to controvert, is not to dispute. When a trial is in progress before a jury on several issues and as to one the defendant says to the plaintiff, who has the affirmative of the issue, I do not controvert the proposition you assert, I think that is equivalent to saying, I admit your proposition.

I think the judge could assume in his charge that any fact in the case was not disputed, if such was the case, and if a party wishes to dispute this assumption, he is bound to say so to the court, at the time, and have the matter corrected, or the fact of the admission settled; and it is not sufficient simply to except so much of the charge without saying more. (*Hoffman v. Etna Fire Ins. Co.*, 1 Robertson, 521.) In that case, in speaking on that subject, the court, Judge Robertson, says: "If the learned judge assumed as the foundation of his instruction, that there was no such dispute erroneously, that error should have been corrected, not by an exception, but by calling his attention to it to have the correction made." That is, in this case, when Judge Harding said, "the degree of this homicide was murder in the first degree. There has been no question as to the degree of the crime of murdering Hibert." If the counsel wished to controvert that fact they should then have said so, and if it was not true that defendant had admitted that fact, the court would have corrected the statement and left the fact to be found by the jury, and before this court can find this statement error it must appear from the bill of exceptions that the fact was not admitted, or this court is bound to hold that the statement of court is true.

The judge has important functions to perform in the progress of a trial by a jury; he must decide what evidence tends to prove any proposition at issue in the case; if it has no such tendency it should be rejected as irrelevant. And if to save time on the trial the parties agree that any proposition is established, such agreement is in the presence of the court, and the party who makes such admission can not afterwards retract it without leave of the court any more than he can retract his plea of guilty, and the court is and must be the judge of the fact, whether such admission is made, and that, too, whether it be oral or in writing, and the decision of the court on that matter can not be reviewed unless the agreement or admission is in writing or preserved in the bill of exceptions. (Hill. on New Trials, p. 312, sec. 69.)

It is also held by a majority of the court that the follow-

ing part of the charge was erroneous: "The evidence tends in some degree to establish one circumstance, that is, that defendant was in the immediate vicinity when Hibert's life was taken, and acting in an unusual manner or doing as men do not usually." The instruction simply calls the attention of the jury to the fact that there is some evidence in the case which tends to prove these propositions. When such evidence was offered, the court had to determine whether it tended to prove these propositions. If it was offered for that purpose, and in the opinion of the court had no tendency to prove the facts it was offered to establish, the court ought to have rejected it. "Whether or not the evidence on one side tends to establish a particular fact, is a question of law for the court; while its weight and convincing force are questions for the jury." (41 Barb. 417.) I think this instruction was not erroneous; and taking this whole charge together, I think it did not have a tendency to influence the jury to the damage of the defendant, and that the judgment should be affirmed.

THE CITY OF PORTLAND, Appellant, v. LEE SAM, Respondent.

DAMAGES, MEASURE OF—STREET IMPROVEMENT.—Upon the trial of an appeal to the circuit court from the report of viewers appointed by the common council of the city of Portland, to assess the damages which the owners of property will sustain by reason of the widening of a street, the owner of a building being an appellant, is entitled to recover for any additional improvements which he has put on the building between the time of making the report and its adoption by the common council, when such improvements are taken for public use.

VERDICT, WHEN SUFFICIENT.—On such trial, where the jury are required to determine the damages and the benefits which the owner of the property will sustain by reason of taking a part of it for public use, the verdict is sufficient if it can clearly be ascertained how much are the damages and how much the benefits, if any.

APPEAL from Multnomah County. The facts are stated in the opinion.

J. C. Moreland, City Attorney, for the appellant.

Dolph, Bronaugh, Dolph and Simon, for respondents.

By the Court, KELLY, C. J.:

The common council of the city of Portland, deeming it expedient to extend laterally the lines of Second street, from the south line of A street to the south line of Madison street, on the eleventh day of July, 1876, directed the city surveyor to survey the same, make a plat thereof, with the portion of each lot or part of lot to be appropriated, which report having been made and being satisfactory, was adopted by the common council, my ordinance approved August 5, 1876. The respondents had a leasehold estate in the east seventy-five feet of lots 1 and 2, in block 20, continuing till January 1, 1885, and the absolute ownership of the buildings thereon. The improvements on the south seventy-five feet were completed prior to January 1, 1876, and those on the north twenty-five feet were commenced under a contract for full completion on July 5, 1876, and on August 21, the lower story was finished, and prior to September 19, 1876, the building was fully completed externally. On August 21, 1876, the common council appointed viewers of the proposed extension of Second street, of which respondents had notice. The viewers reported to the common council on August 31, 1876, and their report was adopted by an ordinance approved September 19, 1876, since which time the city has done nothing towards widening the street, collecting assessments or paying damages to property. Nor has the city paid or tendered the respondents any sum whatever as damages to their property.

In their report, the viewers assessed the damages to the buildings of respondents at nine hundred and thirty dollars; and from this asssessment the respondents appealed to the circuit court. The case came on for trial on the thirteenth of February, 1878, when the jury found the following verdict: "We, the jury in the above entitled cause, find the damages to the interest of the said defendants to the south half of lots 1 and 2, in block 20, to be one thousand six hundred and sixty-six dollars and sixty-seven cents; and we find the damages to the interests of defendants in the north half

of lot 1, in said block, to be eight hundred and thirty-three dollars and thirty-three cents; and we find the damages to defendants' interest in said lots 1 and 2, in said block, over and above all benefits thereto, to be the sum of two thousand five hundred dollars."

Several exceptions were taken to the rulings of the court upon the admission and exclusion of the testimony of witnesses; but it is unnecessary to consider them, as the same questions are raised in the instructions to the jury which were excepted to by the appellant. The court instructed the jury in substance: "That the defendants were entitled to recover damages to their improvements by reason of the proposed widening of the street, as the improvements existed when the ordinance, adopting the report of the viewers, was approved September 19, 1876. Although the defendants had notice that this improvement was to be made by the city, they need not await the result of the decision of the common council between the giving of the first notice and the adoption of the report of the viewers. But they are entitled to compensation for all damages sustained by being required to alter their improvements put up during that time, so as to conform them to the widened street."

This appeal was heard and determined under the provisions of sec. 9, act of December 19, 1865, of appellant's charter, which is as follows:

Sec. 9. "Such appeal shall be deemed and be heard and determined, and the judgment thereon enforced, so far as practicable, in the same manner as an action at law. The jury shall view the proposed street or alley, the property to be appropriated and the property against which benefits are assessed, and proof of damages and benefits may be introduced by the city and the appellants; the city shall be considered the plaintiff. The jury shall assess and determine by their verdict how much less valuable, if any, each lot or part thereof, with the improvements, may be rendered by the laying out, establishing or widening such street or alley, and in case of persons having different estates and separate interests in any lot or part thereof, or of the improvements thereon, shall apportion the same between them, and shall also assess and de-

termine the value of the benefit and advantages, if any, of such street or alleys so to be opened, laid out, established, or widened, as the case may be, to the respective owners, lessees and other persons interested in any lands, tenements, hereditaments and premises, any part of which is required for the opening, laying out, establishing or widening of such street or alley, in excess of the damages which any such owner, lessee or other person interested will sustain by reason of the opening, laying out, establishing or widening of any such street or alley, and assess and determine the value of the benefit and advantage of such street or alley to the respective owners, lessees or other persons interested in any lands, tenements, hereditaments and premises not required for the purpose of opening, laying out, establishing or widening any such street or alley, but fronting or to front thereon, or being at and within half the distance of the next street or alley thereto, and also within one hundred feet of the boundary of the street or alley to be laid out, established or widened on each side thereof; and which the jury shall deem to be benefited by such street or alley in respect to the respective estate and interest of said owners, lessees and other persons respectively so interested in any lands, tenements and premises; but the issues, testimony and verdict upon such appeal shall be confined to the parties appealing and the jury shall not re-assess any damages or benefits unappealed from. The verdict of the jury shall be a final and conclusive determination of the matter of such assessment."

The appellant contends that the viewers having been appointed on the twenty-first day of August, and reported their assessment of damages on the thirty-first day of August, 1876, of which fact the respondents had notice, it was their duty to suspend work on the brick walls of their building, then in the process of construction, and await the conclusion of the city council in regard to the appropriation of their property; and that if they expended more money in completing the structure (then probably half complete), it was their own fault, for they had full notice that the property would ultimately be required for public uses, by the report of the

viewers. It is further contended by the counsel for appellant that by the ninth section of the act of December 19, 1865, before referred to, it is provided that "the jury shall not reassess any damages unappealed from," and, therefore, any improvements to the property made after the assessment from which the appeal was taken could not lawfully be considered by the jury because no appeal was taken from such unassessed damages. We think this clause has reference to the reassessment of damages for any person who has not joined in the appeal as provided in section 7 of the same act. The prohibition relates to cases which have been unappealed, and has no reference to the assessment of damages by the jury in any case before the court. It relates to the parties who have not appealed. This is apparent from the context. "But the issues, testimony and verdict upon such appeal, shall be confined to the parties appealing, and the jury shall not reassess any damages or benefits unappealed from."

We will now proceed to consider the alleged error in the charge of the court, wherein the jury were instructed that the defendants were entitled to recover damages to their improvements by reason of the widening of the street, as the improvements existed when the report of the viewers was adopted on the nineteenth of September, 1876. The court did not err in giving this instruction. Although the respondents had notice of the report of the viewers made on the thirty-first of August, they were under no obligation to suspend work on the building. Like every other owner of property, they had complete control over it, and the right to improve and enjoy it, until it was appropriated for public use. The common council were under no obligation to adopt the report made by the viewers or pay for the property proposed to be taken. It was entirely optional with them whether they would go on with the widening of the street or abandon it altogether, and it would be unjust to hold that it was the duty of the respondents to cease working upon their building as soon as the viewers made their report, or go on with the improvements at the peril of losing all expenditures incurred by them while await-

ing the uncertain action of the common council. The court held, and properly so, that the rights of the parties were reciprocal; that so long as there was no obligation on the part of the appellant to go on with the contemplated improvements, or pay respondents the damages which they might thereby sustain, there was no obligation on their part to suspend work on the building then in the process of construction. These views are in accordance with the law as held by the supreme court of New York in a case quite similar to this one. (*In the Matter of Widening Wall Street,* 17 Barb. 618.)

Another assignment of error is that the verdict of the jury is informal in this, that it does not make any findings of the benefits to the property of respondents. The ninth section of the act referred to requires the jury to "assess and determine the value of the benefit and advantage, if any, such street * * * so widened may be to the respective owners," etc. And this court held in the case of *The City of Portland v. Kamm,* 5 Or. 362, that a verdict in this form: "We, the jury in the above-entitled cause, find for the plaintiff," was indefinite and insufficient, for the reason that it did not state how much the defendant was damaged, nor how much he was benefited by the extension of the street. This court further held in that case that the jury in their verdict must state the sum of the benefits and of the damages separately, or at least show the sum of the difference between them." Tested by the rule here laid down, we think the verdict in this case is sufficiently definite and certain. The jury are required by the act referred to "to determine the value of the benefit, if any," etc. If the widening of said street was of no benefit to the leasehold estate of respondents, then there was nothing for the jury to determine, as to any such benefits. In their verdict they say that the damages to the interests of the defendants in the south half of lot 1 and lot 2 are one thousand six hundred and sixty-six dollars and sixty-seven cents, and the north half of lot 1 eight hundred and thirty-three dollars and thirty-three cents, in all two thousand five hundred dollars. And further, they find that the damages over and above all benefits are two thousand five hundred dollars. The inference is

therefore irresistible, that there were no benefits to be determined by the jury. We think, therefore, that the verdict is neither informal nor insufficient, and that the judgment should be affirmed.

DOSCHER et al., Appellants, v. BLACKISTON et al., Respondents.

EQUITY JURISDICTION—DECREE OF DIVORCE.—In a decree of divorce rendered in March, 1862, under the statute of this state, then in force, the party in fault was divested of her land, and the same was vested in her children: *Held*, that the court had the power, under the statute, to so transfer the land.

IDEM.—If a court making a decree, which, by its terms, divests one person of land and vests it in another, has not the power to so vest the land and the decree is void in that behalf, the decree will also be inoperative to divest the title, and it will remain where it was.

DECREE—INTERPRETATION—INTENTION GOVERNS.—The meaning of decrees as well as of statutes is to be ascertained from the manifest intention of those who made them, and a decree will not be so construed as to operate against the manifest intention of the court making it.

APPEAL from Multnomah County.

In 1860 William Blackiston was the owner of a donation land claim. At that time, in consideration of love and affection, he conveyed the south half of the claim through one Odell, as trustee, to Laura A., his wife, during her natural life with a contingent remainder to her children by William, who should survive her. In February, 1862, there were four of such children living, Frances G., Charles A., Clara, and Tobias M. No other children were born of the marriage.

In March, 1862, a decree of divorce was granted in the state circuit court against Laura A., at the suit of William. By this decree the conveyance of William to Laura A. of 1860, was set aside, and the title to the south half of the donation claim, was decreed to vest in the said children, Frances G., Charles A., Clara, and Tobias M.

In 1863 Frances G. and Tobias M. died without issue.

In December, 1863, a judgment was recovered against William, and the plaintiff, John Doscher, upon which execution

issued, and a levy made upon all the estate of William in the donation claim. A sale was made on the execution to one Thoburn, who was acting, as is claimed, as the agent, in the purchase of the plaintiff, Ann Doscher.

Thoburn conveyed the property to J. N. Dolph on trust. The plaintiffs claim that Thoburn, in these proceedings, acted as the agent, and under the direction of Ann Doscher, while Dolph claims that the conveyance through Thoburn was from John Doscher, the husband of Ann. Upon the direction of John Doscher, Dolph brought a partition suit, and subsequently in pursuance of a decree therein, conveyed to the two surviving children, Charles A. and Clara, portions of the south half of the donation claim.

It is claimed, on the part of the appellants, that Laura A., having been divested of her life-estate before any estate became vested in the children, the estate reverted to Odell in trust for William, and that the Doschers succeeded to this estate under the execution sale against William.

The object of this suit is to cancel the deeds made by Dolph to the children, Charles A. and Clara, and to compel Dolph to execute a deed to the appellant, Ann Doscher to the estates so conveyed to the two children.

The bill was dismissed, whereupon this appeal was taken.

The statute under which the decree of divorce was granted between William and Laura A. was as follows:

Sec. 7. "The court, in granting a divorce, shall make such disposition of and provision for the children as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children." * * *

Sec. 8. "In granting a divorce, the court shall make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of children." (Or. Stat. 1855, 440.)

Sidney Dell, for appellants.

Northup & Gilbert, for respondents.

By the Court BOISE, J.:

From the pleadings and exhibits in this case it appears that William Blackiston being the owner of the land in controversy, conveyed it to James A. Odell, in trust to convey to his, Blackiston's, wife for life, remainder over to his children. Said Odell performed the trust by making the following deed: "For the consideration of one dollar to me paid by Laura Ann Blackiston, of the county of Multnomah, Oregon, and for divers other good and valuable considerations, I, James A. Odell, do hereby sell and convey unto the said Laura Ann Blackiston, for and during her natural life, and from and after her decease to the children of said Laura Ann and William Blackiston who shall survive the said Laura Ann; or if any of said children shall die, leaving issue, then to the survivors, and said issue share and share alike, the issue of each child taking the same share that the parent would have taken if living at the death of said Laura Ann, the following described property, to wit: (Here follows a description of the property.) After this, in March, 1862, at the suit of said William, a decree of divorce was granted between the said William and Laura Ann on account of the alleged misconduct of said Laura Ann in which decree as to this land described in the deed named above, the court decided and decreed "that the said Laura Ann Blackiston be and she is hereby divested of all right, title and interest, property, claims and demands of, in and to the south half of the donation land claim of said William Blackiston and that said south half of said land claim be, and is hereby vested in Francis G. Blackiston, Chas. A. Blackiston, Clara Blackiston and T. M. Blackiston, in equal proportions in fee-simple; and that the said William Blackiston, is hereby authorized to have sole control, management and care of said south half of said claim, for the use and benefit of said Francis G., Chas. A., Clara and T. M.

Blackiston until they are lawfully entitled to the same in their own right." No question is made in this case but what the deeds to Odell, and from Odell to Laura Ann and children, are in due form to convey the land.

But it is claimed by the counsel for the appellants that the last-named deed conveyed only a contingent estate to the said children, and that the decree of divorce divested the life-estate out of said Laura Ann, but did not vest it in the said children, for the reason that the court had no authority by the statute to vest the same in said children, and that therefore, the decree being valid so far as it divested the life-estate out of said Laura Ann, destroyed it, and with it the contingent remainder to the said children. We think it was the intention of the court to transfer by its decree this property from said Laura Ann to the children. It was an attempt to convey the land by a decree, and if the court had no power under the statute to convey the land, then all this part of the decree was void, as well that which divested the life-estate out of Laura Ann, as that which vested it in the children. All this part of the decree seeks to accomplish one object, that is to vest this property in these children. It was an attempt to convey by decree of a court. In such conveyances there must be one who holds the title to be conveyed, and one who is to receive it; and if the decree fails to make the conveyance, the title will remain where it was, for a decree should never be made to operate against the manifest and declared intention of the court. To have this decree operate as contended for by counsel would be to make it effectuate an end contrary to the manifest intention of the court. The meaning and effect of decrees as well as statutes are to be ascertained from the manifest intention of those who make them, and if this property did not pass to the said children by these words of the decree, it stood unaffected by them.

As to whether or not the decree of divorce would by its own force divest property, not disposed of by its terms, out of the guilty party and in the party at whose suit the divorce was obtained, we do not now feel called on to decide. For we think

the decree vested the life-estate of said Laura Ann in said children, who held the estate in remainder, and the whole estate became vested in them when they received by this decree the particular estate held by their mother before the divorce. This question of the power of the court in this behalf was settled by this court in the case of *Jacob Cline v. John Hurly*, tenant of Mary Cline, which was decided in 1864, where it was held that the circuit court had the authority to bestow on the children of divorced parties the real estate of the party in fault; and the decision of this court in that case concludes us in the decision of this case, for whatever might be our disposition to hold in this matter now, were it presented for the first time, we feel bound by the rule which has been so long established and often acted on by the circuit courts, whereby, in several instances, property which is now of great value has been transferred by decrees in divorce cases. We would not be warranted in disturbing estates in land depending on such decrees under a statute which has long since been repealed, and the lands thus transferred by these decrees sold and purchased in good faith on their sanction. For the people justly look on rules of property, settled and fixed by the decisions of the supreme judicial tribunal of the country, as giving the highest assurance that they will not be overturned or become uncertain. Such being our opinion of the effect of this decree, it determines this case in favor of the respondents, and the decree of the circuit court will be affirmed with costs.

A. P. ANKENY et al., Respondents, v. CHARLES A. BLACKISTON et al., Appellants.

SERVICE OF SUMMONS—SEVERAL DEFENDANTS.—Where the service of summons in a suit in chancery is made by serving a copy of the summons upon each of several defendants and a copy of the complaint is only served upon one of such defendants, and it does not appear in the return that the plaintiff directed in writing on the copy of the complaint served, on which defendant it should be served, such service, if defective, can only be taken advantage of on appeal, and does not render the decree void.

GUARDIAN—RIGHT TO APPEAR.—The general guardian has authority to appear for his ward and answer for him in a suit and such appearance will waive an irregularity in the service of process.

APPEAL from Multnomah County.

This suit involves the validity of a decree rendered in a partition suit to which the appellants were parties defendant. It was brought to quiet title. The respondents had a decree as prayed for, from which this appeal is taken.

The facts are stated in the opinion.

B. Killen and Northup & Gilbert, for appellants:

When lands are granted to two or more persons to hold to them and their heirs, or for the term of their life, without any restrictive or exclusive words, all the persons named in such instrument to whom the lands are so given take a joint estate and are called joint-tenants. (2 Greenl. Cruise, 364.) Joint-tenancy is where two or more persons, not being husband and wife, at the date of its acquisition, have any subject of property jointly between them in equal shares. (1 Preston on Estates, 186.)

Joint estates were favorite estates at common law, and whenever an estate vested in two or more persons by purchase, there arose at once the presumption that it was a joint estate. (*Aveling v. Knipe,* 19 Ves. 441; Dart on Vendors, 431.) The words "share and share alike," do not create a tenancy in common. (*Moore v. Cleghorn,* 10 Beav. 425; *Stinson v. Butterman,* 5 Cush. 153; *Purdy v. Purdy,* 4 Md. Ch. Dec. 547.)

A deed to two or more persons vests in them a joint estate. (*Whittridge v. Barry,* 42 Md. 151; *Jones v. Jones,* 1 Cal. 469; *Fisher v. Wigg,* 1 Lord Ray. 622.)

Joint estates existed in Oregon up to October 17, 1862. The act of the legislature abolishing joint estates could have no effect upon joint estates vested at that time. The legislature has no authority to give such an effect to a statute as will deprive joint-tenants of one of the essential elements of the tenure, the right of survivorship. (*Green v. Blanchard,*

40 Cal. 198; *Boston F. Co. v. Condit,* 19 N. J. Eq. 399.)

The decree of partition in the Thoburn suit was not an adjudication upon the title of the defendants Clara and Charles. At common law partition was considered as a mere possessory action, which left the title as it found it. (*Harlan v. Langham,* 69 Pa. St. 235; *Pierce v. Oliver,* 13 Mass. 212; *Malet v. Foxcroft,* 1 Story C. C. 475.)

The statutes of Oregon, at the time of this partition, did not make a decree of partition binding upon the title of parties to the suit. In some states it is held that a decree of partition is decisive of the claims of title of the parties thereto, but it will be observed that in those states the statutes have expressly provided that if it shall appear that there are parties claiming the same portion adversely to each other, the court may decide upon such adverse claims. (*Forder v. Davis,* 38 Mo. 115; *Wade v. Deray,* 50 Cal. 376.)

The Oregon law of partition contains no such provision. Again, the court had no jurisdiction of that partition suit, for the reason that the plaintiff therein was not in possession of the land he sought to partition. (Stat. of Or. 198.)

The pleadings in the partition suit show that the parties thereto claimed to hold adversely. "The object of the partition is to turn an estate that is held in common into an estate in severalty, and not to furnish a mode of settling conflicting titles. (*Brock v. Eastman,* 28 Vt. 660; *Florence v. Hopkins,* 46 N. Y. 186.)

If the land be held adversely to the plaintiff he must first establish his right by an action to recover possession. (*McMasters v. Carothers,* 1 Pa. St. 325; *Bonner v. The Proprietors,* 7 Mass. 475; *Abbergottie v. Chaplin,* 10 Rich Eq. 428; 9 Cowen, 530.)

Again, there are irregularities in the proceeding for partition which are sufficient to invalidate the decree. In a suit in chancery infant defendants can only appear by guardian *ad litem,* who must be appointed by the court, otherwise the infant will not be bound by its decrees. (*Myers v. Myers,* 6 W. Va. 369; *Fitch v. Cornell,* 1 Sawyer, 156; Stat. of Ore-

gon, p. 110, sec. 31; Story Eq. Plead., sec. 58, note.)

The return of service of summons should have shown that service was made upon the infant defendants by leaving a copy thereof with them and with their guardian. The fact that the infant defendants appeared and filed answer does not give the court jurisdiction unless they were properly served. The summons was defective, in that it did not apprise the defendants of the nature of the relief sought. No service of complaint was made except upon the defendant, John Doscher. The summons simply notified defendants that the plaintiff would apply to the court for the relief prayed for in the complaint.

Errors of less magnitude than these have been held sufficient to justify a court in setting aside decrees of partition. A judgment in partition was treated as void because the record did not show whether the commissioners were sworn. (*Smith v. Moore's Heirs,* 6 Dana, 417.) The record of partition will be disregarded unless it show affirmatively that the various steps required by law have all been taken. (*Gayton v. Shane,* 7 Dana, 498; *Jink v. Howland,* 3 Gray, 537; *Newell v. Saddler,* 16 Mass. 122; *Thayer v. Thayer,* 7 Pick. 209; *Schuyler v. Marsh,* 37 Barb. 356.)

If this court should hold that the circuit court exceeded its jurisdiction in vesting this land in the children by the decree of divorce, then the partition is wholly inoperative and void, as it was the invariable rule at common law that estates in remainder or reversion could not be divided by proceedings for compulsory partition, and there is no statute changing that rule in this state. In fact, the same rule is enacted by statute in many of the states. (*Stevens v. Enders,* 1 Green, N. J. 273; *Packard v. Packard,* 16 Pick. 194; *Baldwin v. Aldrick,* 34 Vt. 532.)

Dolph, Bronaugh, Dolph & Simon, and Sidney Dell, for respondents:

The rights of the parties to a suit in partition are determined by the decree. (Civ. Code, sec. 425; Herman on Estoppel, 93, 94; *Morenhaut v. Higuera,* 32 Cal. 289; Free-

man on Judgments, 272, sec. 306.) "When an infant is a party he shall appear by guardian, who may be appointed by the court in which the action is brought, or by a judge thereof, or a county judge. (Civ. Code, p. 110, sec. 31, and authorities cited.)

"Nothing contained in this title shall impair the power of the supreme court, the circuit court, the county court, or courts of a justice of the peace, to appoint a guardian to defend the interests of any minor impleaded in such courts or interested in any suit or matter therein pending; nor their power to appoint or allow any person as next friend for a minor to commence, prosecute or defend any suit in his behalf." (Mis. Laws, p. 555, sec. 12.) "Every guardian appointed under the provisions of this title shall * * * appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian or next friend." (Mis. Laws, p. 556, sec. 20.) California statutes of date of April 29, 1851, are literally the same as the Oregon statutes. (Cal. Code, p. 4, secs. 89, 94.)

"The provisions of sections nine and ten of the civil practice act relative to the appointment of guardians *ad litem* where infants are parties, only apply where there is no general guardian, or where he does not act." (*Gronfier v. Puymirol,* 19 Cal. 629.) "Whenever the interests of the minor require it, the court in which an action is pending will appoint a guardian *ad litem,* even though the minor may have a general guardian." (Id.)

"Where in a suit against infants there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons." (*Smith v. McDonald,* 42 Cal. 484; *Spear v. Ward,* 20 Id. 677.) A judgment or decree against a minor without the appointment of a guardian is not void or voidable. (*Peak v. Sharted,* 21 Ill. 137; Freeman on Judgments, secs. 131, 513; *Joyce v. McAvoy,* 31 Cal. 273.)

In a suit where the court has complete jurisdiction of the subject and of the parties, a decree against infant defendants,

where there is no evidence of fraud or collusion, is as valid and effectual as if taken against adults.

By the Court, BOISE, J.:

In this suit the plaintiffs claim title through divers mesne conveyances from one Thomas Thoburn, who purchased the land in question at a sale of the same on execution on a judgment in favor of one *Kalmes v. William Blackiston et al*, the father of the said Charles A. Blackiston and Clara Blackiston. These conveyances are in due form and are not in that respect questioned. After obtaining a sheriff's deed to the land, and before conveying the same, Thoburn brought a suit of partition against John Doscher and wife, William Blackiston and wife, Charles A. Blackiston, Clara Blackiston, Charles M. Carter and Sherry Ross, to partition the south half of the land claim of William Blackiston which includes the land in question. In this suit a summons was duly issued, and we find indorsed on it the following return:

"State of Oregon, county of Multnomah: I hereby certify that I served the within summons on the within named defendants, John Doscher, Ann Doscher, William Blackiston, Clara Blackiston, Charles A. Blackiston, C. M. Carter and Sherry Ross, in Multnomah county, on the seventh day of November, A. D. 1865, by delivering to each of them a copy thereof, together with a copy of the complaint on John Doscher, prepared and certified to by the plaintiffs' attorneys. I further certify that after due diligence I have not been able to find Ann Blackiston in this county.

"JACOB STITZEL, Sheriff."

The defendants appear and claim interest in the land. The said Charles A. Blackiston and Clara Blackiston being minors, appeared by C. M. Carter, their guardian, and answered, and in their answer, claimed all of said south half of said land claim, except four acres thereof sold to Sherry Ross, and prayed that they be decreed to be the owners thereof, except said four acres. In this partition suit the court finds and de-

crees that Thomas Thoburn is the owner of one undivided half of said south half of said land claim as described in complaint, and that Clara and Charles A. Blackiston are the owners of the other undivided half thereof, except four acres sold to Sherry Ross, and ordered a partition thereof accordingly, the part set off to said Clara and Charles A. to include the four acres sold to said Ross, and the court finds further that William Blackiston, Ann Blackiston, John Doscher and Anna Doscher have no interest or estate therein. In said partition suit the land now claimed by the plaintiffs was partitioned and set off to said Thomas Thoburn, under whom the plaintiffs claim, so if the decree in that partition suit is valid and binding on the parties thereto, then the plaintiffs in this suit as against the defendants are the owners in fee of the land claimed by them, and are entitled to the relief they seek. We will now proceed to examine this decree:

1. It is claimed that Thoburn does not allege possession; he alleges that he is in constructive possession, which is sufficient, and this is supported by the facts alleged.

2. It is objected to the decree that the service is not sufficient, for the reason that no copy of the complaint was served on Charles A. or Clara Blackiston, or their guardian. The copy of the complaint being served on John Doscher, who was declared by the court to have no interest in the land, and it not appearing that the plaintiff directed the complaint to be served on him by indorsing such direction in writing on such copy. We think this objection is very technical, and at most could be made available, if at all on appeal, when a decree has been taken by default. In this case, as the parties appeared and answered, a defect in the service would be waived, if it is determined that the appearance was such as would bind infants. In this case C. M. Carter, their general guardian, appeared for them and defended their interest, and claimed for them the whole property. And we think that under section 20, page 556, of the code he had the authority, and it was his duty to appear for his wards in that suit, and that they were as much bound by the proceedings therein as

though they had been of lawful age and appeared for themselves. This decree seems to be sufficient in form and binding on all the parties to it. It is not therefore necessary for us to inquire into the validity of the sale of the land on execution in case of *Kalmes v. William Blackiston et al.*, for the rights of the parties have been adjudicated in the partition suit, and while that stands its determination of the rights of the parties to it must remain as there settled.

The decree of the court below will be affirmed with costs.

STATE OF OREGON, Respondent, v. JACKSON GRANT, Appellant.

INSTRUCTIONS—MURDER—DEGREE OF GUILT.—A person charged with murder in the first degree may be convicted under such indictment of murder in the second degree, or of manslaughter. On the trial of such case, the degree of guilt, as well as the guilt itself, should be left to the determination of the jury, and not assumed by the court.

APPEAL from Multnomah County.

On the twenty-second day of October, 1878, the appellant was indicted for the crime of murder, and was tried and convicted of murder in the first degree on the sixteenth day of January, 1879. Upon the trial the court, among others, gave to the jury the following instructions:

1. "Two classes of testimony are relied upon by the state in this case, viz.: confessions and circumstances. Evidence of admissions or confessions made by the defendant since his arrest has been offered, and is before you. A confession, without some other proof that a crime has been committed, is not sufficient to warrant a conviction. Confessions are always to be received with caution. The situation of the witness, his surroundings, the excitement under which he may have labored, the conflicting emotions of hope and fear by which he may have been actuated, and the inability of the accused to contradict or explain, are all to be taken under consideration. If, however, the confessions are made freely and voluntarily; if they are made at different times and to different persons; if

they are corroborated by the conduct of the party accused, and by other evidence, they may become the most convincing proofs of the law."

2. "Circumstantial evidence may be quite as satisfactory as direct evidence. In some cases it is more so. As stated by the court in a case referred to by counsel in your hearing, when willful and deliberate murder contemplated before hand has been committed, it rarely occurs that direct positive evidence concerning it exists. When a man lies in wait for another and secretly shoots or stabs him to death, he is careful of every precaution against observation by others. The evidence of his crime must be found in circumstances, and if these circumstances concur and point clearly and satisfactorily to the guilt of the accused, producing that conviction in the mind to the degree required, it is sufficient."

3. "If you should find that it was the habit of the defendant to frequent the vicinity where the killing took place; if he was seen in that immediate vicinity about the time when, according to the testimony, the killing must have been done; if he was in the habit of carrying a weapon capable of inflicting such wounds as caused Spellen's death; if the defendant has made contradictory or false statements in reference to the fact of his having been in Spellen's vicinity about the time of the homicide; such facts are material for your consideration."

4. "There is testimony which shows that Dennis Spellen was found dead near his cabin on Sunday, thirtieth day of last June, and that he had died from the effects of a gunshot wound in the back. The testimony tended to show that he was so shot by some person or persons while he was walking across a log over a ravine about seventy-five feet distant from his cabin, and that the person or persons so shooting did it from ambush, or from a place where he or they had been lying in wait. If this is true, then the killing was done of premeditated and deliberate malice, and is murder in the first degree in the person or persons who did the shooting."

5. "The testimony tended to show that the deceased had

been dead about three days. There was also the testimony of a witness who worked upon the building on the corner of Stark and Front streets where Spellen worked, to the effect that Spellen worked on such building on Tuesday, the twenty-fourth or twenty-fifth day of June. The Tuesday of that week came on the twenty-fifth of June. If, then, Spellen had been dead three days when found on the thirtieth of June, and if he quit work in the city Tuesday night of the twenty-fifth, the killing was probably done between the night of the twenty-fifth and twenty-eighth day of June, or on Wednesday or Thursday, the twenty-sixth or twenty-seventh days of June."

6. "The witness Zegler testifies that he saw Grant at different times near this cabin in the latter part of this month with a gun in his hand; that once he saw him leaning against the corner of the cabin, and that upon seeing witness the defendant turned back. The German, who swore through an interpreter, testified that he saw the defendant on Thursday or Friday before the body was discovered; that he was near the cabin with the woodchopper; did not see him have a gun. He must have seen Grant there with the woodchopper, if he is truthful and reliable, and not mistaken in what he says on the twenty-seventh or twenty-eight days of June. Who was the woodchopper, and was it Spellen? There is testimony to the effect that Spellen was accustomed to chop wood at intervals for the railroad. You may consider from all the facts and circumstances whether this woodchopper was or was not Spellen, and whether or not Grant, the defendant, was seen on Thursday or Friday of that week with Spellen at or near this cabin, and you are to give to it whatever importance the fact, if it is a fact, of the defendant being at and in the vicinity of this cabin near the time when the killing must have been done, in determining the question of the defendant's guilt or innocence. It may be important for you to consider what the probable fact is, as to whether the person who did the killing had been much about or in the vicinity of Spellen's cabin, and had become acquainted with the location and surroundings and with the habits of the deceased. All of

these facts and circumstances should be carefully weighed by you as tending to corroborate or contradict the alleged confessions made to Smith and his wife."

7. "In the anxiety which all men should feel to secure the punishment of him who perpetrates an atrocious crime, we should carefully guard against the conviction of an innocent person. And on the other hand, in the tenderness which men feel for human life, we should not hesitate to pronounce that conviction when the testimony is convincing."

8. "There is no evidence in this case which reduces the crime from murder in the first degree to murder in the second degree, or to manslaughter. The defendant, if he is guilty at all, is guilty of murder in the first degree."

No exception was taken to that part of the instructions which states that Spellen was found dead near his cabin on the thirtieth day of June, and that he had died from the effects of a gunshot wound in the back. These facts were admitted before the jury on the trial. With this exception, each of the foregoing instructions was excepted to.

J. Quinn Thornton, for appellant:

The errors insisted upon in the charge of the court to the jury, as clearly erroneous, are the language of the court contained in the first, second, and third instructions taken in the order in which the language was employed.

[The last sentence in each of instructions one and two, and all of instructions three, are quoted and referred to. —— Rep.]

The counsel for the appellant submits that the language thus quoted is clearly a hypothetical direction to find the appellant guilty. And we affirm as a proposition of law as old as the common law, and sustained on both principle and authority, that though the court do not, in so many words, give a positive direction to the jury on the testimony, yet if they do so in strong hypothetical language which embraces all the points of the very case under consideration, a new trial will be granted. And that such a direction would be to all intents and purposes positive, and have that effect.

In maintaining this proposition, the following authorities are cited: (*Reel v. Reel*, 2 Hawks (N. C.), 63; *Hart v. Miller*, 3 A. K. Marshall, 33.) These cases are cited in Graham & Waterman on New Trials, vol. 3, pp. 763, 766. Very little attention to the case of *Reel v. Reel*, will show that it is exactly like the case contained in the bill of exceptions.

The judge's charge in the North Carolina case, and the charge of the court in the case of the *State v. Jackson Grant*, are palpable infringements of the law, which makes the jury the exclusive judges of the facts, and in both cases objectionable on general principles, as in terms dictating the verdict.

But this decision stands not alone. A similar one was made by the court of appeals of Kentucky, in *Hunt v. Miller*, 3 A. K. Marshall, 336. In that case too, also the court hypothetically charged the jury. On this subject the court of appeal said: "And it was irregular, because, instead of leaving the jury to weigh the credibility of the witnesses, and determine the facts, without any intimation of opinion from the court on the evidence, the instructions imply an opinion and decision by the court, that both the facts and the law were in favor of Miller's right to recover."

Whether therefore we consider the second, third and fourth exceptions in the light of either principle or authority, the instructions of the court below will be seen to have been erroneous. Nor can the counsel for the state escape from conclusion here reached by suggesting that the court below did not instruct the jury to find a named verdict. No, certainly not. This would have been an open and palpable error. But the jury must not be misled by the court in any manner. Whether therefore they are induced to find a wrong verdict by a positive direction, or by being left to draw an erroneous conclusion from the proof, the consequences being the same, there is the same ground for a new trial. The charge must be not only correct, but so explicit as not to be misconstrued. If from the obscurity, or from the use of expressions that are misunderstood by the jury, it be misapprehended, so that er-

roneous inferences are drawn from it, a new trial will be granted. It has been held, that where the charge of the court has even a tendency to make an erroneous impression upon the jury, and to mislead them in their views of the case, a new trial will be granted. (*Benham v. Cary*, 11 Wend. 83; *Troxdale v. The State*, 9 Humph. 411.)

The fifth and sixth instructions are erroneous because:

1. They are argumentative; and, 2. They invade the province of the jury by carefully analyzing a portion of the testimony, and then charging the jury that "the killing was probably done between the night of the twenty-fifth and twenty-eight of June, or on Wednesday or Thursday, the twenty-sixth or twenty-seventh days of June."

The authorities cited in another part of this brief, and under another head, show as clearly as precedents can show any doctrine of the law, that it was the duty of the jury, to the exclusion of the court, to say if it could or should be said at all that "the killing was probably done between the nights of the twenty-fifth and twenty-eighth of June, or on Wednesday or Thursday, the twenty-sixth or twenty-seventh days of June."

Without now pausing to present this objectionable feature of the instructions of the court in a stronger light, I observe that the charge is argumentative, will be at once seen by even a casual reading, to say nothing of a critical analysis with a view to eliminating its legitimate meaning. And I will not now detain the court by saying more than that when a charge is argumentative and evasive, this furnishes a ground of reversal, if it is calculated, as this charge certaintly was, to mislead the jury. (3 Graham and Waterman on New Trials, 849; *Rhodes v. Sherwood*, 9 Ala. 63.)

A judge may not express his opinion on the sufficiency or insufficiency of testimony given in a case to prove a fact. (3 Graham and Waterman on New Trials, 732; *Bowman v. Bartlett*, 1 A. K. Marsh. 86.) A question of fact belongs exclusively to the jury. (*Hardaway v. Manson*, 2 Munf. 231; *Tyler v. Ulmer*, 12 Mass. 163; *Eames v. Blackheart*, 12 Ill.

195; *Baldwin v. Hayden,* 6 Conn. 453; cited as authorities, 3 Graham and Waterman on New Trials, 731, 737.)

Upon recapitulating the testimony, the court should always instruct the jury that they are the exclusive judges of all questions of fact. (7 Ind. 38; 10 N. Y. 207; and Or. Civ. Code, sec. 198, and many authorities there cited.)

A judgment may be reversed for erroneous instructions, notwithstanding the verdict may appear to be right upon the proof. (*Gaines v. Buford,* 1 Dana, 481.) A charge which is clearly erroneous, is not cured by another part which states the laws correctly. (79 Pa. St. 397; *Clem v. State,* 31 Ind. 483.)

J. F. Caples, District Attorney, and *M. F. Mulkey,* for the state:

It is the province of the judge to instruct the jury as to the tendency of the evidence. The weight of evidence is a matter to be left entirely to the jury. (Hilliard on New Trials, 226, sec. 41.) On questions of fact the judge has a right to advise the jury. (Id. 227, sec. 45.) It is to some extent a matter of discretion with the judge how far he will state he facts in summing up a case. (Id. 227, sec. 46.) Even comments by the judge on the evidence is no ground for a new trial, unless the defendant has been prejudiced thereby. (Id 228, sec. 47-9; Civ. Code, 151, sec. 227.) If the statement by the judge was not material, and did not effect the merits of he case, it is not error. (Hilliard on New Trials, 230, sec. 52.)

"Whether or not the evidence tends to establish a particular fact is a question of law for the court, while its weight and convincing force are questions for the jury." (41 Barb. 417.)

The court is the judge as to whether there is evidence in a case reducing the crime from murder in the first degree to murder in the second degree or to manslaughter; and if there is no such evidence, the court has a right to tell the jury so. (*State v. Garraud,* 5 Or. 216.)

The question as to whether the crime was manslaughter or murder in the second degree was not raised on the trial at all;

no such thing appears from the bill of exceptions, and the judge had a right to charge as he did in the last part of his charge. (27 Cal. 507.)

Error will not be presumed—it must appear affirmatively upon the face of the record. (1 Or. 51.) The judge could assume in his charge that any fact in the case was not disputed, if such was the case, and if a party wishes to dispute this assumption he is bound to say so to the court at the time, and have the matter considered or the fact of the admission settled; and it is not sufficient simply to except so much of the charge without saying more. (*Hoxman v. Etna Fire Insurance Co.*, 1 Robertson, 521.)

By the Court, PRIM, J.:

This appeal is based upon exceptions taken at the trial to the charge of the court. All the material parts of the charge appear to be set out in full in the bill of exceptions; and having examined it carefully, we find no serious objections to any portion thereof, except the last instruction, which is in these words: "There is no evidence in this case which reduces the crime from murder in the first degree to murder in the second degree or to manslaughter. The defendant, if he is guilty at all, is guilty of murder in the first degree."

This instruction, we think, is erroneous and should not have been given. The appellant is charged in the indictment with murder in the first degree, and under the indictment might have been convicted of murder in the first degree, murder in the second degree, or manslaughter. Section 160 of the criminal code provides that, "where it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only." It was the province of the jury to determine the degree of the guilt as well as the guilt itself of the appellant, and this instruction withdrew that question from their consideration. While the court may state to the jury what the evidence tends to prove, it is their peculiar province to determine upon the

weight and effect of the evidence. (Hilliard on New Trials, 226, sec. 41.)

The facts reported in the bill of exceptions are very meager; they are, that the deceased was found dead in a ravine, near his cabin, with one large hole and twenty-two small ones in his back; that they were gunshot wounds and were the cause of his death. These facts are insufficient to raise a conclusive presumption of murder in the first degree.

To constitute murder in the first degree it is not enough to show that the deceased was killed by some one; but it must be shown that he was killed purposely, and of deliberate and premeditated malice. In this case the malice might be inferred from the use of a deadly weapon if there was anything to show that it was done purposely and with deliberation.

For aught that appears the deceased may have been killed by some one purely accidentally and without any purpose whatever to injure him or any one else, in which case it would have been murder in either degree. Or it may have been done by some one while engaged in the shooting of wild game, but without "due caution and circumspection," in which case it might have been involuntarily manslaughter. In this case we think the court erred in not leaving the degree of guilt to the determination of the jury as well as the guilt itself. The judgment of the court below is reversed and the cause remanded for a new trial.

E. B. DEAN & CO. et al., Appellants, v. L. LAWHAM et al., Respondents.

CONTEMPORANEOUS AGREEMENTS.—Two contemporaneous written agreements, between the same parties and concerning the same subject-matter, are to be construed as one contract.

STANDING TIMBER—POSSESSION AFTER SALE.—Where the owner of standing timber sells it, but by the terms of the contract of sale, he is to cut the timber into saw-logs and deliver them to the vendee at his mill, the possession of the property remains in the vendor after the sale.

PLEDGE, BY ONE IN POSSESSION.—The lawful possessor of personal property has a right to pledge it to another who has done work upon

it to secure payment for his services, and the pledgee can hold the same until his claim is satisfied.

IDEM—DELIVERY, TO WHOM MADE.—The bailee of goods, held in pledge, is bound to deliver them back to the person from whom he recovered them when his claim is satisfied.

Per MR. JUSTICE BOISE, dissenting:

CONTEMPORANEOUS AGREEMENTS—ONE CONTRACT, WHEN.—Two contemporaneous agreements between the same parties and concerning the same subject-matter are to be taken together and construed as one contract only so far as the last contract refers to the first, and by its terms modifies it, or when, either from the writings themselves or from extrinsic evidence, it appears that in fact the two agreements are parts of one transaction.

LIEN, CAN ONLY BE GIVEN BY OWNER.—The general rule is that the right of lien must be given by one having the right of property. The bailee of property may employ workmen to labor upon the same, but he can not make the bailor responsible for his contracts with such workmen.

JUDGMENT—AMOUNT OF.—Where the bailee of personal property having a lien thereon is adjudged to have a return of the property, or an alternative money judgment in case a return can not be had, such alternative judgment should only be for the amount of his lien.

APPEAL from Coos County.

Strahan & Burnett and S. H. Hazard, for appellants.

W. W. Thayer, for respondents.

By the Court, KELLY, C. J.:

This was an action for the recovery of personal property brought by the appellants against the respondents, for the possession of nine hundred and twelve fir logs of the value of three thousand seven hundred dollars, in which the appellants, who were the plaintiffs below, claimed that they were lawfully possessed of the same.

This was denied by the defendants, who claimed that they were lawfully possessed of the property and entitled to its return.

The case was tried by the court by consent of the parties without a jury, and the following findings of fact were made: That the timber from which the logs in dispute were cut and manufactured, originally was the property of one Charles Horner, who sold it to one James Whybock, as it grew upon

his land; Whybock having the right to remove it within two years from January 6, 1876.

That thereafter, the said James Whybock, executed, and delivered to the appellants the following writing:

"Know all men by these presents, that I, James Whybock, of Coos county, Oregon, for and in consideration of the payment and terms hereinafter mentioned, have bargained and sold, and by these presents do sell and convey unto E. B. Dean & Co., all the timber formerly owned by Charles Horner, and purchased by me from said Charles Horner on the eighth day of December, 1875. This sale is made for and in consideration of fifty cents per thousand feet of logs, cut and manufactured from said timber; said sum to be placed to my credit at the time of delivery of said logs at said mill; provided, and this conveyance is upon the condition that said E. B. Dean & Co. shall cut and remove said timber within two years from this date; to have and to hold the said property unto said E. B. Dean & Co. and assigns forever.

"In testimony whereof, etc."

That thereafter, upon the same day, the same parties entered into the following agreement:

"This agreement, made this sixth day of January, A. D. 1876, by and between James Whybock, of the first part, and E. B. Dean & Co., of the second part, witnesseth: That said party of the first part, for and in consideration of the terms herein written, agreed to cut and manufacture into saw-logs and deliver to the party of the second part, at their mill in Marshfield, all the timber belonging to the said party of the first part on the lands of Charles Horner, in Coos county, Oregon, or as much of said timber as said party of the first part can reasonably cut and deliver within the period of two years from the date of this agreement. Said party of the second part hereby agrees to pay for the work and labor herein agreed to be performed by the party of the first part the sum of four dollars and fifty cents per thousand feet of logs, cut and delivered as aforesaid.

"The party of the second part further agree that they will furnish a reasonable amount of supplies and money

to enable said party of the first part to carry on the work aforesaid, the money and supplies advanced to be received by the party of the first part in part payment for such work.

"In witness whereof, etc."

That the logs described in the complaint were cut and manufactured by the said James Whybock from the timber described in the written agreements set forth; that the respondents herein were employed by the said James Whybock, as laborers, in cutting and putting in the water the said saw-logs, and did furnish their labor in cutting and putting in the water said logs; that there was due from Whybock for said services, and unpaid on the fifth day of October, 1877, the sum of five hundred and eighty-nine dollars and ninety-eight cents; that on said fifth day of October, A. D. 1877, Whybock delivered to the respondents the possession of said logs, to retain them as a pledge for the payment to them of said sum of five hundred and eighty-nine dollars and ninety-eight cents; that at the time the respondents performed said services, and at the time when they took possession of said logs, they had no knowledge or notice of the written agreements referred to, and in good faith believed that the timber from which they were cut was the property of Whybock.

As conclusions of law the court found: That as against the respondents the appellants were not the owners or entitled to the possession of said logs; that the respondents were entitled to the possession of them and were entitled to a judgment for the return to them of the logs or for the sum of three thousand seven hundred dollars, the value thereof, if a return could not be had, and judgment was entered accordingly. The errors assigned by appellants are substantially as follows:

1. That from the facts found by the court, the appellants were the owners and entitled to the possession of the logs; 2. That from the facts found, respondents were not entitled to the possession of the logs; 3. That from the facts found, if a return of the property could not be had, the judgment in favor of the respondents should have been for five hun-

dred and eighty-nine dollars and ninety-eight cents, and not for three thousand seven hundred dollars, the value of the logs.

The appellants claim that by the first written agreement, set forth in the findings of the court, dated January 6, 1876, James Whybock sold and delivered to them the growing timber, which he had purchased from Charles Horner, and out of which the logs in controversy were made, and that by virtue of such sale they received possession of the same. They further claim that such possession was not re-transferred to Whybock by the second agreement set forth in the findings of the court, and consequently he could not legally give possession to the respondents.

It is unnecessary for us to consider what would be the legal effect of the first agreement, standing by itself, as between the parties to it. The two contracts being contemporaneous, and relating to the same subject-matter, must be construed together as constituting but one agreement. (2 Par. on Con. 503; *Cornell v. Todd,* 2 Denio, 130; *Craig v. Wells,* 1 Kernan, 315; *Makepeace v. Harvard College,* 10 Pic. 302; *Sibley v. Holden,* Id. 250; Chitty on Contracts, 89, note 1.)

When the two instruments in writing, dated January 6, 1876, are thus construed as forming one contract, the agreement is substantially as follows: Whybock sold to E. B. Dean & Co. all the timber which he purchased from Horner on the eighth day of December, 1875, in consideration of fifty cents per thousand feet of logs, to be cut and manufactured from the timber. Whybock, however, was to cut and manufacture the timber into saw-logs, and deliver them to E. B. Dean & Co. at their mill. He was to cut all the timber, or so much of it as he could reasonably cut and deliver within two years from the date of the agreement. E. B. Dean & Co. agreed to pay him four dollars and fifty cents per thousand feet of logs cut and delivered at their mill in Marshfield.

The possession of the timber, after these agreements were made, was clearly in Whybock. He was not, as claimed by appellant's counsel, in the custody of it merely as a servant

or hired man, employed by them to cut the timber into saw-logs. He could not be discharged by them at will, as a hired man could. He had the sole right to cut all the timber on the land; or so much as he was able to cut within two years. No other person could be employed by appellants to do the work, so long as Whybock fulfilled his agreement with them. He was by the terms of the contract to deliver the logs at their mill and to be paid four dollars and fifty cents per thousand feet for all the logs he should deliver to them. Delivery of property by one person to another presupposes that the one delivering it has the possession. Delivery is defined to be the transmitting the possession of a thing from one person to another; and it only takes place in the sale of property, when nothing remains to be done by the seller as between him and the buyer.

Upon whom would the loss have fallen in case the logs had been destroyed before they were delivered by Whybock at E. B. Dean & Co.'s mill? Clearly upon him. (Story on Bailments, sec. 427, a.) And if upon him, then he was in possession of them.

Having the exclusive right to cut the timber into saw-logs, he lawfully could and did employ the respondents to do it for him; and for their labor in so doing they had a lien upon the property on which their labor was bestowed. The possession of the logs was given by Whybock to respondents, on October 5, 1877, to be retained by them as a pledge for the payment of five hundred and eighty-nine dollars and ninety-eight cents due for their services. Independent of any statutory regulation, they had a right to retain this possession until the lien was discharged by a payment of the money due for their labor.

But it is claimed by the appellants that the judgment of the court below was erroneous in this; that if the property could not be returned, they were required to pay three thousand seven hundred dollars, the value thereof, instead of five hundred and eighty-nine dollars and ninety-eight cents, the sum due to respondents. We hold that there was no error in this respect.

The respondents received the possession of the logs from

Whybock, and they had no right upon the payment of their lawful demand to surrender that possession to any person other than the one from whom they received it. A bailee is bound to deliver the goods back to the person by whom he has been intrusted with the custody of them. (Story on Bailments, sec. 450; *Lyle v. Barker*, 5 Binney, 457; *Pomeroy v. Smith*, 17 Pick. 86.)

A bailee is bound to protect the rights of his bailor, as well as his own. He can not lawfully deliver the goods intrusted to him to one who is a stranger to the transaction, and thereby defeat any rights or lien which the bailor may have in the property committed to him.

It is claimed by appellant that the cases of *Single v. Barnard*, 29 Wis. 463; and *Warner v. Hunt*, 30 Wis. 200, support the position assumed by them, that the respondents are only entitled to a return of the property, or the value thereof, in case a return can not be had, to the extent of five hundred and eighty-nine dollars and ninety-eight cents. We do not consider the cases analogous to the one before this court.

The former was an action of replevin to recover a quantity of logs, brought by those claiming to be the owners and entitled to the possession against the sheriff, who had seized the logs by virtue of an execution in favor of a lumberman who had a lien upon them. It was held that the defendant had a right to hold the lumber to the amount of the execution in his hands to satisfy the lumberman's lien. The case in the 30 Wis. was an action of replevin for recovery of a cow detained by a poundmaster. The plaintiff in the case claimed that he was the owner and lawfully entitled to the possession of the animal.

The defendant in his answer denied the allegations in the complaint and gave notice that he claimed a lien for two dollars and fifty cents as poundmaster. The jury found for the defendant and that he was entitled to the possession of the property and assessed the value at forty dollars. Upon this verdict there was judgment that the defendant have a return of the property, which had been delivered to the plaintiff, or if return could not be had, that the defendant recover

from the plaintiff the value thereof, assessed at forty dollars. This was the judgment in the court below, and was reversed by the supreme court, on the ground that the defendant had a special property in the cow of only two dollars and fifty cents, and ought not therefore to have a judgment for forty dollars. These cases have no analogy to the one under consideration. In both of them the contest was between the owners of the property sought to be recovered as plaintiffs and persons having a special property as defendants. In neither of them was there an intervening claim paramount to that of the plaintiff as in the case before us. If the claim and lien of Whybock were out of the way, then the Wisconsin cases relied on by appellant's counsel would be analogous to this one. Whybock had a right to the possession of the logs as against E. R. Dean & Co., until they should be delivered at their mill. He had this right when he pleaded them to the respondents, and it was neither destroyed nor lessened by giving them in pledge to his workmen. A bailee is bound not only to return the goods to the bailor when his demand is satisfied, but he is equally bound to defend the interests of the bailor in an action brought to recover the property by one not entitled to the possession of it. In the case of *Pomeroy v. Smith*, 17 Pick. 85, one Atkinson pledged certain goods to the plaintiff as collateral security for the payment of a debt due to him from Atkinson, and also for the indemnification of the plaintiff against certain liabilities incurred by him as surety for Atkinson. After the goods were delivered to the plaintiff, they were attached as the property of Atkinson, by the defendant, who was a constable, and taken from the possession of the plaintiff.

The defendant contended that if the plaintiff, upon the evidence, was entitled to a verdict, he should recover only such a sum in damages, as would discharge the debt due to him from Atkinson, and indemnify him against such liabilities. But the judge instructed the jury that if they should find a verdict for the plaintiff, he was entitled to recover damages to the full value of the goods so taken by defendant. The jury returned a verdict for the plaintiff and assessed damages in conformity with the instructions of the judge.

On appeal to the supreme court the judgment was affirmed. Shaw, C. J., delivering the opinion of the court said: "The judge ruled that the plaintiff was entitled to recover the value of the goods. The general rule is found on the consideration, that for all beyond the debt for which the goods are pledged, the pledgee is responsible to the pledgor."

So in the supreme court of Pennsylvania, it was held that a pawnee may recover the full value of goods, against a stranger, who takes them away, although they were pledged to him for less, being answerable to the pawnor for the excess. (*Lyle v. Barker*, 5 Binn. 457; Story on Bailments, sec. 352.)

The judgment is affirmed.

Mr. JUSTICE BOISE, dissenting:

The first instrument signed by James Whybock is a conveyance of the timber therein referred to, and had there been no other agreement made, the grantors, Dean & Co., would have had the right to at once commence cutting the timber and conveying it to their mill, where by the contract it was to be put to the credit of Whybock. It is not difficult to see why this clause was inserted in the contract. There must be some way of ascertaining the amount of the timber, and the most convenient place was at the mill where it could be measured, and an account taken by persons of experience in such business. It must have been the object of this agreement to secure this timber to Dean & Co. for the use of the mill. It is claimed that the second agreement modified this, and that the same are to be taken together and construed as one contract. So far as the last conrtract refers to the first, and by its terms modifies it, this is true, but no farther. This second writing is simply an agreement to cut this timber, and by its terms in no way modifies the contract of the sale of the timber, and does not refer to it in any manner, but it does say that said Whybock, who is to cut all the timber belonging to the said party (meaning Dean & Co.) on the lands of Charles Horner in Coos county, showing that the timber belonged to Dean & Co., which is an acknowledgment that Dean &

Co. owned the timber that had just been conveyed to them by the first instrument in question. If Dean & Co. had immediately after the execution and delivery to them of the first instrument by Whybock made a contract with a third person in terms like the second instrument now under consideration, I think Whybock could not have questioned their ownership of the timber. The first instrument had completely invested Dean & Co. with it; as much so as the sale of a field of corn by a written contract at fifty cents per bushel, the number of bushels to be ascertained when harvested, and in a condition to be measured.

This timber standing in the forest on the land was not in a condition to be measured so that the parties could determine the amount. Dean & Co. were to pay for it at fifty cents per thousand feet. The first contract, being in writing, was an executed contract so far as transferring the property was concerned, and put the grantee, Dean & Co., in possession of the timber; as much as the sale of a field of standing corn would put the purchaser in possession of it. So far as the sale of the timber was concerned, it was complete on the execution and delivery of the written agreement or bill of sale; the seller had nothing more to do to complete the sale. Dean & Co. were to cut the timber and ascertain the amount. There was as complete a delivery of the thing sold as its nature would permit. By this contract the timber was placed at the disposal of Dean & Co., and was so situated that Dean & Co. could begin at once to cut and remove it from the land, and this was a sufficient delivery in such a case.

But to return to the question whether these two contracts should be construed together as forming one contract, the rule laid down in the case of *Cornell v. Todd et al.*, 2 Denio, 130, which case is referred to and relied on as authority for construing the two writings before the court in this case as forming one agreement, is thus stated by Judge Bronson:

"Several deeds or other writings executed between the same parties at the same time, and relating to the same subject-matter, and so constituting parts of one transaction

should be read and construed together as forming parts of one agreement."

This is true, and it is not necessary that the instruments should refer to each other if in point of fact they are parts of a single transaction. But the learned judge in that case goes on to say, that "Until it appears that they are such, either from the writings themselves or by extrinsic evidence, the case is not brought within the rule." Now in this case there is no reference in either of these agreements to the other; nor are they shown by extrinsic evidence to relate to the same subject-matter. One is a bill of sale of a quantity of standing timber; the other is to manufacture that timber into saw logs, which are entirely distinct subjects, as much so as the sale of timber for a house and a contract to build the house. One is the sale of property, and the other is an agreement to work for certain hire. And further, I think these written agreements in their terms ignore the conclusion that they were to be parts of one transaction. For if it was the intention of the parties that Whybock was to furnish timber and deliver logs at the mill of Dean & Co., why did they not simply enter into an agreement that Whybock deliver to Dean & Co. all the logs on this land within two years at five dollars per thousand feet, to be paid for on delivery?

We must not suppose, without there is some reason, either apparent on the instruments or proven by the testimony, that these two instruments were made where one would have done better. We must give force and effect to both if we can. I think the fair import of these agreements is that Dean & Co., being the owners of a mill, and desiring to secure logs, bought this timber, and by the first agreement secured it to their use. Suppose they did, at the making of the first contract, intend that Whybock should have the contract to cut the timber and deliver it to them. They may, and probably did, judging from after developments, fear that he would not be able to deliver it; then, on his failure, they could have others perform this work which he was employed to do in the second contract. Such a construction will explain and give effect to both contracts, and

be in accordance with the prudent conduct of careful business men.

I will next consider the matter of the lien of L. Lawham *et al.* on the logs in question in this action. From the view I take of the rights of Dean & Co. to this timber, Whybock, by virtue of the second contract with Dean & Co., became as to them a bailee of work on the thing bailed, or, as it is defined by law writers, "the hire of work and service, or *locatio operis faciendi,* such as the hire of tailors to make clothes, or jewelers to set gems." (Story on Bailments, sec. 422).

He was to take the timber of Dean & Co. and manufacture it into saw-logs and deliver them at their mill. Whybock was not obliged to part with possession of the logs until he was paid for his labor; that is, he had a lien on them for such labor. (Story on Bailments, sec. 440.) But when this lien was discharged by Dean & Co. by paying him for his work, then he was bound to deliver the logs to them, they being the owners, subject to this lien. In this kind of cases, if the property be destroyed while the work is being performed on it, without the neglect of the bailee, the loss falls on the bailor. (Id. sec. 437.)

The bailee in these cases, though he may employ others to assist him in his labor, can not make the bailor responsible for his contracts with such workmen. For a bailee is an agent with special authority, and can not delegate his powers so as to raise a priority of contract between his principal and his employees, so that those who work on the thing bailed must look to the bailee for their pay. (Story on Bailments, sec. 440; *Monk Hollingsworth v. Phineas Dow,* 19 Pick. 228.)

This last case cited is in principle identical with the one under consideration. In that case it appeared that Hollingsworth had purchased a machine in an unfinished state, and entered into a contract with one Nesbit, by which it was stipulated that Nesbit should finish the machine for nine hundred and fifty dollars, of which sum two hundred dollars were to be paid when the machine was finished and de-

livered, and the residue in six months afterwards, and that the machine should be completed in ten weeks from the date of the contract. Nesbit, without the consent or knowledge of Hollingsworth, agreed with Dow to finish the machine. Dow took the machine to his shop for this purpose, and did most of the work on the machine.

It appears that during the progress of the work at Dow's shop, Hollingsworth, or his agent, came frequently to look at the machine, and occasionally spoke to Dow respecting it. It was held in that case that Dow had no lien on the machine. Nesbit being the bailee of Hollingsworth, under a contract to finish the machine, could not sub-let the contract so as to bind Hollingsworth. He had no authority to contract for Hollingsworth.

In that case Chief Justice Shaw said: "A lien is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner or by some person by him authorized. In cases of innkeepers and a few others who are by law bound to give credit for the keeping of horses, it may well be held that the person putting up the horse at the innkeeper's stable shall be deemed the agent of the owner, whoever he is, so as to provide for his sustenance, and therefore the innkeeper may have a lien, though the horse be left by a person other than the owner. But the general rule is as above stated—that the right of lien must be given by one having the right of property; and I think there is no doubt that such is the rule unless it has been changed by our statute. I will now consider that subject. Section 13, page 655 of the code, provides that any person who shall make, alter, repair, or bestow labor on any article of personal property, at the request of the owner or lawful possessor, shall have a lien on such property. That statute would give a lien in a case like this; but it was repealed by a statute approved October 28, 1874.

Section 17 of this act provides that: Any mechanic, artisan or merchant, who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property, shall have a lien * * * (Laws of 1874, p. 111.)

This is the only provision of the statute on this subject, and the lien of the respondents in this case is not provided for, and I think does not exist under the statute or at common law.

The court below found that as against the defendants the plaintiffs, Dean & Co., were not the owners or entitled to the possession of the property. In this I think the court was wrong, for I think the proper construction of the written instrument purporting to convey this timber to Dean & Co. shows them to be the legal owners of the property, and I think also they were entitled to the possession as against the respondents.

But if they were not entitled to the possession as against the respondents, and had the finding of the court been correct, that the respondents had a valid lien on these logs to the amount of five hundred and eighty-nine dollars and ninety-eight cents, that was the amount and value of their special property in the logs.

In this case, where the court found and had before it, as on a special verdict, the value of the respondents' interest in the property, they were only entitled to a judgment for the value of that interest. I think in case where in an action by the general owner the defendant is adjudged in lawful possession by virtue of a lien and is adjudged to return the property, his alternative judgment for money in case return can not be had should be the amount of his lien; for all the value of the property above that belongs to the general owner, and the amount of the lien is the value of his special property, and no man is entitled to a judgment for more than belongs to him. (Story on Bailments, sec. 352; 7 Cowen, 670; *Warner v. Hunt*, 30 Wis. 200; 29 Id. 463.)

W. W. PARKER and JAMES W. WELCH, Executors, et al., Respondents, v. JAMES TAYLOR, Appellant.

INJUNCTION—TRESPASS, WHEN WRIT WILL ISSUE TO PREVENT.—Where a shore-owner has the right, under the laws of the state, to erect wharves on the water-front adjacent to his land, an injunction will issue to restrain the erection of obstruction to such wharves.

ESTOPPEL.—A party is not precluded from asserting his title by the fact that he has been instrumental in causing a street improvement that imposed an expense upon another by reason of such others claims to the premises, nor by the fact that such other has paid the cost of an improvement chargeable upon the premises in controversy, with the full knowledge of and without objection from the party against whom the estoppel is sought to be pleaded. In such case it should appear that the acts of one were relied upon by the other in what he did.

NAVIGABLE STREAM—BOUNDARY OF LAND ADJACENT.—Lands patented by the United States extend to the meandered line of the stream, which is the line of ordinary high water.

IDEM—TIDE LANDS—WHARVES.—The land lying between high and low water belongs to the state and can be sold by it. The state has power to provide for and regulate wharves, which it has done by act of the legislature. (Mis. Laws, 787.) A shore-owner acting under the authority conferred by the statute, and conforming to the restrictions imposed, may construct wharves from his land into navigable water so far as is necessary or convenient to accommodate shipping, provided he does not impede navigation.

SHORE-OWNER—SALE BY, DOES NOT TRANSFER RIPARIAN RIGHTS.—W., being a shore-owner of lots 5 and 6, made application to purchase from the state the adjacent tide lands. While such application was pending he sold one hundred and twenty-five feet of said lots. The one hundred and twenty-five feet included all of said lots above high water, and extended over a part of the tide land applied for to a street which was in greater part laid out over such tide land: *Held*, that by such sale the purchasers did not acquire any rights beyond the one hundred and twenty-five feet. The after-acquired title of W. in so much of the tide lands as were included within the one hundred and twenty-five feet vested in them and nothing more. The land over which the street is located, and the riparian rights adjacent thereto, remained in W., subject to the right of passage by the public over the street.

APPEAL from Clatsop County.

In 1860, James Welch, deceased, purchased from John M. Shively and wife, lots 5 and 6 in block 134, and lot 1 in block 135, in the town of Astoria. The lots so purchased were a part of the donation land claim of Shively and wife. A portion of the lots on the south were above high water. They extended on the north into the Columbia river below low-water mark to the ships channel.

The state claiming to own the land between high and low water, Welch afterwards, in 1876, purchased the state's title to such portions of these lots and took its deed therefor.

While the application to purchase from the state was pending, Welch sold one hundred and twenty-five feet to Koefed, Cone and Reynolds off of the south part of lots 5 and 6. This included all of said lots above and below high water to a street called Water street.

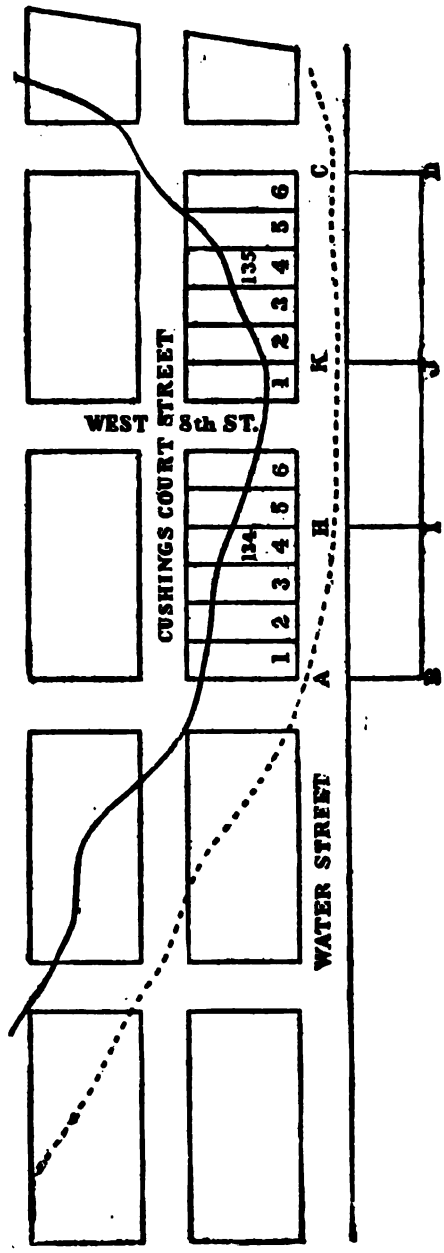
In 1871, Shively and wife executed their deed to Taylor, the appellant, for certain lots which he, Shively, had laid out below low-water mark, and in front of the lots purchased by Welch in 1860, Taylor claiming under this purchase, and Cone and Reynolds claiming riparian rights under their purchase of lots 5 and 6 from Welch, proceeded to improve and drive piles in front of lots 5 and 6 in block 134, and lot 1 in block 135. Welch thereupon brought this suit to prevent the continuance of the work.

In his answer, Taylor set up the deed of Shively and wife to himself of April, 1871; his actual and open possession thereof since said date; a permit by the common council of Astoria, to make the improvement in question and that the plaintiff ought to be estopped to deny his right, for the reason that Welch with others petitioned for the improvement of said Water street, knowing that a large part of the cost of the improvement would fall upon him, Taylor, by reason of his ownership of the property in dispute, and that said street was so improved and such cost was paid by him, Taylor, with the knowledge of Welch and without claim of ownership by him.

These portions of the answer were struck out on motion. The court decreed the relief prayed for and Taylor appealed.

Pending the suit Welch died, and James Welch, one of the heirs of the deceased, and W. W. Parker, executors, were substituted as parties plaintiff.

The subjoined plat represents the location of the lots and premises referred to. The lettes A. B. C. D. represent the tract below low water purchased by Taylor from Shively. The letters H. I. J. K. represent the premises in dispute, below low-water mark and fronting lots 5 and 6 in block 134 and lot 1 in block 135. The two irregular lines represent the high and low-water marks on the Columbia river. Welch


WEST
CUSHINGS COURT STREET
8th ST.
WATER STREET
135
134
1
2
3
4
5
6
A
H
K
C

claims the premises in dispute by reason of his ownership of the adjacent shore and tide lands.

W. D. Hare, F. J. Taylor, and Hill, Durham & Thompson, for appellant:

The allegations in the complaint are sufficient to entitle the plaintiffs to recover in ejectment, or forcible entry, either of which furnishes the plaintiffs a full and complete remedy at law. This case is not taken out of the rule by the allegation that defendant's entry was under some claim of right, because, in this state, the legal title as well as the right of possession may be determined in ejectment, and in such action no claim of the defendant can prevail against the legal title which the plaitiffs say they have. (*Tomlinson et al. v. Rubio et al.,* 16 Cal. 203.)

The complaint shows that the premises in controversy are below ordinary low water of the Columbia river. The plaintiffs could obtain no legal title to lands so situated, nor can they maintain a suit to quiet that which they never had by any process acquired. The fee of such lands belongs to the state, and have never in this state been granted to private parties, but subject to the public rights of navigation the state may permit the erection of private wharves thereon, and the person who once righfully obtains possession of such lands may hold it against all the world, except the state. (*Coryell et al. v. Cain,* 16 Cal. 567; *Pollard's Lessee v. Hagan et al.,* 3 How. 212.)

The appellant went into actual possession, as the testimony shows, in 1871, under his deed from Shively and wife, which deed, though it did not convey the fee, did at least, convey to appellant the right of possession, theretofore had and exercised by Shively. And the appellant, in the act of entering upon and holding the actual possession, as he did, was not and is not guilty of trespass, and the respondents have no standing either in equity or at law to question the appellant's right of possession. (*People v. Davidson,* 30 Cal. 379; *Attorney-General v. R. R. Co.,* 2 Green Ch. 136.)

In *The People v. Davidson* the court uses this language: "The clear result is that if a wharf built or threatened to

be built upon tide lands or upon lands below the line of low water, without public authority, is, or would be, injurious to commerce and navigation, and proceedings at law would not be adequate to the emergency, the erection may be abated or enjoined in equity; but where the wharf is not or would not be attended with any such result, the equitable jurisdiction fails, and the people are left to their legal remedies."

In this suit it is alleged that the part of the river in controversy is not now used for purposes of navigation, and that fact is conceded by all parties; nor do the respondents anywhere claim that the proposed wharf of the appellant is injurious to commerce or navigation, or that it is a nuisance. It follows that the remedy, if any, is at law. (*Stark v. Starr*, 6 Wall. 402.)

The state has not the power to part with the legal title to the lands in question, for they are the bed of the navigable stream, which is a public highway, held by the state in trust for the common benefit of the public. However this may be, it is true that the state has not parted with its title, and it follows that the respondents are not the owners of the legal title. The respondents can not maintain any rights claimed by them as riparian proprietors. The rule applicable to fresh water rivers has no application to tide waters where the tide ebbs and flows. (*Jones v. Soulard*, 24 How. 41.)

The case of *Jones v. Soulard* was ejectment for the recovery of land claimed as an accretion by the shore-owner. The land was on the shore of the Mississippi river, at St. Louis, where the river is navigable, but is not affected by the ebb and flow of the tides; and in deciding the case the court said: "The doctrine that on rivers where the tide ebbs and flows grants of land are bounded by ordinary high-water mark has no application to this case, nor does the size of the river alter the rule."

The owner of lands on tide waters have no rights as riparion proprietors extending beyond the line of ordinary high water. (*Dana v. Jackson St. Wharf Co.*, 31 Cal. 118; *Stevens v. P. & N. R. R. Co.* (3 Am. 269), 34 N. J. 532;

People v. N. Y. Ferry Co. 68 N. Y. 71; *Gould v. Hudson R. R. Co.*, 6 Id. 522.)

There is another rule which we invoke, and which, applied to this case, will defeat all claim based on the idea of riparian proprietorship. Such right can not be extended beyond the street or public highway in front of the upland. (*The Schools v. Risley*, 10 Wall. 91.) It nowhere appears and is not seriously contended that respondents have or ever had any possession of the land, and for that reason this suit can not be maintained. (*Stark v. Starr*, 6 Wall. 402.) The city of Astoria had authority under its charter to grant the license to appellant. (Laws of 1872, p. 194.)

All that part of the answer alleging facts which it was claimed ought to estop the respondents was stricken out, and the testimony upon this subject was not fully taken, but there is sufficient in the testimony to indicate that this is not a case where strained constructions of law or doubtful inferences of fact ought to be made.

The acquiescence of James Welch, deceased, in all that was done about the premises, the understanding between him and the appellant about the improvement of Water street, the payment by appellant of large sums of money to Shively for the property, with the full knowledge and acquiescence of Welch, and the expenditure of one thousand eight hundred dollars in improving said street upon the petition of Welch, all show good faith upon the part of appellant, and throw about this claim of respondents such an air of immorality that equity will not now sustain their claim.

Dolph, Bronaugh, Dolph & Simon and W. W. Thayer, for respondents:

A grant of land adjacent to a navigable stream extends only to meander lines of ordinary high water. (*Hinman v. Warren*, 6 Or. 408; *R. R. Co. v. Schurmier*, 7 Wall. 272; *Kraust v. Crawford*, 18 Iowa, 549.)

The owner of the shore, by virtue of such ownership, has a right to construct wharves, bridges, piers and landing places below low-water mark, if he conforms to the regula-

tions of the state, and does not obstruct the paramount right of navigation. (*Dalton v. Strong*, 1 Black. 23; *Railroad Co. v. Schurmier*, 7 Wall. 272; *Yates v. Milwaukie*, 10 Wall. 497; *Grant v. Davenport*, 18 Iowa, 179; Angell on Tide Waters, 171.)

This right may be transferred without the shore, or may be reserved upon sale of the shore. (*Goodsell v. Lawson*, 42 Md. 348; *Emuns v. Turnbull*, 2 Johns. 322.)

Tide lands belong to the state by virtue of its sovereignty, and do not pass by United States patent. (*Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 Id. 477, 478; *Den v. Jersey Company*, 15 Id. 426; *Ward v. Mulford*, 32 Cal. 365; *People v. Davidson*, 30 Id. 379; *Barney v. Keokuk*, 4 Otto, 338; *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Dubuque R. R. Co.*, 32 Id. 106.)

Even if there is a street where the roadway has been built and that less than the usual width of a street above low-water mark, Welch would retain the fee and the riparian rights appurtenant. (*Banks v. Ogden*, 2 Wall. 57.) Plaintiffs are entitled to the remedy of injunction. (*Georgetown v. Alex. Canal Co.*, 12 Pet. 91; *Hougham v. Honhey*, 42 Iowa, 364.)

By the Court, BOISE, J.:

It is claimed that the court erred in overruling the demurrer to the amended complaint. As the appellants did not stand by their demurrer, they waived all the causes thereof, except that the complaint does not state facts sufficient to constitute a cause of suit. The questions presented in the complaint are matters within the jurisdiction of a court of equity. The complaint shows that the respondent is the owner of land immediately above high water, and of the adjoining tide lands, and claims that he has a right to build a wharf or wharves on these lands, and to extend them beyond low water on the lands in controversy, and that the appellant is building obstructions that will prevent him from thus extending his wharf or wharves beyond low water, and that he threatens to continue and maintain these obstructions, and continue to interfere with respondent's use of this

property, and asks for an injunction to restrain appellant from the continuance of these unlawful acts. Welch, being the owner of the shore, has by the law of the state a right to build a wharf or wharves on the land in question and reclaim it from the water. This he can not do unless Taylor is restrained from placing obstructions in the way of his contemplated improvement. It is the threatened interference with the future enjoyment of Welch's franchise that he complains of and asks to be protected against by injunction. This an action of trespass or for a nuisance could not reach, and the proper remedy is by injunction.

The learned author, in 2 Story's Equity Jurisprudence, says: "Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If indeed courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country." We think, therefore, that the court has jurisdiction of the subject-matter of this suit, and that the complaint makes a sufficient case for its exercise.

It is also claimed that the court below erred in striking out certain parts of the appellant's answer, and particularly that part thereof which sets forth an estoppel, which plea is set forth in the statement of the case. The question as to the error of the court in allowing the motion to strike out this part of the answer is rendered immaterial in the consideration of the case in this court, for the reason that the evidence in the case shows that the appellant, James Taylor, was not induced to make the improvements on the premises in question, on Water street, from his reliance on the representations of Welch, which are set out in the plea of estoppel, and he was not therefore injured by the ruling of the court in that regard. If this court were to sustain the plea of estoppel, and send the case back to the circuit court, that an issue might be made thereon, the evidence now in the case would defeat the plea, for it is evident from all the facts that Taylor was aware when he made these improve-

ments that Welch claimed the right of wharfage on the property in controversy.

We shall not therefore at this time discuss the merits of this plea of estoppel as to its form, deeming it immaterial in view of the evidence now in the case taken since the ruling of the court on the merits of this plea. As to the other parts of the answer stricken out, we do not deem them material in settling the rights of the parties in this suit. As to that part of said answer which alleges possession in Taylor for twenty years, it can not be a defense in this case, for the reason that to make it available we would have to hold that the statute of limitations runs against the state, for the state did not part with its title until 1876. We will now proceed to consider this case on the merits.

We will first consider the facts of the case, first those admitted, and second, those we deem established by the evidence. It is admitted that James Welch in his life-time was the owner in fee of lot 1 in block 135, and lots 5 and 6 in block 134, in the city of Astoria, as early as the year 1860, or so much thereof as lies above the line of ordinary high water of the Columbia river, and that the line of ordinary high water of the Columbia river is about sixty-five feet north of the south boundary line of said lots. The evidence establishes the following facts: That about September, 1875, James Welch made an application to the proper authorities of the state to purchase the tide lands in front of these lots, and on the nineteenth day of August, 1876, received a deed from the state for the tide lands in front of and on lots 5 and 6 in block 134, and on the eighteenth day of September, 1876, received a deed from the state for said land on and in front of lot 1 in block 135. Through these deeds and his said admitted title from Shively Welch derived his title to these lands in controversy, which are now claimed by his administrator and heirs. It is also admitted that John Shively and wife were the owners by patent from the United States of these lands above high water, and that Welch obtained his title to the said lots from said patentees, and that said Shively laid out the city of Astoria, in conjunction with Welch, who claimed to own

said town lots in conjunction with Shively. Shively and Welch divided the town property between them, Shively obtaining the patent and deeding to Welch his half of the lots and blocks.

After the town had been laid out, including all the land above high water, and in the part of the plat in question, extending beyond the line of ordinary high water, Shively laid out some lots below ordinary low water, including the land now in controversy, and claimed to own them. He afterwards deeded to Taylor the property in dispute, and it is through this deed from Shively that Taylor derives his title, so far as he has a title by deed. Taylor took possession under his deed, and erected some structures on piles on the premises, and claims that this property being beyond low water, is not the subject of purchase from the state, or of ownership by the owner of the tide lands and shore adjoining, and that if Welch did get the tide lands and adjoining land above high water, he is not thereby entitled to this property lying between the said tide lands and the ship channel of the Columbia river. To determine this question involves the consideration of certain legal propositions which we will now proceed to consider.

1. The patent extended to the meander line of the Columbia river, which was the line of ordinary high water. (*Hinman v. Warren*, 6 Or. 408; 7 Wall. 274.)

The tide lands lying between high and low water belong to the state, and can be sold by it. The state has also the power to provide for and regulate wharves, which it has done by act of the state legislature. It is provided: "That the owner of any land in this state lying on any navigable stream or other water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into the stream or other water beyond low-water mark, so far as may be necessary and convenient for the use and accommodation of any ship or other boats or vessels that may navigate such stream or other water." It is also further provided: "That the corporate authorities of the town wherein such wharf or wharves is proposed to be

constructed, shall have the power to regulate the privilege or franchise so granted." (Mis. Laws, 787.) Under this provision of the statute, any person within an incorporated town in this state may build and maintain a wharf from his land at high water into navigable water, so far as is necessary or convenient to accommodate shipping, if he conforms to the legal restrictions imposed on him by the authorities of the town and does not impede navigation. Such structures are erected in all commercial towns, and have been recognized as legal structures in all the states. (37 Conn. 387; 18 Iowa, 178; Angell on Tide Waters, 171, 234; 7 Wall. 272.) This right of wharfage is a franchise appurtenant to the riparian owner, and if any person builds a structure which interferes with it, by intervening between the shore and the deep water where ships can come and ride in safety, the owner of the shore may have such structures removed so that his wharf can be extended to a place convenient for the uses of commerce. If these views as to the rights of riparian owners are correct, it follows that if Welch was the owner of the shore, he had the exclusive right to wharf out to the ship channel. We will now return to the consideration of his riparian ownership at the time this suit was brought.

In September, 1875, when he made his application to purchase the tide lands in front of and on these lots, he was the owner of so much of the lots as were on the Shively claim, the north line of which is agreed to be about sixty-five feet from the south line of the lots, making the lots lie sixty-five feet on the Shively claim south of high water, and sixty feet on the tide land north of the line of high water. While this application was pending, Welch sold one hundred and twenty-five feet of lots 5 and 6 in block 134, to other parties. This sale conveyed to his grantees all the land on these lots above high water, and a part of the tide land which he afterwards got by his deed from the state, in front of and on said lots 5 and 6. It is claimed that when he sold the land immediately above high water, he then ceased to be a riparian owner, and that transfer rested in his grantees all the tide lands on and in front of these lots. As has been before stated, the patent from the United

States conferred on the patentee no right to the tide lands lying between high and low water. These were the property of the state and absolutely at its disposal. Its deed gives to them the same fee-simple title as the patent from the United States gave to the land above high tide.

Welch having a deed from the states holds all the land covered by the deed unless he has conveyed it by deed to some other person. Welch conveyed to Koefed, Cone and Reynolds, one hundred and twenty-five feet off the south ends of lots 5 and 6 in block 134. This would be all the land as far north as what is called Water street, and it is claimed that this street being a highway is vested in the public and the land conveyed by the deed from the state does not reach north of it. So far as this street is concerned it makes no difference whether it is a legal highway or not. If it was established by the city authorities while the land belonged to the state, the state was not thereby divested of its title in the soil. The street was only an easement on the land, the fee remaining in the owner. Such is the common law rule which has never been abrogated.

Welch, on purchasing land from the state over which a legal highway was located, would take the land subject to the right of passage by the public. He would have a right to extend his wharf out on a level with the elevated street, and the street would not interfere with his wharf, or his wharf with the free passage in the street. (*Ranks v. Ogden,* 2 Wall. 57.)

Land situated as this is, covered with shoal water may, under proper regulations by the state and municipal authorities, be reclaimed from the sea by filling in or by driving piles and building on them, and becomes private property and the subject of sale the same as any other property. (*Lockwood v. N. Y. and New Haven R. R.* 37 Conn. 387.) And as this state has given such mud flats to the riparian owner as a franchise, he alone may reclaim the same, under such regulations as the state has or shall prescribe. We think, therefore, that Welch was the owner of that part of the tide land lying north of lots 5 and 6 in block 134.

As to lot 1 in block 135, no question is made but what Welch owned it and all the tide land on and in front of it, but it is claimed that he had sold the right of wharfing which appertains to lot 1. The testimony shows that at the time of the bringing of this suit the title was in Welch; that a deed was made to the Parkers about the time the suit was commenced which was delivered after its commencement, and that a reconveyance was made before the suit was determined in the circuit court. W. W. Parker, the only witness on that subject, says that it was agreed between Welch and the grantees in this deed that Welch should clear the property of all claims. The deed was left in his possession to deliver at the proper time. It would seem then that if Welch was to prosecute this suit in his own name as the owner of the land to clear it of the appellant's claim, that the deed ought not to have been delivered until the suit was determined, and as it was improperly delivered and the land reconveyed, it did not operate to abate this suit. As the title was in the heirs when the final issues were made up in the case this conveyance should not embarrass the determination of the present rights of the parties to this property.

The evidence in this case shows that respondents are the owners of the property in question, and that the appellant, James Taylor, is interfering with and threatens to interfere with their enjoyment and use of it and that the injunction issued by the circuit court should be made perpetual.

VINCENT WATSON, Appellant, v. WILLIAM J. SMITH et al., Respondent.

SPECIFIC PERFORMANCE—DEED AND CONSIDERATION OF SUPPORT.—Where a father conveys to his daughter and her husband a tract of land, and in the deed names the consideration as five hundred dollars, where in fact no consideration was paid, but the real consideration was an agreement that his daughter and her husband should live with the father on the land, and support him and his wife in comfort during their lives. A court of equity will compel the performance of such agreement to support the father and mother, and charge the same on the land so granted.

DECREE SET ASIDE, WHEN—MENTAL WEAKNESS.—Where a decree has been entered, by consent, against one who did not on account of weakness of mind from old age, understand its effect, a court of equity will open it to protect the rights of such aged person.

APPEAL from Linn County. The facts are stated in the opinion.

F. A. Chenoweth, for appellant.

Strahan & Burnett and L. Flinn, for respondents.

By the Court, BOISE, J.:

The principal facts in this case are: That in 1863 Vincent Watson, the plaintiff, and his wife, made a deed to William J. Smith, and his wife, Minerva J. Smith, and their children, to two hundred and sixty-one acres of land, situate in Linn county. The nominal consideration of this deed is four hundred dollars. But the real consideration was that said Minerva was the daughter of the plaintiff, and he and his wife desired that she and her husband should live with and take care of and provide for them in their old age. And the evidence clearly shows that such was the understanding and agreement of the parties at the time the deed was executed. Vincent Watson and his wife, and Smith and his wife, continued to live together for a time after the deed was made, but not to exceed one year, when some questions arose about the validity of this deed, and the parties to it believed it not to be operative to convey the land to the grantees, and Vincent Watson and William J. Smith went to the record of deeds, where this deed was recorded, and tried to cancel the same by causing to be written on the record the following words:

"State of Oregon, County of Linn, December 17, 1863.

"This deed is stricken from the record, being incorrect. This is done by consent of and at the request of the parties herein.

his
"VINCENT X WATSON,
mark
"WILLIAM J. SMITH.
"MINERVA J. SMITH."

Minerva J. Smith swears that she did not write her name to these words or cause it to be done, and there is a conflict in the evidence on this point. The evidence tends to show that the reason for putting this on the record was that the deed was thought to be inoperative from informality in its execution. Soon after this, Smith and wife moved away from the place, and remained away until about 1875. We think the weight of the testimony shows that during this time, or up to a short time before 1875, Smith and wife supposed this deed was void, and gave them no title. Vincent Watson continued to occupy the place during all this time, and did not request or manifest any desire to have Smith and wife return to live with him, and his expressions would indicate that he was satisfied to have them stay away. He treated the land as his, and supposed it was; and deeded it to his son, who has since died, and who left a will devising this land to his relatives. It seems from the testimony, that Smith, about 1875, became advised that this deed was a good one, and that the attempted cancellation by Watson and himself did not affect or defeat its operation; and he began to claim the land and brought a suit in the circuit court of Linn county to quiet his title, praying therein to have this deed declared operative and to set aside the subsequent deed which had been made by Vincent Watson to his son, Vincent M. Watson, now deceased.

About the same time, Vincent Watson brought a suit against W. J. Smith and wife, Perry Watson et al., in the same court, to set aside this deed and for other purposes, for the reason that the consideration was his and his wife's support during life; that such contract, which was the consideration, had not been kept or performed by the grantees; and that the contract of support and the deed had been canceled by the parties thereto; and alleging that Smith and wife had left the place and refused to support and care for Vincent and his wife.

These suits were at issue and were compromised in June, 1876. A decree was entered in the suit by *Smith v. Watson*, declaring that Smith and wife were the owners in fee of this

land by virtue of the said deed, and foreclosing all rights of Vincent Watson in the land.

In the case of *Watson v. Smith and wife* a decree was entered dismissing the suit and reciting that the same was settled by the parties thereto. The stipulation on which these suits were compromised is on file, and provides that in consideration of the settlement of the suits and an agreement that Smith and his wife have a decree against Watson to quiet their title, said W. J. Smith and Perry Watson will furnish Vincent Watson and Mary Watson, his wife, all the necessaries and comforts of life, according to their station, so long as they or either of them shall live. And said W. J. Smith agrees that Vincent Watson, and wife may remain in possession of the residence on the place in question and one half acre of ground and the garden connected therewith, and that when they shall die, will give to them a decent and respectable burial.

This stipulation or agreement then proceeds as follows: "And in further consideration of the premises this provision is expressly made and agreed upon, 'that in the event that Wallace Cushman, the bondsman of said Vincent Watson for the payment of costs and disbursements of this suit, has the costs and dibursements to pay, then, and in that case, said Smith and Perry Watson agreed to repay the same to Cushman; which costs and disbursements are to be deducted out of the funds that would otherwise be applied for the necessaries and comforts of life for said Vincent and Mary Watson.'"

These suits were all settled at the cost of Vincent Watson, and decrees rendered for the same in each case. But the amount of these costs is not stated. So it seems that in case these decrees for costs were of a considerable amount, there would be no adequate provision for the support of Vincent Watson and wife. The stipulation and settlement seems to be very barren of any future prospects for good in their behalf. The evidence shows that nothing has been furnished them under it, and that they are now left in extreme old age to the charity of their neighbors.

This unfortunate matter seems to have been a fruitful

cause of litigation, as three suits growing out of it have been compromised, and the one now before us is the fourth. In those that have been compromised the merits of the controversy were not before the court or passed on and determined by it; so this is the only suit in which the case has been presented on its merits. We, therefore, feel less reluctance in opening the decrees than we would had the facts been fully considered in any of the former cases. We will now proceed to consider what passed by this deed, and the effect of the conduct of the parties thereto.

The deed, being good in form, conveyed the land by its terms to W. J. Smith, his wife and children and being invested with the title, they could only be deprived of it by their deed or by the decree of a competent court. The writing on the record did not revert the title in Vincent Watson or in any way affect it, and is in no way important, except as evidence tending to show the understanding of the parties as to the consideration or agreement by Smith and wife to maintain Vincent Watson and wife.

Under this deed Smith and wife could have maintained ejectment for the land against Vincent Watson, and Watson would have had no defense at law. Smith had no occasion to go ito a court of equity to quiet his title, which was perfect under his deed, and the decree rendered by the court, in the case of *Smith and wife v. Watson,* declaring that they are owners under this deed, has added nothing to their title, unless it be that part thereof which forever bars Vincent Watson from setting up any claim to this land, and with this exception the parties stood in the same relation to the land before as after the decrees.

We think that, considering the extreme old age of the plaintiff and his acknowledged weakness of mind when he assented to these decrees, which, we are satisfied from the weight of the evidence, he did consent to without understanding their purport or effect; it is the duty of the court to examine into the equities which plaintiff has alleged as a reason for setting aside or modifying this deed.

As we have before said, the consideration of this deed was the agreement on the part of Smih and wife to pro-

vide for and support the grantors. The misunderstanding that arose as to the validity of the deed and the rights of the parties under it which arose soon after it was executed, caused the parties to separate and left Vincent Watson in the possession of the premises, from which he was enabled to make a support for himself until he was deprived of the possession under the decree referred to. The parties lived separately by mutual consent, so far as the evidence shows; Watson enjoying the land, being content to look to it, and not to Smith, for a support. Nor does he seem to have deserved any aid from Smith. There was no refusal by Smith and wife to support Watson and wife, nor anything done which would properly be a willful violation of their contract, and which would warrant the court in declaring a cancellation of the deed. But we think that by the understanding of the parties, Vincent Watson was to be supported as a consideration for this conveyance, and that Smith and wife can not hold the land discharged of this trust or charge. Heretofore, and until after the decree in the suit that was compromised, they contributed nothing to his support, nor have they since. Prior to that time the land supported them; and as for the future, the evidence would indicate that unless this land is charged with their support, they will be left destitute. We think, therefore that Vincent Watson and wife should have the possession and enjoy the rents and profits of this land as long as either of them shall live. (*Yoakum v. Yoakum,* 78 Ill. 85.) And that the decrees of the court referred to in this suit should be so modified and set aside as not to in any manner interfere with or impair such life estate of Vincent and Mary Watson in the said premises. We think that nothing less than this would be just under the evidence in this case. Mr. Watson was the possessor of a large estate, which he has bestowed on his children, having given to his said daughter Minerva one hundred and six acres, besides the land in question, which land he seems to have reserved for support in old age; and as he earned it by his labor and economy, he ought not now to be deprived of it and cast on charity for support.

As to the case of R. S. Strahan, whose mortgage covers this land as well as the one hundred and six acres deeded to Minerva J., the evidence shows that he has been conversant with all these legal proceedings, and had full notice of all the equities of Mr. Watson in the premises.

The decree in his case will therefore be so modified that it shall be a lien only on the estate of Minerva J. and W. J. Smith in the land in controversy, and any sale under said decree in favor of said Strahan shall only transfer the title to said premises subject to the said life-estate of said Vincent and Minerva Watson.

THE BANK OF BRITISH COLUMBIA, Respondent, v. W. W. PAGE AND WIFE, Appellants.

EXECUTION SALE—SEPARATE LOTS, SOLD TOGETHER.—A sheriff selling real property on execution which consists of several town lots, can sell the same separately or together in his discretion. And unless there be an apparent abuse of this discretionary power, the court ought not to set aside the sale for that reason.

IDEM—LEVY, NOT NECESSARY ON FORECLOSURE.—Where an execution is issued upon a decree of foreclosure to sell mortgaged property, it is not necessary that the sheriff should make a levy upon the premises before proceeding to sell the same.

APPEAL from Multnomah County. The facts are stated in the opinion.

There was no appearance for appellant.

W. H. Effinger, for respondent.

By the Court, Kelly, C. J.:

This is an appeal from an order of the circuit court for Multnomah county, confirming the sale upon execution of four lots of ground in the city of Portland. The objections filed to the confirmation were: 1. That there is no evidence that legal notices of said sale were made as prescribed by law; 2. The lots were not sold separately as required by law.

The sheriff's return, indorsed on the execution, shows that

he posted printed notices of the time and place of sale for four weeks successively prior to the day of sale, in three public places in Multnomah county, particularly describing the property levied on; that he published the notice once a week for four weeks successively in the Weekly Bee, a weekly newspaper of general circulation published in Multnomah county, by all of which notices the said real estate, particularly described, was advertised to be sold at public auction on Friday, the nineteenth day of October, 1877, at ten o'clock A. M., at the court-house door in Multnomah county.

The return of the sheriff shows that in publishing the notices of the sale he fully complied with the requirements of law as set forth in section 288, p. 167 of the civil code.

The next objection urged against the confirmation is, that the lots were not sold separately, as required by law. The return shows that the sheriff first sold lot 6 in block 200; then lots 2 and 3, in the same block, and lastly, lot 7 in the same block.

The statute prescribing how real property shall be sold on execution, says: "When the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately, or otherwise as is likely to bring the highest price." This leaves the sale of real property, consisting of several known lots, entirely to the discretion of the sheriff as to whether he will sell it in separate parcels or not. And unless there be an apparent abuse of this discretionary power, the court ought not to set aside the sale for that reason alone. (*Griswold v. Stoughton*, 2 Or. 61.)

There is another assignment of error in the notice of appeal on a point not made in the court below: That no levy was made upon the said real property, before the sale thereof.

The sheriff in his return certifies that he "received the decree and order of sale on the seventh day of September, 1877, and on the —— day of ——, 18—, levied on the real estate mentioned and described in said decree and order of sale, which is as follows [here description of lots]. It is apparent from the return that the levy was made after the

right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed. But whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Section 2340 provides as follows: "All patents granted or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights, etc., acquired under the preceding section."

The first question is: Did Ralls acquire such a right? It is admitted that he became the owner of this ditch and water right and occupied and used it prior to 1866, and that he, or persons under him, used it for conveying water for mining purposes in 1866-7. The title to the land now owned by the appellant was then in the United States. The patent to it from the United States to the appellant reserves the water rights mentioned in section 2339, above quoted, so that Ralls would still be the owner and entitled to use this ditch unless he has lost such right by abandonment.

The second and important question in this case is: Has Ralls lost this right by abandonment? It is claimed by the appellant that the fact that he did not use it for a period of about ten years is sufficient evidence to prove an abandonment. The right being one belonging to real property, could not be lost by non-user alone, short of the period for the limitations of actions to recover real property, which is twenty years. (1 Nev. 188; 6 Cal. 510; 10 Id. 181.)

But such a right might be shown to have become extinguished by an act of abandonment showing that Ralls had intentionally abandoned the same. It is claimed by the appellant that the bill of sale made by Ralls of three mining claims to a Chinaman proves that he had abandoned all claim on this ditch.

The following is the bill of sale, as exhibited in the testimony of Ralls:

"Know all men by these presents that I do this day bargain and sell to Yack three mining claims, situated

on Kane creek, three hundred yards in length. Said claims are creek claims. Said claims are bounded on the northwest by Yacks and running south-east three hundred yards to a stake for which he pays the sum of ninety-five dollars. Said claims are entitled to all the water below the two upper ditches.

"October 4, 1864."

Nothing is said in this instrument about the ditch in question, and the evidence of Ralls shows that these claims were located along the creek above the head of the ditch in question, that is, the third ditch, and below the head of the second ditch and above its lower outlet. They were along by the side of the second ditch and it does not appear that they were worked by the water of either of the ditches. They are described as creek claims. These claims might have been worked, and any water that was not used up by them might have flowed on and entered the third ditch, the ditch in question, without interfering with their operations. It appears from the testimony that this ditch was used by persons, with the consent of Ralls, in 1866-7, which was after the date of this instrument, and we do not see from the testimony how the use of the ditch in question would affect the claims sold to Yack, for he had the water first, and this ditch could only receive the surplus water that ran on past their claims. We think this instrument, and the circumstances under which it was given, as proven, does not prove an abandonment by Ralls.

No abandonment is proven by the testimony in this case, when considered without reference to the statute of Oregon, which we will next consider in connection with the facts found in this case.

The statute referred to is section 7 of the act relating to mines and mining claims, page 685, and is as follows: "That ditches used for mining purposes and mining flumes permanently affixed to the soil, be and the same are hereby declared real estate during the time the same shall be used for that purpose, provided, that whenever any person, company or corporation being the owner, or proprietor of any ditch, flume or water right have or shall abandon the same,

and who shall for one year thereafter cease to exercise ownership over said water right, ditch, or flume; and every company, corporation, or person who shall remove from this state, with intent or purpose to change his or their residence, and shall remain absent one year without using or exercising ownership over such water right, ditch or flume, by a legally authorized agent, shall be deemed to have lost all title, claim or interest therein."

The word abandon means to desert or forsake. In maritime law it means to relinquish to underwriters all claim. It is "used of an insured person who gives up all claim to the property covered by the policy which may remain after the loss or damage by a peril insured against." There can be no abandonment without some action of the will and an intent to abandon. (1 Nev. 188.) Such intent may be inferred from the declarations and acts of the party charged with an abandonment, because it is only by the declarations and acts of persons that we infer their intention, and in this case, as before suggested, no abandonment has been proven. We must construe the word abandon in the statute according to its ordinary signification, and it would be necessary in order to show that Ralls had lost his right to the ditch in question, by this statute to show first that he had given up all claims to it, which would be an abandonment, and then that after such abandonment he had ceased for one year to exercise any acts of ownership over it. This is the natural and literal construction of the statute, and that such construction will accomplish the intention of the legislature, which seems to have been to make mining rights stable, and give to them the character of real property. In construing them and the evidence necessary to show that these rights have been acquired, transferred or lost, it will be necessary to apply the rules which govern similar transactions in relation to real property.

Entertaining these views of the law and evidence in this case, we have found no error in the conclusions and decree in the circuit court, and its decree will be affirmed, with costs.

FRANCIS E. BROOKS, Plaintiff and Appellant, v. HENRY E. ANKENY, C. M. CARTWRIGHT, B. F. HARDING, and J. M. PRITCHARD, Defendants and Respondents.

EQUITABLE ESTATE OF MARRIED WOMAN—POWER OF COURT IN DIVORCE PROCEEDINGS.—Where a married woman, in 1862, filed a petition to obtain a divorce from her husband under the act of January 17, 1854, and it appeared from facts set forth in the petition that she had an equitable estate in a portion of a tract of land for which her husband had the legal title, the court in granting a divorce had authority under that act to render a decree that the divorced husband should pay her a sum of money in lieu of her equitable interest, and at the same time divest her of such equitable estate and vest the same in the husband absolutely.

ESTOPPEL—ACCEPTANCE OF MONEY DECREED IN LIEU OF EQUITABLE INTEREST, EFFECT OF.—The court having rendered a decree in such divorce suit that the husband should pay to the wife a sum of money in lieu of her equitable estate in his land, which was paid to and accepted by her, she is thereby estopped from asserting her equitable title to the land; and the decree rendered in the divorce case is a bar to a suit afterwards brought for its recovery.

APPEAL from Marion County.

In 1856, and long prior thereto, the appellant was the wife of the respondent, Pritchard, who was a settler upon three hundred and twenty acres of land in Marion county under the act of congress known as the "donation law," which gives to the wife of a settler one half of the donation acquired. Pritchard, desiring to exchange this tract for another of like extent, it is alleged promised the appellant that if she would join in a deed of conveyance to the donation claim he would cause one hundred and sixty acres of the land taken in exchange to be conveyed to her. She did so join in the conveyance, and the exchange was effected. Pritchard did not cause any part of the lieu lands to be conveyed to the appellant, but took the entire parcel to his own name.

On the thirteenth of October, 1856, the appellant, learning that her husband had not complied with his promise, took from him a deed, executed by him, which attempted to convey to her one hundred and sixty acres of the exchange lands. This deed was duly recorded on November

4, 1856. In March, 1862, the appellant petitioned in the circuit court for Marion county for a divorce from Pritchard. In her petition she alleged that Pritchard had a fee-simple title to about seven hundred acres of land in Marion county. It is alleged that the said seven hundred acres includes the one hundred and sixty acres claimed by the appellant. On the twenty-fourth of the same month a decree was rendered granting the divorce prayed for, and directing that Pritchard should pay to the appellant money and other personal property aggregating about one thousand dollars, and that her interest in the real estate of Pritchard be divested. In December, 1862, Pritchard conveyed the one hundred and sixty acres in question to the respondent, Harding, from whom it passed by deed through Cartwright to Ankeny. This suit is brought to compel Ankeny to convey to appellant the legal title to the one hundred and sixty acres in question.

Strahan & Burnett, Powell & Flinn and Bonham & Ramsey, for appellant:

Pritchard purchased the land in controversy with the appellant's property, but took the deed thereto in his own name, without appellant's knowledge or consent. This created a resulting trust in Pritchard for appellant's use. (*Linville v. Smith*, 6 Or. 202; 6 Id. 231; 2 Washburn on Real Prop. 449, note 7; 1 Hilliard on Real Prop. 428.) Pritchard, as trustee of the appellant, could not dispose of said land, so as to deprive the plaintiff thereof, to any person having notice of appellant's interest. (Perry on Trusts, secs. 217, 828, 835; 2 Washburn on Real Prop. 450, 478, 482; 38 Mo. 546; 41 Ala. 262; 31 Cal. 17; 2 Duv. (Ky.) 655; 1 Story Eq. Jur., sec. 395.) The record of the deed from Packard to appellant was notice to all the world. (Perry on Trusts, sec. 223; Code, 518, sec. 26.) A decree divesting the appellant of her interest in the land of Pritchard could not have the effect of divesting her of her own land, and vesting the same in Pritchard. The decree of the court only operated to divest appellant of her contingent right of dower in the land of said Pritchard. In equity the *cestui que trust* is seised absolutely of the freehold, and the trust

estate is considered as equivalent to the legal ownership. (2 Wash. on Real Prop. 455.)

To constitute an estoppel by record in this case, it is necessary that the record should disclose that the appellant claimed certain facts in her petition in the former suit, which must be denied or contradicted to enable her to maintain this suit, and that such facts were necessary and material to the cause of action in the former suit, and that the issue raised thereby was tried on its merits. (Bigelow on Estoppel, 82 83, note 3; 109 Mass. 265; 44 N. Y. 1; 33 Id. 63; 35 Wis. 141; 31 Conn. 417; 3 Const. 511; 50 Pa. St. 17; 2 Leading Cas. in Eq., 620, 627, 671.)

There is nothing in the petition for divorce that is inconsistent with the appellant's present claim. We have been unable to find a case or an authority authorizing a court in a suit for divorce to hear and determine a contest as to the ownership of land between the parties thereto, or to determine their respective interests therein. If the court had attempted to pass upon plaintiff's right to the one hundred and sixty acres of land in controversy in the divorce suit, such action would have been without jurisdiction, and of course would not be binding by way of estoppel or otherwise. (Herman on Estoppel, sec. 201; Id., secs. 40, 95.)

But if the court could in such case hear and determine such contest; then, as the allegations in the petition must be taken as confessed for want of an answer, the conclusion is inevitable that the court considered the land in controversy as the absolute property of the appellant. (Washburn on Real Prop. 455.) Or else that the court considered the allegations insufficient for want of a proper or certain description as to the one hundred and sixty acres of land that the plaintiff claimed, and therefore disregarded the same; and in either case there could be no estoppel.

The grantees of Pritchard are bound by notice: 1. Of the deed of October 13, 1856; and, 2. By the claim of the appellant in the petition for divorce; and, 3. That the court must have regarded appellant as the owner of the land in rendering the decree for divorce, for that is the only equi-

table construction that can be put upon the decree. (1 Story Eq. Jur., sec. 64: Perry on Trusts, sec. 824.)

Where lands were given to the separate use of married women, and the husband in possession made conveyances in mortgage, it was held that the grantees or mortgagees were bound to notice the equitable construction of the will as a doctrine well understood, and the same rule applies to leases. (Perry on Trusts, sec. 834.)

And the taking of a legal estate with notice of a prior right, makes a person a *mala fide* purchaser. (Wade on Notice, sec. 50, 51; 2 Leading Cases in Eq.; *Le Vene v. Le Vene,* 23; 1 Wash. on Real Prop., 5, 54, 58, 59, 62; *Hill v. Cooper,* 6 Or. 181; Code, sec. 726.)

Appellant could not be barred or estopped by the recitals in the petition for divorce, as she was a married woman. (Bigelow on Estoppel, 443, 444, note 1; 2 Gray, 121; 10 Allen, 512; 117 Mass. 241; 10 Cush. 276.

There is another reason for construing the decree of the court set up as a bar, as contended for by the appellant. To construe said decree as claimed by the respondents, is to say that the court divested the appellant of her property and gave it to respondent because she had just cause of divorce against him. This would be contrary to the maxim that "no man should take advantage of his own wrong;" and to give this decree the construction asked for by respondents, would be in effect saying that the court decreed that he should profit by his own wrong; and the court would thereby assume the authority to divest the appellant, who was guilty of no wrong, of her property, and vest the same in the respondent who was the wrong doer, which is contrary to the first principles of constitutional law and to common honesty and common justice. The principle that a person found guilty of wrong should forfeit his property, is abrogated by the constitution of the United States. It was founded in oppression and barbarism. But the principle that the person wronged should be divested of his or her property, and that the same should be vested in the wrongdoer, has never yet been sanctioned or recognized by a court of justice. The legislature can not enact a law, nor can a court pronounce

a decree which will operate to arbitrarily take the property of A. and give it to B. (*Winehamer v. The People*, 13 N. Y. 390.)

Knight and Lord, for respondents:

The pleadings and decree in the divorce suit show conclusively that the matter sought to be litigated was fully determined in that suit, and that plaintiff is estopped under the well established rule that "The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, and as evidence conclusive between the same parties upon the same matter directly in another court," or as the rule has been more liberally stated by a later decision: "Where a court in a former action between the same parties had jurisdiction over the subject and the parties, and the question of fact were the same as in subsequent action and were necessary to its decision, and either were or might have been litigated in the suit, and the final hearing was upon its merits, the judgments is *res adjudicata* as to all those things that were, or under the pleadings might have been, controverted in that action whose adjudication was necessary to the final disposition of the case." (Freeman on Judgments, secs. 283 and 284, and notes; 5 Rob. 38; 7 Cal. 250; 2 Mo. 282.)

The power of the court in divorce suits to dispose of the property of the parties, is fully conferred under section 8, Territorial Laws. (Mis. Laws, 496.) "A bill filed for a divorce is to be taken against the party filing it as true. The recitals in a decree are conclusive against the party who sought it." (22 Ill. 390.)

By the Court, KELLY, C. J.:

The deed of J. M. Pritchard to his wife, the appellant, dated October 13, 1856, being between husband and wife, was void in law, but it nevertheless conveyed to her the equitable title to the one hundred and sixty acres described therein, which title she held at the time she procured a divorce from her husband in 1862. And the question now arises, what was the effect of the decree of divorce upon this equitable title?

This, indeed, is the only question in the case. The statute then in force in this state in relation to the proceedings in divorce suits provided that "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of children." (Statutes of Oregon, 1855, p. 540.) Under this statute, when a decree of divorce was granted, a duty was imposed upon the court to make such a disposition of the property of both parties to the suit as under all circumstances should appear to the court to be equitable and just. In such cases it had jurisdiction over the property of both parties, as well as over their persons. This was expressly given by the law. In the case under consideration the appellant in her petition for a divorce from John M. Pritchard sets forth facts which show that she had a resulting trust in the lands of her husband because her real estate had been exchanged in part payment of it. And she asked the court to decree and set apart to her such real estate "or other property" as would be sufficient to reinstate her in her just rights to the donation claim exchanged for the land which she alleged was conveyed in fee-simple to her husband. In compliance with this prayer in her petition, the court in its decree ordered and directed the defendant, Jno. M. Pritchard, to deliver to her certain personal property, and pay her money amounting in all to one thousand dollars, and at the same time divested her of all her interest in law and equity in and to the real estate of her husband, and decreed that it should belong to him absolutely. This is the land now in controversy, and we think that after the decree of divorce the appellant ceased to have any equitable estate or interest in it. That the court had power under the act of January 17, 1854, to transfer by its decree the property of one of the parties in a divorce suit to the other, is not now an open question. That was determined by this court in the case of *Doscher v. Blackiston,* decided at this term of the court. But it is ob-

jected to the validity of the decree in respect to the land, that the court had no authority to adjudicate and determine the contest as to the ownership of the land between the appellant and her husband, in the divorce suit, and therefore the decree is not binding on her by way of estoppel. The court did not decide any disputed right of property in that case. There was no contest in regard to it, and the court only made such a disposition of the property as the statute authorized it to make.

It is also objected that there was no sufficient description of the land in appellant's petition for a divorce so as to authorize the court to make any decree disposing of her interest in it. We think there was no necessity for any description of it. Appellant alleged in the petition that her husband was the owner in fee-simple of certain real estate, and set forth facts showing that she had an equitable interest in it. She asked for and obtained a decree giving her other property in lieu of it. The legal title to the land was already in her husband, and no transfer of it was sought. No description of it was therefore necessary, either in the petition or in the decree of the court. There was no error in the proceedings of the circuit court, and the decree will be affirmed.

ELLIS T. JONES, an infant, by JAMES JONES, her guardian, Respondent, v. B. DOVE, Appellant.

EXECUTION SALE—COLLATERAL ATTACK.—Where a sale is made under an execution which varies from the judgment in certain particulars, either in the amount of the judgment, or in the names of the parties, such variances are treated as irregularities, which are amendable, and in a collateral proceeding such amendments will be considered as actually made.

WILL—MISDESCRIPTION OF LAND DEVISED.—A will which devises land described as the north half of the donation claim of Bartholomew Dove, may be admitted in evidence, to be followed by extrinsic evidence tending to show that the north half of the donation claim of Bethuel Dove was intended to be devised.

LANDLORD AND TENANT.—A tenant is estopped from disputing his landlord's title, and when the relation is once established it attaches to all persons succeeding to the possession of the premises through or under the first tenant.

APPEAL from Benton County.

This is an action of ejectment brought by the respondent against L. C. Perry and John Dove, to recover possession of certain lands in the county of Polk. Perry and John Dove answered that they were holding as tenants under Bethuel Dove, who, upon application therefor, was substituted for them as defendant.

The respondent claimed through an execution sale of the premises in question under an execution which purported to be issued upon a judgment rendered on the second of August, 1858, for four thousand eight hundred and seventy-three dollars and twenty-one cents and costs, amounting to two dollars, against J. B. V. Butler, to Rohrer and the appellant, Dove.

The judgment proved in support of this execution was rendered on the sixth of August, 1858, at a term of court began on the second of that month for four thousand eight hundred and seventy-three dollars and twenty-one cents and costs, in the district court to the amount of one hundred and five dollars and thirty-eight cents, and costs in the supreme court, amounting to nine dollars and five cents, against the three persons named above, and one Carley.

The purchaser's title at this execution sale passed to one Oliver M. Hurt, from whom the respondent, Ellis T. Jones, claims by devise.

The will of Hurt describes the land devised to Ellis T. Jones as the north half of the donation claim of Bartholomew Dove—the land claimed being the north half of the claim of Bethuel Dove. Parol testimony was admitted to identify the land described in the will as that claimed.

The respondent had judgment, from which this appeal is taken.

The appellants rely upon their objections to the parol testimony to identify the land described in the will, and to the manuscript of the judgment under which the execution sale was had.

W. W. Thayer and Hill, Durham & Thompson, for appellant.

R. S. Strahan and John Burnett, for respondent.

By the Court, PRIM, J.:

This case was tried by the court without the intervention of a jury. The conclusions of fact and law found by the court are full and complete, and the only questions sought to be reviewed here are the rulings of the court in the admission of evidence offered by the respondent to sustain her title to the land in controversy. Respondent offered a donation certificate from the United States to Bethuel Dove showing compliance by him before 1858 with the donation law in respect to a tract of land in Polk county, and also oral evidence showing that the tract of land donated to Bethuel Dove embraced the demanded premises. To the admission of this evidence no exception was taken, but all of the other evidence offered by respondent was duly excepted to by appellant. But as the appellant has failed to call attention to any of those exceptions except the fourth and ninth, we infer that the others are abandoned and not relied upon here. The first ground of error upon which we are called to pass is the admission of the transcript of the execution issued out of the supreme court of the territory of Oregon, dated November 24, 1858, directed to the sheriff of Polk county, and under which the demanded premises were sold. This transcript was objected to on the ground that it did not appear to be an execution issued upon the judgment introduced; that there were variances between it and the judgment, and that it was void. The fact of variance is conceded. The execution was issued out of the same court in which the judgment was rendered; the parties are the same, with one exception; one of the parties against whom the judgment was rendered is left out of the execution. The amount of the principal judgment is the same, but differs as to the amount of the cost recovered, and there is some slight variance in date. As a matter of course, it must be made to appear that the execution was issued upon the same judgment

introduced in evidence. But, "if from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued and enforced as an execution upon the judgment shown to the court * * * the writ ought to be received and respected." (Freeman on Executions, sec. 43; *Hunt v. Loucks,* 38 Cal. 372.) And the record being silent upon that matter, the court will presume that other facts were shown which satisfied the court that it was issued upon the identical judgment produced in evidence. If the execution was void, the objection to its admission was well taken, and should have been sustained. *Crittenden v. Leitensdorfer et al.,* 35 Mo. 239, is cited by appellants as sustaining the proposition that such variances render the sale under the execution void, and passes no title. But we can not regard this case as good authority; it does not appear to be a well-considered case; no authorities are cited, and the weight of authority as well as principle is clearly against any such doctrine. There is a distinction "between executions issued without authority and executions issued under an authority, which is erroneously pursued," while "the former class are void," the latter are "erroneous" and merely voidable. (Freeman on Executions, sec. 43.)

The case of *Lee v. Crossan,* 6 Humph. 281, was an action of ejectment, and the title of plaintiff was based upon a sale under an execution and sheriff's deed. The judgment was rendered against three, and the execution had been issued against two only. It was held to be clear upon principle as well as authority, that the execution was "irregular and voidable," but not void. The court said: "If the matter had been properly brought to the notice of the court in due time, and in a proceeding for that purpose, it would have been quashed and superseded." But it was further held to be equally clear that direct proceedings to correct the variance, not having been taken in time, the sale was not invalidated by such variance. (*Durham et al. v. Heaton,* 28 Ill. 264; *Jackson v. Walker,* 4 Wend. 463; 5 John. 100; *Rigg v. Cook,* 4 Gilman, 336.)

While a sale is made under an execution which varies from the judgment in some particulars either in the amount of the judgment or the names of the parties, such variances are treated as irregularities which are amendable, and do not render the execution void in a collateral proceeding, and when it appears that the writ is amendable, the amendment will be considered as actually made in all collateral proceedings. (Freeman on Execution, secs. 63, 67, 71, 72.)

We think the execution was properly admitted by the court below.

The next objection is to the admission of the transcript of the probate and will of Oliver M. Hunt. The admission of this transcript was excepted to on the ground that it does not appear on the face of the will that the land devised to the appellant is the land in dispute. By this will the testator devises "unto Ellis Texella Jones and Hattie Jones, children of James and Elizabeth Jones, my real estate situated in Polk county, state of Oregon, being the north half of the donation claim of Bartholomew Dove, and bounded on the north by the land of James Jones and on the south and east by the land of Benjamin Hayden."

In the case of *Hattie Jones v. Dove,* 6 Or. 188, this same question was before this court. In that case the court below had ruled that the variance between the names Bartholomew and Bethuel, was such that no evidence could be admitted to show that the intention of the devisor was to devise the north half of the claim of Bethuel Dove, instead of Bartholomew Dove. This is the same will that was before the court at that time. This court reversed the judgment of the court below in that case, holding that the will was admissible, and that extrinsic evidence was admissible to identify the land and to show what particular property was intended to pass or to make certain either the person or thing described. (Wigram on Wills, 142.) We see no good reason why that decision should be overruled. But another question is raised on this appeal which we think determines this action against the appellant.

The court below found as a conclusion of facts in the thirteenth finding, that L. C. Perry, one of the defendants, sued

in this action as being in possession, was put in possession of the demanded premises, by James Jones, the guardian of respondent herein as the tenant of the respondent; that he remained in the possession of said premises as such tenant for about three months, when he delivered the possession of the same to Bethuel Dove, the appellant, who has ever since remained in the possession of the same.

Thus it will be seen that appellant is not in a position to question the title of respondent. The rule is well settled that a tenant is estopped from disputing his landlord's title. And "when the relation of landlord and tenant is once established it attaches to all persons who succeed to the possession of the premises, through or under the first tenant, and they are all as much bound by the covenant and agreement of the original lessee, as though they were their own." (Tyler on Ejectment, 208.)

The judgment of the court below is affirmed.

J. K. MORRISON, Respondent, v. JOHN A. CRAWFORD, Appellant.

VOID ATTACHMENT—DAMAGES, MITIGATION OF.—Where goods are seized on a void attachment and are afterwards seized by the same person on a valid attachment and sold in due process of law, and their proceeds applied in payment of the debt of the owner, such application can be shown in mitigation of damages in an action by the owner for the conversion of the goods.

PRACTICE—BILL OF EXCEPTIONS—EXHIBITS.—An exhibit attached to a bill of exceptions and referred to therein as a part of the bill of exceptions will be treated as a part thereof.

APPEAL from Linn County.

This was an action commenced by the plaintiff against the defendant in the circuit court of Linn county, Oregon, to recover three thousand two hundred and forty-four dollars and fifty cents damages, for wrongfully taking, carrying away and converting a large amount of personal property belonging to the plaintiff, to the defendant's use.

The trial before a jury resulted in a verdict and judgment in favor of the plaintiff for one thousand one hundred and

twenty-six dollars and sixty-nine cents, from which defendant has appealed to this court.

The facts are more fully stated in the opinion.

Humphrey & Hewett and Bonham & Ramsey, for appellant.

Strahan & Burnett and J. J. Whitney, for respondent.

By the Court, BOISE, J.:

It appears from the pleadings and the facts set forth in the bill of exceptions, that John A. Crawford, as administrator of the estate of Henry Myer, and as administrator of the copartnership property of Myer & Houck, commenced an action against Mathews and Morrison, to recover the sum of eight hundred and fifty dollars and fifty-seven cents, and had an attachment issued and the property in question levied on.

This action, for some irregularity in the proceeding, was dismissed, and the attachment dissolved. Afterwards, on the twenty-fourth day of October, 1877, said Crawford, as administrator, commenced a new action against the same parties for the same debt, and again attached the property without the same having been returned to Morrison.

The property was afterwards sold on an execution issued on a judgment obtained in this last action, and another judgment in favor of Crawford and against Morrison alone. So it appears that the proceeds of the property were applied in payment of debts due from the plaintiff to Crawford. Morrison received the benefit of the proceeds of the goods. The main and only important question in this case is, can one who has levied a void attachment on goods, after such void attachment has been dissolved, seize the same goods on a valid attachment on execution and apply them through such process to the payment of a judgment in his favor and against the owner of the goods, and then, when the owner brings an action to recover the value of the goods, alleging a wrongful taking and conversion under the void attachment plead in mitigation of damages to such action by the owner, the second attachment and the application of the proceeds of the sale of the goods on due process on a judgment obtained under the second at-

tachment? Before returning to the numerous and conflicting authorities on this question, it may be well to look at the situation of the parties.

In this case it seems that Morrison was liable to Crawford for a sum of money at the time of the levying of the first attachment, which was due and ought to have been paid. Crawford, by mistake, either of fact or law, committed some error in the first proceeding, which made his attachment a nullity and made him a trespasser in taking the goods. He then became liable to Morrison for a conversion of the goods, and to pay him their value. Morrison had his option either to claim the specific property and replevin the goods, or to insist on a conversion and bring trover or trespass.

Had he, in this case, proceeded at once and obtained a judgment for the value of the goods before an execution had been issued on judgments of Crawford against him, and the judgment had been on the records of Linn county, in favor of Morrison against Crawford, for the entire value of the goods, as well as the judgment in favor of Crawford against Morrison, the one ought to be set off against the other. In that case Crawford would have had the benefit of his judgments, as well as the parts satisfied by the proceeds of the goods as that not satisfied, and Crawford could have then applied the proceeds of the goods to his own use.

The theory contended for by the respondent is, that when Crawford first had the goods taken on the first void attachment, he converted them and they became his. It is true that Morrison had the right then to commence an action for the goods and declare a conversion, or he had a right to follow the specific property and assert the ownership in himself; for one is not deprived of the ownership of his property by a trespass, and until Morrison did elect to consider this trespass a conversion, he was still the owner of the goods and could alone transfer the title. Morrison continued the owner as against Crawford until he elected to claim the conversion and the value of the goods, and if the goods were then attached by a creditor of Morrison, other than the tort-feasor, they could be properly applied to the payment of such debt.

The view of this case, claimed by the respondent, and fully sustained by the New York authorities cited *Lyon v. Yates*, 52 Barb. 237; 21 Wend. 396; 28 N. Y. 659; 61 Id. 247, if correct, entirely deprive a party who sues out an attachment, which from some irregularity is dissolved, from ever availing himself of the property so attached, to satisfy his claim, however just that claim may be. He can not return the property to his debtor, for he is not obliged to receive it; and he can not sell it in the market, for he does not own it, until the debtor elects to sue him for a conversion; and he has no other way left but to obtain his judgment against his debtor, and try to set it off against a judgment which his debtor shall obtain against him for a conversion of the property.

In cases of this kind, where an attachment is sued out in good faith, and to secure a debt, the genuineness of which has afterwards been evidenced by a judgment in favor of the attaching creditor, we think the failure of the attachment, for some irregularity in the proceedings by which it was obtained, which is usually the fault of attorneys rather than the creditor, should not subject such attaching creditor to any greater liability or forfeiture than the actual damages which the debtor has suffered. If the property so attached is afterwards taken on execution by such attaching creditor, and applied on the debt to secure which the irregular attachment was issued, and consequently used for the benefit of the debtor, we think it would be proper to plead such application in mitigation of damages to an action afterwards brought by the debtor for a conversion for taking the goods on the void attachment. Such is the rule in effect as declared in many of the states.

In Massachusetts it was held that where a tax collector levied a distress for taxes but did not sell as required by statute, he was a trespasser *ab initio*, but, as the proceeds of the distress were applied in payment of the delinquent's taxes, the rule of damages was the value of the distress deducting the amount applied by the collector to the payment of the tax.

(14 Pick. 356.) So in the state of Connecticut in the case of *Curtis v. Ward,* where the rule in New York above referred to is cited and discussed, it is held that where goods are seized on a void attachment, and then afterwards seized by the same person on a valid attachment and sold in due process and applied in payment of the debt of the owner, that such application can be shown in mitigation of damages in an action by the owner for a conversion of the goods. In this case the court says the rule of damages is in case of trover the value of the goods at the time of conversion, with interest. But to this general rule there are certain exceptions as well established as the rule itself. And both the rule and the exceptions proceed upon the same principle that the plaintiff ought to recover as much and no more damages than he has actually sustained. This is also the rule in many other states. (7 Ohio St. 299; 3 Zabrisca, N. J. 342; 16 Vt. 397; 45 N. H. 339.)

There was an objection made on the argument that the Exhibit B, which is a transcript of the judgments on which the proceeds of the sale were applied was not properly a part of the bill of exceptions, it not being incorporated into it, but referred to in the bill as a transcript of said judgments, and marked Exhibit B. It has been the practice to prepare bills of exceptions in this manner, and we do not see that any wrong or inconvenience can arise from it as a matter of practice, and we think the exhibit should be considered and treated as a part of the bill of exceptions.

We think the rejection of the evidence showing the application of the proceeds of the sale of the goods sued for to the payments of the judgments which the defendant had against the plaintiff was erroneous, and a new trial will be granted with costs.

STATE OF OREGON, Respondent, v. AH SAM, Appellant.

PERJURY—VARIANCE.—Where an indictment charged a person with having sworn that he saw A. at the house of B. on a day named, and it is shown that A. was not there on that day; and testimony is produced tending to show that the defendant did not so swear, but that instead he swore that he saw A. at the house of B. on another day: *Held*, that it was error to instruct the jury that the variance was not material.

APPEAL from Multnomah County.

The indictment charges that one Han How was arrested on a charge of larceny from a dwelling-house, and at the time of her preliminary examination before a justice of the peace the appellant was called as a witness for the state, and testified that he, appellant, saw the said Han How at the house where the larceny was charged to have been committed on the thirtieth day of October, 1877, and the indictment charges that this statement was false. In this, it is claimed, consisted the perjury.

On the trial the state negatived the allegation by proof tending to show that the said Han How was not in Portland on said thirtieth day of October, 1877.

The appellant introduced evidence tending to prove that the appellant did not swear that he saw Han How at the place where said larceny was charged to have been committed on the thirtieth day of October, 1877, but that he did swear that it was on the twenty-ninth day of October, 1877, and that such was the fact.

The appellant requested the court to instruct the jury that "if they found from the evidence that the defendant swore, at the time and place charged in the indictment, that the woman Han How was in the room where the larceny was said to have been committed on the twenty-ninth of October, 1877, instead of the thirtieth day of October, 1877, as charged in the indictment, then the jury should find for the defendant."

The court refused to give the instruction, but instructed the jury that if they did so find, then the variance would be immaterial.

Hill, Durham & Thompson, for appellant.

J. F. Caples, District Attorney, and M. F. Mulkey, for respondent.

By the Court, PRIM, J.:

We think the court erred in this instruction. It is true that a crime may be charged to have been committed on one day and proved to have been committed on another. But that principle we apprehend is not applicable in this case. Here the crime was alleged to have been committed on the fifth day of November, 1877; and any other day might have been shown by the testimony, because the day on which the oath was administered was not of the essence of the crime. But the variance is one which totally changes the statement of the witness complained of from the statement alleged to be false to a statement, the truth of which is neither charged nor proven to be untrue.

The judgment is reversed and a new trial ordered.

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*IRI ORTON, Respondent, v. M. W. ORTON, L. GOLDSMITH & CO., Appellants.

CHATTEL MORTGAGE—CONTROL OVER BY MORTGAGOR RENDERS VOID, IN WHAT CASE.—When it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor unlimited power to dispose of the property mortgaged for the use of the mortgagor, the mortgage is void as to purchasers and attaching creditors. In such case there is no lien as against innocent purchasers, and where there is no lien there is no mortgage.

APPEAL from Marion County.

This is a suit by the respondent, Iri Orton, to foreclose a chattel mortgage, executed by the defendant, M. W. Orton. The mortgage was executed and duly registered on the twenty-first day of September, 1878, to secure a promissory note of that date for two thousand one hundred and fifty-two dollars and interest, payable one day after date. The property

* See 33 Am. Rep. 717.

mortgaged consisted of a stock of goods. The mortgagor was permitted to remain in possession of the goods and dispose of them in the usual course of his business as a retail dealer. On the ninth of October, 1878, the appellants, L. Goldsmith & Co., brought suit by attachment against the mortgagor, M. W. Orton. The goods were levied upon under the attachment. On the twenty-fourth of the same month L. Goldsmith & Co. recovered a judgment in the attachment suit for three thousand eight hundred and eighty dollars. The appellants, Goldsmith & Co., filed a demurrer in the court below, which having been overruled, is not insisted upon here. They allege want of consideration and fraud in the execution of the mortgage.

The court below decreed a foreclosure of the mortgage. From that decree this appeal is taken.

H. H. Gilfrey and Tilman Ford, for appellants:

When it appears from the mortgage itself or by evidence *dehors* the instrument, that the mortgagor shall retain possession, and sell and appropriate the proceeds to his own use, the mortgage is fraudulent in law, irrespective of the intention of the parties. (5 Ohio, 1; 52 N. H. 155; 1 Abb. Pr. 143; 51 Ill. 352; 1 Saw. 7; 3 Met. 515; 18 Ill. 403.)

A mortgage, with possession and power of disposition reserved to the mortgagor, is fraudulent, although placed on file in the clerk's office. (5 Ohio, 1; 3 Bank Reg. 75; 17 Wend. 492; 1 Saw. 7.)

A mortgage with possession and power of sale reserved to the mortgagor, is independent of the statute, fraudulent and void. (11 Wall. 392; 8 Nat. Bank Reg. 117; 1 Saw. 7.)

Goods sold by a mortgagor, who is left in possession with the power of sale by the mortgagee, can not be followed into the hands of innocent purchasers, and an execution purchaser has the same rights, and the goods can not be followed into his hands. (4 Comstock, 590; 17 Wend. 492.)

Bonham and Ramsey, for respondent:

Under the statute, if there had been no filings of the mort-

gage, or change of possession of the chattels, there being a sufficient consideration, the validity of the mortgage would depend entirely upon the intent with which it was executed; and if it was made in good faith, and without any intent to defraud creditors, it must be held to be valid. (*Moore v. Floyd,* 4 Or. 101; 7 Bush, 29; 11 Met. 333; 2 Cush. 294; 2 Story, 646; 34 Md. 455; 121 Mass. 408; *People v. Bristol,* 35 Mich. 28; 42 Maine, 139; *Hughes v. Cory,* 20 Iowa, 399.)

In this case it is admitted that the mortgage was duly filed on the day of its execution, and filing being a substitute for delivery and a continued change of possession, there is no presumption whatever against the validity of the instrument. The presumption is that it is not fraudulent. (6 Or. 362.)

The cases cited by appellants differ from this case in this, that in them the mortgagors have unlimited power of disposal; while in this case the power to sell is limited, so that the mortgagor should not render the security insufficient. The question of fraud is one of fact and not of law. (4 Or. 101.)

By the Court, BOISE, J.:

So far as the overruling of the demurrer to the complaint is concerned, as the appellants have not insisted on it as a ground of error, we will consider it as waived by them. The mortgage is admitted to be sufficient in form and properly filed so as to give it validity, unless it was fraudulent in its inception, or rendered void by the subsequent acts of the parties to it. The testimony of both the mortgagor and mortgagee shows that the mortgage was executed to secure the payment of a note for the sum of two thousand one hundred and fifty-two dollars, which note was made in lieu of a former note for two thousand dollars, and interest, made February 2, 1878. The consideration of the two thousand dollars note was the sum of nine hundred dollars, loaned at that date by Iri Orton to his son, M. W. Orton, and his signing as surety for his son a note to Ried and Cox for one thousand one hun-

dred dollars. If this testimony of the Ortons is true, then we think there was a valuable consideration for the note and mortgage. Their testimony, though questioned by the appellants, is not contradicted in this regard. But conceding that the mortgage was valid in its inception, the other question and the main question in this case is, did the subsequent conduct of the parties to this mortgage render it void as to the attaching creditors, L. Goldsmith & Co.?

The evidence proves that after the execution of the first mortgage, Iri Orton permitted his son, M. W. Orton, the mortgagor, to continue to sell the mortgaged goods, which was a stock of merchandise, and apply the proceeds to his own use. And it seems from the evidence that it was the intention of said Iri, at the time he took this mortgage, to permit his son to use the goods in the same manner as he had used them before the mortgage was given, and that this same understanding continued after the second mortgage (the one sued on) was given, and up to the time that the goods were attached by L. Goldsmith & Co. The respondent testifies that he knew the store was kept open and the goods were being sold by his son the same as before the mortgage was given, and when being examined as a witness he was asked this question: "It was your calculation that he (M. W. Orton) should just go along, and if everything went smooth, that he should sell goods and get other goods, and go ahead?" To which he answered: "Yes, sir; that was the idea." And again he was asked: "And you expected him to do that, didn't you?" Answer: "I didn't know when I might close him right out; I didn't know when. If he could have done well, I should not have closed him out." He was then asked what he meant by doing well; to which he answered: "If he could have sold a good deal of goods and got money to keep him from going under." It is true that the respondent claims that his son was not to so far diminish the stock of goods as to render it sufficient to the ample security of the note. But there was an unlimited right to dispose of the goods, and if the entire stock had been sold by M. W. Orton, prior to the commencement of this suit, the respondent could not, under the state of facts de-

veloped in this case, have maintained replevin or trover against the purchasers for the goods so sold. That is, no lien attached to the goods that could have been enforced against the purchasers thereof in good faith. Where there is no lien there is no mortgage. For the lien which attaches to the property mortgaged is the very essence of the mortgage. We think that where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor an unlimited power to dispose of the property mortgaged, for the use of the mortgagor, that the mortgage is void as to purchasers and attaching creditors of the mortgagor.

It was claimed by the respondent's counsel in the argument, that this mortgage is aided by the statute of this state, section 766, p. 262, which provides that every sale of personal property capable of immediate delivery to the purchaser, and every assignment of such property by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignee, during his possession, disputable only by making it appear on the part of the person claiming under such sale or assignment, that the same was made in good faith for a sufficient consideration, and without intent to defraud creditors. But the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law.

This statute does not in any way reach or provide for the case before the court. This mortgage is regular in form, and is recorded. The presumption raised by the statute which may be rebutted is as to mortgages that have not been recorded. But the statute is silent as to the effect of a provision in the mortgage, or an agreement between the mortgagor and mortgagee, that the mortgagor may sell the mortgaged property; and when this fact is made to appear, as in this case, then it becomes the question of law for the court to determine

what shall be the legal effect of such an agreement as affecting the creditors of the mortgagor.

This question has been the subject of much discussion in the courts, and there is some apparent diversity in the authorities. We think the weight of authority as well as reason is in favor of the rule before indicated, that where there is an unlimited power given to the mortgagor by the mortgagee to sell the mortgaged property which still remains in his possession, that the mortgage is void as against the attaching creditors of the mortgagor. In this case it was the manifest intention of Iri Orton to have M. W. Orton continue the business in his store, and sell the goods in the same manner as before the mortgage was given. This power to sell and continue the business as before, enabled M. W. Orton to appear as the unembarrassed owner of the goods, and enabled him to obtain credit which would have been denied him had the right to sell the goods been denied. As the power to sell was unlimited, there was no security retained in the goods to Iri Orton; for he abandoned his lien by his mortgage when he granted the power to his son to do with the goods the same as he had been doing. Such an agreement was utterly inconsistent with his claim under the mortgage, and annulled its provisions. The views we have taken harmonize with the English common law doctrine, and the rule as established in the federal courts, and many of the state courts. (1 Smith's Lead. Cas., 52, 7 Am. ed.; 22 Wall. 513; 16 Ohio, 547.) We think the decree of the circuit court should be reversed, and the respondent's bill dismissed.

BEN HOLLADAY and C. TEMPLE EMMET, Respondents, v. S. G. ELLIOTT, Appellant.

PRACTICE—APPEAL—NOTICE OF, HOW SERVED ON NON-RESIDENT.—Where the sheriff serves notice of an appeal on non-resident respondents having no attorney in the county, and their places of residence are unknown to him, he may serve the notices on the clerk of the circuit court, notwithstanding the appellant's attorney living in another county may know where the respondents reside.

IDEM—ABANDONMENT OF APPEAL, PARTY NOT PRECLUDED BY.—Where a notice of appeal to the supreme court is served on the respondent, the appellant may abandon it, and give a second notice at any time within the period limited by law for taking appeals.

APPEAL from Marion County. The facts are stated in the opinion.

W. H. Effinger, R. S. Strahan and John Burnett, for appellant.

Dolph, Bronaugh, Dolph & Simon and Thayer & Williams, for respondents.

By the Court, KELLY, C. J.:

On the eleventh day of March, 1878, the appellant, by his attorney, served a notice of appeal on respondents, who were non-residents of this state; Mr. Holladay being a resident of Washington, D. C., and Mr. Emmett of San Francisco, California. The notice was served by mail, as required by law, and filed with the clerk of the circuit court for Marion county, on the fifteenth day of March, 1878. On the same day, an undertaking for an appeal was also filed, signed by the appellant and W. W. Sweeny as surety.

Both appellant and Sweeny were then in San Francisco, although the latter made an affidavit annexed to the undertaking, that he was a resident of Oregon, and possessed the requisite qualifications to become such surety. On the eighteenth day of March, 1878, the respondents notified the attorney of appellant that they excepted to the sufficiency of the surety on the undertaking. The attorney of the appellant becoming satisfied that it would be impossible to procure the attendance of Sweeny so as to justify within the time required by law, abandoned this attempt to appeal. On March 27, 1878, appellant gave a second notice of appeal, and filed the same, together with an undertaking properly executed, and with sufficient surety. This latter notice was served by the sheriff of Marion county, who indorsed his service thereon as follows:

"I hereby certify that I served the within notice of appeal within said county, this twenty-seventh day of March, 1878, on the within named plaintiffs and respondents, Ben Holla-

day and C. Temple Emmet, by delivering a copy thereof, for each of them, prepared and certified to by me, as sheriff, to George A. Eades, county clerk, and *ex officio* clerk of the circuit court for said county of Marion, Oregon; and I further certify that, after making diligent search, I have been unable to find either of said plaintiffs and respondents, Ben Holladay or C. Temple Emmet, in said county, and that the residence of both of them is unknown to us, and that none of plaintiffs' attorneys reside within this county.

"J. A. BAKER,
"Sheriff Marion County, Oregon."

On January, 9, 1879, the respondents filed a motion to dismiss the appeal.

On this state of facts two questions are presented for our consideration:

1. Had the appellant a right to abandon his first notice of appeal and give a second notice, and file a new undertaking?

2. If he had that right, was the service of the second notice properly made?

We hold that a party appellant may abandon an attempted appeal when he discovers that he has given an imperfect notice or when it is inconvenient or impossible for the surety to justify in case of exception to his sufficiency. An attempted appeal may be abandoned before it is perfected, and the appellant may give a new notice and undertaking at any time within the period limited by law for taking appeals. An appeal is deemed to be perfected after the time allowed to except to the sureties in the undertaking, or from the justification thereof, if excepted to. (Sec. 527, subdivision 4, Civil Code.)

The appeal first attempted in this case was not perfected, and the appellant could lawfully abandon it and give the second notice and undertaking.

The respondents objected to the sufficiency of the service of the second notice of appeal, for the reason that their places of residence were known to the attorney of appellant, and it was his duty to give that information to the sheriff

who served the notice. We think the service is sufficient. It was made by an officer of the court where the decree was rendered, and by one authorized to serve process and notices of appeal. It was his knowledge, or rather want of knowledge, of respondents' places of residence; that was to govern him in making the service, not the information or belief of appellant or his attorney. It was the duty of the sheriff to make diligent inquiry in order to ascertain where the respondents resided, and no doubt he did so. But it did not devolve on him to go outside his own county to make that inquiry. When a non-resident suitor obtains a judgment or decree in a county, where he has no resident attorney, he ought to make inquiry of the clerk of the court, whether any notice of appeal be served on him, or to request that officer to forward to him, or his attorney, any notice of appeal which may be left by the appellant. Owing to the rigor of the statutes governing appeals, and the decisions of this court in construing them, the right of appeal is hedged in with so many obstructions, that it is somewhat difficult to take appeals in cases of non-resident respondents. And we think the statute should not be so construed as to add any further restrictions in the way of reaching the appellate court.

The motion to dismiss the appeal is denied.

C. W. MOORE, Appellant, v. C. S. MILLER, Respondent.

INSTRUCTIONS—BURDEN OF PROOF.—Where A. gives a promissory note to B. as collateral security for the payment of the note of C., in consideration of an extension of time, with the understanding that it is not to be paid unless C. fails to pay his note at the expiration of the time to which the payment thereof was extended, it is not error in an action to recover on such note to instruct that it rests with the plaintiff to prove that both notes were due and unpaid.

APPEAL from Wasco County. The facts are stated in the opinion.

B. Whitten, W. W. Thayer and E. C. Bronaugh, for appellant:

The allegations of defendant in his answer as to the want of consideration of the Miller note, the indorsement and payment of the Minear note are affirmative pleas, and it rests with defendant to prove them as such affirmative allegations. (*Coles v. Soulsby,* 21 Cal. 47; *Gillchrist v. Stevenson,* 9 Barb. 9; Gould's Pleadings, 156, secs. 195-67; 1 Green on Evidence, p. 103, sec. 74; *Blanchard v. Young,* 11 Cush. 345; *Hallister v. Bender,* 1 Hill, 150; *Gray v. Gardner et al.,* 17 Mass. 188; *McGregory v. Prescott,* 5 Cush. 76.)

Hill, Durham and Thompson, and W. H. Effinger, for respondent:

This case was before the supreme court at the last term, when the court used this language with respect to the note sued on and the writings connected therewith: "The writings * * * mean simply that Miller, in consideration of forbearance to Minear, promised to pay, not Minear's note, but a certain definite sum of money at a certain time, with a condition, however, that if Minear's note should be paid before the day fixed, then this promise should be void." (*Moore v. Miller,* 6 Or. 254.)

The question before the court at that time was whether Miller should be treated merely as an indorser of the Minear note, and with that question in view the court used the language quoted. But the question now presented is quite different, and was not then before the court; and the decision then made does not touch the question involved in this appeal, except in so far as it declares the note to be a conditional promise. The court distinctly declared this promise to be not an absolute but a conditional obligation. The correctness of that proposition is beyond dispute, the letters and the note, which together form the contract, being incapable of any other construction.

This being a conditional promise to pay, the plaintiff, if —we say with due submission—he had any cause of action at all to be pleaded, was absolutely obliged to declare upon the facts as they were, and was therefore bound to allege the making of the Miller note—the condition upon which it could have been avoided—and then the non-performance of

that condition. Just as much was he so obliged as in declaring upon a simple promissory note he would be compelled to allege that payment had not been made. (*Lower v. Winters*, 7 Cow. 263; *Stanwood v. Scovel*, 4 Pick. 422; *Whitaker v. Smith*, Id. 83.)

Under these authorities there was a fatal variance between the complaint and the evidence, and the defendant was entitled to a judgment for his costs; so the plaintiff can not claim to have suffered by the instruction. But the court, upon the authority, we suppose, of *Wait v. Morris*, 6 Wend. 394, which is the only case in the books where such a decision has been made, allowed the replication to be considered as curing the defect in the complaint, and submitted the case to the jury as if the action had been brought, as it should have been, upon the conditional contract, instead of the absolute note. To allow the case to go to the jury at all, under this state of the pleadings, was a favor to the plaintiff to which he was not entitled under the authorities, as we have shown above.

So the plaintiff, instead of proving his cause of action, as alleged in the complaint, upon an absolute note, introduced all the evidence to prove the conditional contract, and the instruction complained of simply followed the line of the plaintiff in producing his evidence. The court, allowing plaintiff the benefit of a change of base from the absolute cause of action alleged in the complaint to the conditional one attempted to be proved on the trial, instructed the jury that before plaintiff could recover on the conditional contract, he must show the condition to have been broken.

By the Court, PRIM, J.:

This is an action upon a promissory note for four thousand one hundred and eighty-six dollars and sixty-seven cents, executed and delivered on the fourth day of August, 1874, payable to the order of the cashier of the First National Bank of Idaho, and due in sixty days from date. The complaint is in the usual form.

The answer denies that the cashier of the First National

Bank assigned and transferred said note to appellant, or that he is the owner and holder thereof; or that there is anything due and owing to him thereon as alleged. It admits the execution of the note, but claims that it was intended as indorsement of the note of one A. P. Minear, which was then due in said bank, and for a like amount.

That the only consideration was an extension of time for sixty days to the said Minear, on his note in said bank. It claims that respondent is exempt from any liability to pay said note on account of a want of demand and notice.

That the liability of respondent was only a contingent and conditional one, to happen only on the failure of the said A. P. Minear to pay his note at the expiration of the sixty days.

And it is further alleged that the said Minear had long prior thereto paid off his said note, which fully discharged respondent from any liability to pay said note to appellant. The replication fully denies all the new and affirmative matter set up in the answer.

These issues of fact having been submitted to a jury, a verdict was found for respondent, and judgment rendered thereon against appellant for costs and disbursements, from which this appeal is taken.

The bill of exceptions develops substantially the following facts: Minear executed a promissory note, payable to the cashier of the First National Bank of Idaho, for four thousand dollars, bearing interest at two per cent. per month, which was due August 4, 1874. About this time this Minear note became due, an extension of time was sought, and respondent was requested by letter from the cashier of the bank to indorse it, which he consented to do. The note upon which this action is based, was then indorsed in blank in a letter by the cashier of said bank, and sent to respondent, with the following proposition: "If you will sign and return the note (the one sued on) I will grant the time asked for, and deliver up both notes when either is paid." (Referring to the Minear note, and the one given to secure the extension of time.)

Respondent signed the note, and returned it to said cashier,

stating that he gave it with the understanding in the above letter; that is, should A. P. Minear pay his note, this note to be returned to respondent, and in the event respondent should pay the Minear note, or the one sued on, both to be returned to him. There was evidence tending to show that appellant, at the time of this correspondence, was cashier and stockholder in said bank, but that he had since sold his stock therein, and received in settlement with the bank as a part of his share of the assets thereof, the Minear note, and the one sued on—both representing, in fact, but one debt. The note sued on was regularly indorsed by the payee, and the Minear note delivered for a valuable consideration along with it, but was not indorsed.

Appellant also introduced in evidence the note sued on and a note for four thousand dollars, signed jointly by A. P. and J. W. Minear, which he swore was the note referred to as the Minear note, and that nothing had been paid on either of them, except nine hundred and sixty dollars, which had been credited on the Minear note, but not on the note sued on.

Respondent also having been introduced as a witness in his own behalf, swore that he knew nothing of the note having been signed jointly by J. W. Minear, as well as A. P. Minear. Also, that he believed that the Minear note had been paid off by him, but admitted that he had not paid anything on either of said notes.

At the trial of this cause the court instructed the jury as follows:

"The supreme court, in my judgment, declared the Miller note to be a conditional contract, and therefore I charge you that it rests with the plaintiff to prove that the Miller and Minear notes are both due and unpaid." To which appellant, by his counsel, then and there duly excepted, and assigns here as error.

Under the pleadings and the peculiar state of the facts developed in this case at the time, we think this instruction was not erroneous. While the note upon which this action was based is absolute upon its face, yet the question as to whether it was due and unpaid depended upon the fact as

to whether the Minear note had been paid to the appellant, which was a matter resting peculiarly within his knowledge, and which respondent could not be presumed to know.

It having been admitted by appellant at the trial that it was the understanding between him and respondent at the time of the execution of this note that it was not to be paid unless A. P. Minear should fail to pay his note at the expiration of the time to which payment thereof had been extended, we think it devolved upon him to produce the Minear note in order to show whether it had been paid. This was necessary for the reason that upon the non-payment of that note depended the liability of respondent to pay this note. The production of this note was sufficient to create a presumption of non-payment, and make out a *prima facie* case in his behalf which entitled him to recover, unless respondent could produce affirmative proof of payment. And it further appears from the evidence reported in the bill of exceptions that appellant not only produced both of those notes, but swore that nothing had been paid upon either of them except nine hundred and sixty dollars, which had been paid by Minear and credited upon his notes, but not upon the note of respondent. Upon the production of these notes a question arose as to the identity of the Minear note on account of it appearing to be the joint note of A. P. and J. W. Minear, instead of the separate note of A. P. Minear. And the question as to whether this was the note referred to by the parties as the Minear note, and the further question as to whether it had been paid by Minear having been submitted to the jury, they may have found for respondent upon either of these questions.

There being no error in this record, the judgment is affirmed.

C. G. CAPLES and T. A. McBRIDE, Appellants, v. WILLIAM STEEL, Respondent.

CONTRACT—PURCHASER OF LAND NOT REQUIRED TO DISCLOSE HIS KNOWLEDGE OF THE EXISTENCE OF A MINE TO VENDOR.—A person who knows that there is a mine on the land of another, of which fact

the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser.

IDEM—INTENTIONAL MISLEADING OF VENDOR TO HIS INQUIRY, BY VENDEE, WILL AVOID CONTRACT.—If, however, one about to purchase a tract of land willfully mistakes any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction.

APPEAL from Multnomah County. The facts are stated in the opinion.

Northup & Gilbert, for appellants:

The plaintiffs are entitled to a decree of specific performance of the contract in this case unless they were guilty of fraud, such as to prohibit the interference of a court of equity in their behalf. Fraud will not be presumed, and the burden of proof to establish fraud lies upon him who alleges it.

"A person who knows that there is a mine in the land of another of which the latter is ignorant may nevertheless buy it without disclosing the existence of the mine." (*Harris v. Tyson,* 24 Pa. St., 347.)

"Though the vendor is bound to make known to the purchaser any circumstance lessening the value of the estate, the purchaser is not under a corresponding obligation to communicate any circumstance which may enhance its value; so that, for instance, a man knowing of the existence of a mine under an estate may validly deal with the owner who is ignorant of this fact, without any communication of it." (Fry on Spec. Per., sec. 464; *Drake v. Collins,* 5 How. Miss. 253.)

Thus it has been held by Lord Thurlow that if A., knowing there is a mine in the land of B. of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B. for a price which the estate would be worth without considering the mine, the contract would be good. (*Fox v. Mackreth,* 2 Brown Ch. 420; 1 White and Tudor, Leading Cases in Eq. 205.)

To amount to fraud it must be a concealment of those facts and circumstances which one party is under some legal or moral obligation to communicate to the other, and which the other has a legal right to know. (*Van Aradale v. Howard*, 5 Ala. 596; *Barnett v. Staunton*, 2 Id. 181; *Laidlow v. Organ*, 2 Wheat. 178.)

In an action for specific performance of a contract of sale, if the defendant rely upon a false representation made to him, he must establish in addition, that he will be damaged by performance. (*Morrison v. Lods*, 39 Cal. 381; 1 Story's Eq., sec. 203.)

Fraud and damage must be coupled together to entitle an injured party to relief in any court of justice. (1 Story's Eq., sec. 203; *Vernon v. Keys*, 12 East, 637, 638.)

The cases cited by respondent where courts of equity have denied specific performance on the ground of fraudulent concealment by the purchaser, are cases where the fraud is clearly established, and where the existence of facts materially affecting the value of the property and their concealment by the purchaser are clearly proven.

Dolph, Bronaugh, Dolph & Simon, for respondent:

Specific performance of contracts is not decreed by courts of equity as matter of right in all cases, but the exercise of such jurisdiction rests in the sound discretion of the court considering all the circumstances of each particular case, and will be refused whenever the contract is contaminated by fraud, or the bargain appears to be unconscionable, or the price agreed upon grossly inadequate. The agreement must be certain, fair, and just in all its parts; otherwise this court will not aid in its enforcement, but will leave the parties to their rights and remedies at law. (1 Story's Eq. Jur., sec. 769; 2 Leading Cases in Eq. 665, 667; *Lynch v. Bischoff*, 15 Abb. Pr. 357, note; *Seymour v. Delancy*, 3 Cowen, 445; *King v. Hamilton*, 4 Peters, 311; *Margraf v. Muir*, 57 N. Y. 155.)

Although mere silence of the purchaser as to the existence of a material fact affecting the trade, and unknown to the seller, might not be sufficient to induce a court of equity

to cancel or avoid an executed contract, yet it is with great frequency held to be just ground for refusing specific performance of an executory contract. (*Bowman v. Bates*, 2 Bibb (Ky.), 51; *Frisby v. Ballance*, 4 Scam. 287; *Eastland v. Vanarsdel*, 3 Bibb, 274; *Livingston v. Peru Iron Co.*, 2 Paige, 390; *Bruck v. Tucker*, 42 Cal. 347; *Margraf v. Muir*, 57 N. Y. 158.)

The least positive assertion or conduct on the part of the purchaser which is designated or calculated to conceal or misrepresent the truth, will be sufficient to defeat this claim to have the contract fulfilled. (*Livingston v. Peru Iron Co.*, 2 Paige, 390; *Bradley v. Bosley*, 1 Barb. 125; *Bruck v. Tucker*, 42 Cal. 347.)

By the Court, KELLY, C. J.:

The respondent, William Steel, on the twenty-seventh day of July, 1875, sold to the appellants, C. G. Caples and T. A. McBride, a tract of land in Columbia county, containing one hundred and sixty acres, for three hundred and twenty dollars—twenty dollars being paid in cash, and two promissory notes given for the balance. At the same time an obligation was given by Steel to Caples and McBride to convey the land by deed to them upon the payment of the notes. The first note was paid at maturity, and the second one deposited in the First National Bank of Portland for payment, having been made payable to the order of the cashier of the bank. When it became due it was also paid to the cashier for the respondent, who declined to receive the money.

The respondent alleges in his answer that after the payment of the first note, and before the second became due, he was informed of the existence of a coal mine under the soil of the land in controversy, and that appellants knew before they bargained for it the fact that there was a valuable coal mine on the land. He further alleges that the appellants conspired together to defraud him by concealing this knowledge when they were under obligations to make it known before they purchased the land. The respondent notified appellants that he would not complete the contract,

and tendered them back the money they had paid him, with interest, and also the second note, which they refused to receive. This suit was then brought to enforce the specific performance of the contract. The burden of proof rests upon the respondent to establish two propositions:

1. That there is a coal mine on the land in controversy;

2 That the appellants perpetrated a fraud upon him in making the purchase.

The testimony is quite voluminous, and much of it irrelevant to the matters in issue, but taking it all together we think the respondent has failed to show that there is any vein or ledge of coal upon the land in question, or even upon the adjacent tracts. Small seams have been discovered within a short distance of the land in controversy, but no vein of any value has been satisfactorily proven to exist either on this or the adjoining tracts, and any increased value which may have been added to the land since the purchase by appellants is purely speculation, and arises altogether from the mere possibility that coal may hereafter be discovered upon it in quantity and quality sufficient to make the mining of it profitable. It is a matter of vague conjecture whether the respondent has or has not suffered any loss on account of the sale to appellants, and courts of equity will not any more than courts of law relieve a party from even a fraudulent act which is followed by no loss or damage. (1 Story's Eq. Jur. 203.)

We think the evidence equally fails to show that the sale of the land to appellants was procured through any fraudulent act on the part of either of them towards the respondent.

A person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser. (*Fox v. McReth*, 2 Bro. C. C. 400; Fry on Spec. Perf., sec. 464; *Harris* v. *Tysen*, 24 Pa. St. 347.) Where, however, one about to purchase a tract of land, willfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing

the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction.

Tested by the principles here laid down, we are at a loss to perceive wherein the respondent was misled or deceived by any word or act of either of the appellants, or that they acted otherwise than fair in regard to the whole transaction. As stated by himself in his testimony, the respondent was unacquainted with the land, and went to the residence of Dr. Caples, one of the appellants, and told him that he wanted him, Caples, to take him there, and show him the land. This was done in accordance with the request. The timber and the lay of the land were shown so far as it could conveniently be done. And respondent says that Dr. Caples represented the timber and the quality of the soil as really better than he afterwards found them. This is all he inquired about, or concerning which he expressed a wish for information in regard to the land. If he had inquired of Dr. Caples whether there were any indications of a coal mine on or near the premises, then it would undoubtedly have been his duty to answer truly or remain silent. But no such question was asked, no such information was sought, and therefore no deception was practiced by Caples in saying nothing about the efforts which had been made to discover coal on the adjoining tracts of land. Nor was he under any obligation to take respondent to the several places where shafts had been sunk or tunnels run into the ground in prospecting for veins of coal. The principle is well settled in equity jurisprudence, as we have already stated, that a person who knows that there is a mine on the land of another, of which the owner is ignorant, can lawfully and safely buy it without informing the owner of the existence of the mine. A purchaser is not bound by our laws to make the man he buys from as wise as himself.

The case of *Bowman v. Bates,* 2 Bibb, 47, has been referred to by counsel for respondent as analogous to the one under consideration. We do not so regard it. There the purchaser, who had discovered a salt spring on a tract of land in Kentucky, by artifice prevented the agent of the

vendor, who was aware of the fact, from giving that information to his principal, and then sent his brother to Virginia, where the vendor resided, and bought the land at much less than its actual value. It was the deception practiced upon the vendor and the misrepresentations made to him that constituted the fraud for which the deed was very properly set aside.

The decree of the court below is reversed, and it is now ordered and decreed that the respondent execute and deliver to the appellants a deed for the premises described in the complaint within three months from the date of this decree.

T. M. REED, Appellant, v. S. M. GENTRY and JOHN COPPITT, Respondents.

VERDICT—PRESUMPTION.—The verdict of a jury will be presumed to be as broad as are the issues of fact upon which it was found.

APPEAL from Benton County. The facts are stated in the opinion of the court.

F. A. Chenoweth, for appellant.

John Kelsay and J. K. Weatherford, for respondents.

By the Court, PRIM, J.:

This is a suit in equity and appellant for cause of suit, alleges substantially that he and respondent, Gentry, on September 15, 1876, entered into a written agreement by which said Gentry leased certain lands of appellant in Benton county, for the period of two years, commencing at the date of said lease. The lands to be farmed in a certain manner, which is fully set out in the complaint. Appellant was to have one third of the grain raised on the land, which was to be delivered by said respondent in the warehouse at Corvallis, and one half of the hay in the barn. Appellant was to hold all the grain on the place as security for the faithful performance of the contract on the part of respondent Gentry. That said respondent had violated and broken the contract in the manner and form of farming the same in

various way to appellant's damage in the sum of five hundred and ten dollars.

It is further alleged that respondent, Gentry, had made a secret assignment and sale of said crops to one John Coppitt, who was secretly combining with said Gentry to cheat and defraud appellant out of his lien on the crops raised upon said land by respondent Gentry. Appellant filed bonds and procured injunction to issue and a receiver to be appointed who took possession of all the crops raised on the land and harvested the same.

The answer of respondents denies all the allegations of appellant's complaint, and claims that the sale of the crops to respondent Coppitt was made in good faith and for a valuable consideration; but that it was intended as a chattel mortgage to secure certain amounts due from him to Coppitt. It is further alleged, in the separate answer of respondent Gentry, that on or about the tenth day of August, 1877, appellant wantonly and wrongfully filed the complaint in this suit, and took exclusive possession of all the crops growing on said lands; and that by the careless and negligent manner in which it was harvested the respondents were damaged in the sum of seven hundred and seventy-three dollars.

The appellant replied to respondents' further and separate answer, denying all the allegations of new matter. The cause coming on for trial, the court ordered the following facts to be inquired into by the verdict of a jury:

1. Did or did not S. M. Gentry, one of the defendants, violate the terms of the contract set up in the complaint as therein charged, and if he did so violate said contract, how much, if any amount, was plaintiff damaged thereby?

2. Did John Coppitt, one of the defendants, purchase the crop described in the complaint and answer in good faith for a valuable consideration, and without notice or knowledge of the contract set up in the complaint, and that said S. M. Gentry has violated the same, and that plaintiff was damaged as alleged in his complaint?

3. Did or did not plaintiff wrongfully take possession of the crops described in the answer, as therein alleged, and

if he did so, how much if any amount were defendants damaged thereby, and by any neglect or carelessness of plaintiff in harvesting the same?

The jury returned a verdict in favor of the respondents on all of the above propositions, and gave them damages in the sum of three hundred and seventy-five dollars. Whereupon the court decreed that the complaint be dismissed, the injunction dissolved, and that judgment be rendered for the sum of three hundred and seventy-five dollars in favor of the respondents, and that two thirds of all the wheat and oats in the hands of the receiver be delivered to the respondents and one third to the appellant.

It is claimed by appellant that this decree is incorrect in this, that it allows the respondents to recover three hundred and seventy-five dollars in damages, the full value of their interest in crops and two thirds of the grain in the hands of the receiver in addition. It is insisted, however, on the other side, that this is correct; that the damages found by the jury were only intended to cover that portion of grain wasted by negligence in harvesting the same. This view of the matter we think incorrect, and can not be sustained. The presumption is, that the verdict of the jury is as broad as the issues are upon which they were required to find, and they are broad enough to cover the full value of respondent's interest in the grain. It would certainly be inequitable to allow respondents to recover the full value of their interest in the crops in damages and their proportion of the grain in addition. Entertaining the views herein expressed we hold that the decree of the court below should be modified so as to allow respondents to recover three hundred and seventy-five dollars damages, and their costs and disbursements in the court below; that appellant recover costs and disbursements of the appeal; and that appellant be allowed to retain all the grain in the hands of the receiver.

L. M. STARR, Respondent, v. BENJAMIN STARK, Appellant.

EQUITY—MONEY PAID UPON A JUDGMENT, WHEN MAY BE RECOVERED BACK.—Where one recovers in an action of ejectment the possession of real property, and in the same action recovers a judgment for mesne profits for the withholding of the land, and afterwards the defendant in the action of ejectment brings a suit in equity against the plaintiff, in which it is determined and decreed that such defendant was the owner in equity of the land at and before the commencement of the action of ejectment, and that the plaintiff in such action was holding the legal title as the trustee of such defendant, such defendant may recover of such plaintiff the amount of the judgment for mesne profits, and the costs and disbursements recovered of him on said judgment.

IDEM—DECREE IN EQUITY, EFFECT OF, AS TO A JUDGMENT AT LAW CONCERNING SAME PROPERTY.—A decree in equity affecting property recovered at law does not operate on the judgment at law but on the party to the judgment, and such party may be enjoined from pursuing or enforcing such judgment. If such judgment has been executed a court of equity will treat the party having the proceeds thereof as a trustee in cases where the defendant in the judgment had equitable rights at the time of its rendition over which the court at law had not jurisdiction, and which in a court of equity would have prevented such an adjudication as was made in the court of law.

APPEAL from Multnomah County.

This is a suit in equity brought by the respondent, Starr, against the appellant, Stark, for an accounting for rents and profits received by Stark from certain property in Portland, of which Stark is alleged to have held the legal title as trustee of Starr; and for an accounting for certain moneys alleged to have been recovered from Starr by Stark by means of such legal title, and in violation of his trust for the detention of such real property by Starr.

In 1868 and 1870 Stark, the appellant, brought two actions of ejectment against Starr in the United States circuit court for this district to recover possession of certain separate parcels of real property in the city of Portland.

Such proceedings were had upon these actions that Stark recovered judgment of possession and for his costs, disbursements and damages for the detention by Starr. These judgments were affirmed in the supreme court of the United

States. About the time these judgments were rendered in the United States circuit court, or shortly prior thereto, Starr, the defendant in the actions of ejectment, brought suits in the same court to esablish his title as the equitable owner of the premises in question, and to have Stark declared the trustee of the legal estate for the use of Starr. In each case an injunction was prayed for to restrain the enforcement of the judgments at law. The precise dates of these proceedings and judgments are stated in appellant's brief. The injunctions were denied.

Upon the hearing, the circuit court decreed that the plaintiff, Starr, defendant in the actions of ejectment and the respondent here, was, and had been, in the one case for more than six years prior to September, 1870, and in the other, for more than six years prior to December, 1868, the owner in fee-simple in equity of the premises in question; that Stark had the legal title as trustee of Starr, and that he convey to Starr such title. These decrees were affirmed in the supreme court of the United States.

Stark, having taken possession under the judgments in the ejectment proceedings, surrendered to Starr upon the final determination by the supreme court in the equity suits.

Starr brings suit for rents and profits accruing from the date of the surrender to Stark to that of the surrender by him, amounting to nine thousand three hundred and fifty-nine dollars and thirty-seven cents, and to recover the amount paid by him upon the judgment in the actions of ejectment, amounting, with interest, to five thousand four hundred and thirty-two dollars and thirty-nine cents. The judgments recovered by Stark and paid by Starr in the ejectment proceedings, were for costs and damages for the alleged wrongful withholding by the latter.

The court below found for the respondent, Starr, in the sums and upon the accounts above stated, and the respondent had a decree accordingly. This appeal is taken from so much of this decree as allows Starr five thousand four hundred and thirty-two dollars and thirty-nine cents on account of the judgment in the ejectment proceedings paid by him. The remainder of the decree is not appealed from.

Portions of the answer, which alleged that Stark acted in good faith and upon an honest belief that he was the owner of the premises in question, were struck out by the court below.

Northup & Gilbert, for appellant:

The portions of the answer which were struck out by the court were a proper defense to this suit, and should have been allowed to remain. They showed that in bringing the actions of ejectment, Benjamin Stark acted in good faith in the honest belief that he owned the land he sued for and was entitled to the possession and occupation thereof. If this court should decide, as did the court below, that those judgments were obtained in trust, then the portions of the answer so struck out become pertinent matter of defense to the claim of plaintiff to recover the costs of those actions, amounting to some eight hundred and sixty-three dollars and thirty-nine cents in all.

A trustee is not chargeable with more than he has received, unless in a case of gross negligence amounting to willful default. (*Hamburg Co. v. Edsall,* 1 Beas. (N. J.) 392.)

The defendant Stark then, having acted in good faith in bringing these actions of ejectment and recovering mesne profits thereon, it follows that whether he was a trustee of the legal title for Starr or not, he can not be held to be trustee of the costs paid in those judgments, he never having received the same nor any benefit therefrom. He can not be held to account on an implied trust for that which he never received.

The defendant can not in this suit be required to repay to plaintiff the money which he recovered in those judgments for mesne profits. The money was paid upon judgments at law which have not been reversed, and there is no principle of law or equity which requires the defendant Starr to pay it back.

It has long been settled by a series of adjudications, beginning with the common law and extending through the decisions in the United States, that no action or suit lies to

recover money paid upon a judgment which remains unreversed, and this is true whether the money was paid voluntarily or upon execution. (Chitty on Contracts, 709, 10 Am. Ed.; *Walker v. Ames,* 2 Cowen, 429; *Leonard v. Wilkins,* 9 Johns. 232; *Trustees v. Keller,* 1 Ala. 408; *Fuller v. Shattuck,* 13 Gray, 72; *Carter v. Canterbury,* 3 Conn. 456; 1 Perry on Trusts, p. 191, sec. 168.)

But the plaintiffs seek to base their right to recover upon the ground that since defendant Stark has been adjudged to hold the title to the land in controversy as trustee for the plaintiff, it follows that he received the money on these judgments as trustee also, and should now be held to account for them. To this we answer:

1. The defendant Stark was in no way the trustee of the plaintiff, except that he was trustee by operation of law of the legal title to the land sued for in those actions of ejectment. The trust was a fiction of the law created *in invitum* to prevent an inequitable use of the legal title against the owner of the equitable title. As a matter of fact there was no fiduciary relation or trusteeship between the parties other than exists in every case where one person holds the equitable title and another holds the legal title, and, in ignorance of their rights, they resort to litigation to determine which of them owns the land.

2. Although it has been decided by the supreme court of the United States that Stark held the legal title, which he obtained by patent to the land in trust for Starr, it has not been decided or adjudicated by any court or in any proceeding that Stark recovered possession of this land by those actions of ejectment as trustee of the plaintiff, nor that the judgments for mesne profits were recovered in trust, nor does such a conclusion follow from what has been decided.

In order, then, for the plaintiff to recover on that ground, it must be decided by this court that Stark acted as trustee of Starr in bringing those actions of ejectment, and that all the judgments he recovered were recovered in trust, and that all the money paid him thereon was paid in trust. In short, it becomes necessary to try anew the rights of those

actions at law, and to decide now that the judgments then rendered were wrong, and that the money which those judgments gave to Stark absolutely as his own, was not his money, but belongs to the man from whom the judgments allowed him to take it. It is true that the judgments in ejectment were not conclusive of the title, but the judgments for mesne profits were money judgments, and stand as any other judgments for money, final and conclusive between the parties.

A judgment for money is an adjudication that the defendant is indebted to the plaintiff in a certain sum, the payment of which the plaintiff may enforce by execution. To say that the plaintiff, in the same judgment, owes to the defendant in trust, or otherwise, the very money so collected, is to make the judgment a nullity. It is to attack and set aside a judgment in a collateral proceeding.

The merits of a judgment can never be impeached or questioned in a counter-action by the judgment-debtor, either directly or collaterally. (*Pease v. Whitten*, 31 Me. 117; *White v. Merritt*, 7 N. Y. 355; *Greene v. Greene*, 2 Gray, 361; *Field v. Sanderson*, 34 Mo. 542; *Mosely v. Mosely*, 15 N. Y. 334.)

These decisions are based on the ground that there must be an end of litigation. Said Lord Kenyon, in *Marriott v. Hampton*: "If this action could be maintained, I know not what cause of action could ever be at rest; after a recovery by process of law, there must be an end of litigation."

If the plaintiff is allowed to recover the money in the present suit, there is nothing to prevent a future suit by Stark upon some new state of facts to put in issue and try over again the merits of this suit, and so on *ad infinitum*.

2. A judgment-creditor can not be trustee to the judgment-debtor. It has never been so held. He can not occupy that double and contradictory relation.

Said Lord Chief Justice Eyre: "Shall the same judgment create a duty for the recovery upon which he may have debt and a duty against him upon which an action for money had and received will lie? This goes beyond my comprehension." (*Phillips v. Hunter*, 2 H. Black. 16.)

But whether the defendant Stark was trustee or not of the plaintiff, the decisions we have cited seem to us conclusive that the plaintiff is not entitled to recover this money. Those decisions establish the broad and general doctrine that no action or suit lies to recover money paid on a judgment which remains unreversed. Counsel for respondent admit the correctness of those decisions, but claim that they apply to actions at law and not to suits in equity. Let us see whether this argument is correct: In the first place it is well established by the decisions that the action for money had and received is in its nature an equitable action. (*Irvine v. Hamlon,* 10 Serg. & R. 219; 2 Smith's Leading Cases, 402; *Buel v. Boughton,* 2 Denio, 91.)

Said Lord Mansfield: "This kind of equitable action lies to recover money which ought not in justice to be kept. It lies only for money which *ex aequo et bono* the defendant ought to refund. It lies for money paid by mistake, or for money got through imposition or extortion or oppression or an undue advantage taken of the party's situation." (*Moses v. Macfarlane,* 2 Burr. 1009.)

It is a proper form of action for a *cestui que trust* to recover money from his trustee. (*Merritt v. Millard,* 3 Abb. App. Doc. 291.) "There need be no privity of contract between the parties except that which results from one man's having another's money." (*Maison v. Waite,* 17 Mass. 563.)

Having shown, then, that the recovery of money paid on a judgment has been universally denied in equitable actions brought for that purpose, we apply the doctrine to the case before the court, and claim that in the absence of any precedent to the contrary, the defendant who has paid and satisfied a valid judgment, can not in any case at equity or in law, through the doctrine of a trust, or otherwise, recover the money so paid.

But plaintiff says it is inequitable for the defendant to retain this money, as it was recovered in breach of trust; but even if this were so, "it is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere." (*Homer v. Fisk et al.,* 1 Pick. 439.) "Where one wrongfully

obtains the money of another he can not be disturbed in its enjoyment." (*Woodward v. Hill,* 6 Wis. 148.)

It is true that equity sometimes relieves against a judgment at law, but never after the judgment has been paid. It relieves only by injunction. (2 Story's Eq., sec. 1571; Adam's Eq., 196, 197.)

The cases in which such relief has been granted are, without exception, cases where the interposition of a court of equity has been sought before the judgment was paid.

"But no case has gone the length of deciding that after the proceeding has advanced to the maturity of a judgment, and the judgment collected by execution, it may be recovered back." (*White v. Merritt,* 7 N. Y. 355.)

In any view of this case, it will appear that the plaintiff has been guilty of laches that will prevent his recovery of this money. He might have prevented the collection of the money by an injunction. (High on Injunc., sec. 62; *Failing v. Stark,* 2 Saw. 642.)

Instead of his relying on his equitable defense and obtaining an injunction of the action of ejectment, he took issue with the plaintiff therein and stood upon his legal title — he denied the title of Stark, and, in short, denied *in toto* the existence of the very trust he is now seeking to establish.

He made no application for an injunction until by delay he lost his right thereto.

The action of ejectment for lot 3 was begun by Stark September 17, 1870, and judgment was rendered January 16, 1871. Plaintiff's bill in equity was not filed until January 16, 1871. The action to recover lots 1, 2, and N. ½ of 4, was begun December 21, 1868; the case was tried and submitted August 4, 1869. Judgment was rendered February 15, 1870. The bill in equity was filed August 2, 1870, and it does not appear when motion was made for injunction, but the complaint shows that no injunction was sought in either of these cases until after the judgment had been rendered. The injunctions were properly denied. (*Kamm v. Stark,* 1 Saw. 547.)

The plaintiff, then, having stood by and suffered the de-

fendant Stark to proceed to judgment in those actions and to collect the money thereon, stands in the position of one who has made a voluntary payment of money. A voluntary payment can not be recovered back even though it could not have been enforced at law. (*Corkle v. Maxwell,* 3 Blatchf. 314; *Clarke v. Dutcher,* 9 Cow. 674; *Wyman v. Farnsworth,* 3 Barb. 370; *Benson v. Monroe,* 7 Cush. 125.)

The plaintiff, then, is not entitled to recover the money he paid as costs in those actions at law, because, in the first place, he occasioned all or nearly all of those costs by his own conduct in taking issue with Stark in a useless struggle, and in appealing to the supreme court from a judgment he knew he could not reverse; and, secondly, because those costs were not paid to Stark and were never received by him.

Dolph, Bronaugh, Dolph & Simon, for respondents:

If we correctly apprehend the position of counsel for the appellant, Stark, it is that this money having been collected upon legal process, can not be recovered from Stark, at law or in equity, and they cited authorities in the court below to show that where money has been recovered upon a judgment in an action at law, an action does not lie to recover it back. All these authorities are based upon the leading case of *Marriott v. Hampton,* 7 Durn. and East, 265. In that case H., the defendant, had formerly sued M., the plaintiff, for goods sold and delivered, for which M. had before paid H. and obtained his receipt, not being able however, to find the receipt, at the time, and having no further proof of the payment he was obliged to pay the money again, and gave a *cognovit* for the costs; afterwards he found a receipt and prosecuted to recover back the sum so wrongfully enforced in payment and it was held upon motion for a new action, that the action could not be sustained. We do not deem it necessary in this case to question the law as stated in *Marriott v. Hampton.* The rule is stated by the latest and best considered cases to be, that "Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds of which the party seeking its aid, could not have availed himself at law." (*Carlo*

R. R. Co. v. Titus, 27 N. J. Eq. 102; N. Y. and *Harlem R. R. Co. v. Hawes et al.,* 56 N. Y. 178.)

The plaintiff is not seeking to recover back in equity money collected from him in the actions at law in the sense in which counsel for defendants contend he is. The law determined that as Stark held the legal title, he was entitled to the possession and damages for withholding the premises. Equity determined that Stark held the title in trust for Starr, and compelled him to convey the legal title to him, and surrender the possession to him, and did not thereby disturb the judgment at law or call it in question, nor will it by decreeing restitution to Starr of the moneys inequitably but legally collected from him by Stark.

Our position is that these judgments were recovered by Stark and the money received by him as trustee of Starr, and that having so received it equity will require him to account for the same to his *cestui que.* To use the language of Mr. Justice Sawyer, in overruling the demurrer in the case of *Kamm v. Stark,* in the United States circuit court, a case precisely similar to this: "It as much follows after a decree that Stark held the legal title of the property in trust for Starr at the time he recovered his judgment at law for the possession and damages that equity will compel him to account for the moneys received on the judgment, as to surrender the possession obtained by means of the judgment."

A trustee is a person in whom some estate affecting property is vested for the benefit of another. (Hill on Trustees, 1.) A contract to convey lands creates a trust. (1 Hilliard on R. P. 429; Hill on Trustees, 69, 81, 82.) Equity has jurisdiction in all cases against trustees. (5 Pet. 495; Adams' Eq. 220, 221; *Flint v. Lewis,* 61 Ill. 305; *Norton et al. v. Hixon,* 25 Id. 439, 456; Story's Eq. Jur., secs. 460, 461; Hill on Trustees, 518.) A trustee must account for what he has, or ought to have received, with interest. (3 Wend. 503; 4 Johns. Ch. 297; Adams' Eq. 209; *Rogers v. Rogers,* 1 Paige, 188; Hilliard on R. P., vol. 1, 474, sec. 22.) Equity follows trust funds wherever it can find them.

(*Cook v. Tullis*, 18 Wall. 332; Hilliard on R. P. 463; 9 Cal. 648.)

A trustee will not be permitted to take advantage of his situation to obtain any personal benefit to himself at the expense of his *cestui que trust*. (*Sloo v. Law*, Blatch. 459, 477; *Davis v. Wright*, 2 Hill. 560; *Arnold v. Brown*, 24 Pick. 89; *Green v. Winton*, 1 Johns. Ch. 20; *Oliver v. Pratt*, 3 How. 333; Hill on Trustees, 535; *Shelton v. Homer et al.*, 5 Met. 464; *Jamison v. Glascock*, 29 Mo. 191.)

A trustee of the legal title may maintain ejectments against his *cestui que trust*. (2 Wash. R. P. 489, sec. 18.)

It would seem to follow from these propositions that if a trustee of the legal title who in equity was bound to convey the same to his *cestui que trust* should bring an action for the possession of the trust property, and by means of his legal title turn his *cestui que trust* out of possession of the trust property, and recover damages for the detention thereof, equity would not permit him to profit by his own wrong, by what the court below termed "an active breach of his trust," but would compel him to surrender the damages recovered by the breach of his trust, as well as the possession wrongfully obtained.

So his honor, Mr. Justice Sawyer, of the United States circuit court, held in the case referred to in overruling the demurrer of the defendant, Stark; so Judge Deady, United States district judge for the district of Oregon, held in rendering final decree in the same case; so the court below held in this case. A contrary doctrine would leave a great wrong to go unredressed for the want of a remedy, and be a reproach upon the administration of justice.

By the Court, BOISE, J.:

From the statement of the facts, it appears that Starr, being in possession of the lots which have been in controversy was dispossessed by Stark by action at law, maintained by him on his legal title which he held by a patent from the United States. In these actions of ejectment Stark recovered from Starr judgments for mesne profits and costs and interest on the same, in one case, seven hundred

and fifty-eight dollars and forty-five cents, and in the other two thousand three hundred and eighty dollars and seventy-seven cents. These sums with interest, at the date of the decree in the circuit court, amounted to the sum of five thousand four hundred and thirty-two dollars and thirty-nine cents and it is from that portion of the decree that Stark appeals. The other portion, which is for rents and profits received by Stark since he obtained possession under said actions of ejectment, appellant has paid and does not contest the right of respondent to it.

As appears in the statement of the case, the United States supreme court, by a decree in equity, declared that Starr was the equitable owner of these lots at the time of the commencement of said actions and during all the time for which Stark recovered the rents and profits from Starr; and that during that time Starr was entitled to said rents and profits.

This decree has the effect to restrain the operation of these judgments in favor of or for the benefit of Stark by declaring that he still held the land for the use of Starr, and commanding him to execute the trust by conveying to Starr the legal title. The judgments of the court in the ejectment cases only established the legal title in Stark, and did not affect or determine the status of the equitable title at that time. (*Hill v. Cooper*, 6 Or. 181, and authorities there cited.)

A court of equity does not attempt to act upon a court at law itself, and does not claim any supervisory power over such court or its judgments. It acts solely on the party to such judgments, and will enjoin him in a proper case from pursuing any claim in a court at law over which the courts of equity have jurisdiction, either concurrent or exclusive. And where the party has equitable rights not cognizable in a court of law, which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to redress in equity since the court of law had no proper jurisdiction of the subject-matter forming the basis of redress in equity. (2 Story's Eq. Jur., secs. 1570, 1571, 1573.)

In this case it is conceded that the decree of the supreme court of the United States, declaring the respondent to have been the owner in equity at and before the rendition of the judgments in ejectments against him, renders those judgments inoperative so far as they affect the title to the land; for the equitable title of Starr, on which the decree is based, could not have availed Starr in defending against the legal title in a court of law. And these judgments against him are such adjudications as, Judge Story says, "will interpose no obstacle to redress in equity, since the court of law has no proper jurisdiction of the subject-matter forming the basis of redress in courts of equity."

But it is claimed by the appellant that the judgments for mesne profits, though recovered in the actions of ejectment, art not a part of the judgment for the possession of the land, but separate judgments for damages for withholding the land, which is authorized by statute for convenience and to save multiplicity of actions and costs.

It is true it is a recovery not necessary to a judgment for the possession of the land, yet the right of such recovery for damages which are simply rents and profits, must depend on the determination of the right to possession of the land.

If the right to recover possession fails to be established by the plaintiff in ejectment, then he can not recover the mesne profits. On the other hand, if the plaintiff established his right to possession and his judgment therefor, he has thereby established his right to the mesne profits, and the defendant in ejectment can not have any available defense thereto, unless it be that there are none, or that he has paid the same. It must follow as an inevitable conclusion that if Stark had no just right to the possession of these lots, he had none to the rents and profits which he recovered in these judgments. And that being at that time the trustee of Starr, whatever rents and profits he did receive were received for Starr, and should be accounted for.

As Starr had no power to interpose his equitable right to the rents and profits in his answer to the actions of ejectment, these judgments interpose no obstacle to his recover-

ing them from his trustee who wrongfully withholds them. When a trustee, by virtue of his holding the legal estate, takes the rents and profits, he must account to his *cestui que trust*, and it makes no difference whether he takes them from the *cestui que trust* or a stranger. The question is not how he became possessed of the rents and profits, but whether, when he received them, they belonged to the *cestui que trust*, and where this relation of trust is in controversy with reference to land, or the rents and profits thereof, it can only be settled in a court of equity, and when that relation is established in equity, and the court orders an account by the trustee, it can reach all the trust property and its issues, and interest on the same, which have come into the possession of the trustee.

It is claimed in this case that Stark is not a voluntary trustee, and has only been made so by a construction of law, and is not, therefore liable in the same degree as one who has voluntarily assumed fiduciary relations to his *cestui que trust*. So far as good faith is concerned in Stark's proceedings, it could not affect the right of Starr to have an account for his property wrongfully withheld, and could only be important in considering whether or not Stark should be called on to pay a sum in addition to the real amount due, and interest, by way of damages for the wrongful withholding. Such damages are usually added by charging the trustee a higher rate of interest, and making rests in the nature of compound interest. Courts of equity exercise a larger discretion in adjusting the rights of the parties in such cases. Hill on Trustees, 525.)

The amount of the judgments for mesne profits in the actions of ejectment are the amount of the rents and profits which had accrued to Starr before those actions were brought and wrongfully collected from him, and there can be no question now, since the decree giving the land to Starr, but that he should have the same returned to him, with interest.

It is claimed that whatever may be held, as to these mesne profits, that the costs in these actions were not recovered by

Stark to his use, and that the same were disbursements due or paid to officers and witnesses.

These costs and disbursements were such liabilities or actual expenses as Stark was liable for or had paid in conducting these actions and obtaining these judgments.

The decree establishes the fact that these lots were the property of Starr, and it follows that Stark violated his trust in bringing these actions, and he ought not in justice to compel Starr to pay for this wrong of his. "In equity, more strongly than at law, the maxim prevails that no man shall take advantage of his own wrong. Even at law, if a disseisor aliens the land and descent is lost, and afterwards the disseisor acquires the land by descent or purchase, the disseisee may enter."

"The object of equity is to compensate the *cestui que trust* and place him in the same situation as if the trustee had faithfully performed his own proper duty." (Story's Eq. Jur., secs. 1264, 1278.)

Stark, when acting in relation to this trust, wrongfully obtained this money from his *cestui que trust*, and if he is allowed to retain it he will be allowed to profit by his own wrong. It is claimed that the judgments in ejectment are not reversed but we think as before stated, that the decree which establishes the relations of the parties as trustee and *cestui que trust*, although it does not operate on or annul the judgments, operates on the parties, and thereby suspends the effect of the judgments against Starr, and only serves to show the extent and manner of the wrong of Stark in dealing with the trust property.

The decree of the court below does not award any damages against Stark; it simply restores to Starr what was wrongfully taken from him, with interest, and we think it should be affirmed, with costs and disbursements.

EXTRA ANNOTATION

TO

PRECEDING VOLUME



NOTES

ON THE

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7 Or. 17–38, GREENWOOD v. CLINE.

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Cited in Chrisman v. Chrisman, 16 Or. 130, 18 Pac. 7, applying the rule in favor of sanity of testator.

Wills.—Undue Influence Defined and Deduced from omission to provide for other members of family, pp. 26, 27.

Cited in Smith v. Henline, 174 Ill. 198, 51 N. E. 231, mentioning features indicating probability of undue influence; In re Holman's Estate, 42 Or. 357, 70 Pac. 913, to point that disregard of those having natural claims on testator's bounty cannot invalidate his will.

Distinguished in Re Turner's Will, 51 Or. 8, 93 Pac. 464, there being no evidence of undue influence. Cited in notes to 63 Am. St. Rep. 93, on insane delusions; 37 L. R. A. 271, on what are insane delusions.

Wills.—The Procuring of the Certificate of two physicians attached to the will to the effect that they have examined testator and found him in good health and sound mind, is a suspicious circumstance, p. 29.

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Wills.—Effect of Spiritualism on Validity of Will influenced by it, p. 33.

Cited in Steinkuehler v. Wempner, 169 Ind. 165, 81 N. E. 486, 15 L. R. A., N. S., 673, to point that spiritual communications tending to influence testator are admissible on question of undue influence. Cited in notes in 16 L. R. A. 678, on belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed; 15 L. R. A., N. S., 675, on belief in spiritualism as affecting testamentary capacity.

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7 Or. 39–42, 33 Am. Rep. 693, MATASCE v. HUGHES.

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Cited in Scoggin v. Schloath, 15 Or. 384, 15 Pac. 637, Hoyt v. Clarkson, 23 Or. 55, 31 Pac. 199, and Williams v. Culver, 30 Or. 377, 48 Pac. 366, all approving the rule.

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Cited in State v. Reed, 52 Or. 388, 97 Pac. 631, presuming prejudice from erroneous instruction.

7 Or. 42–47, HUBBARD v. HUBBARD.

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Cited in Oh Chow v. Brockway, 21 Or. 448, 28 Pac. 387, holding that first county court assuming jurisdiction retains it exclusively. Cited in note in 21 L. R. A. 688, on conclusiveness of probate as res judicata.

Wills.—In This State Probate in Common Form has been adopted, p. 44.

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Wills.—When Probate is in Common Form, Ex Parte, it may be attacked directly and proponent must then re-probate it and has the burden of every issue throughout the proceeding, p. 44.

Cited in Clark's Heirs v. Ellis, 9 Or. 133, In re John's Will, 30 Or. 506, 47 Pac. 345, 36 L. R. A. 242, Malone v. Cornelius, 34 Or. 195, 55 Pac. 537, and In re Mendenhall's Will, 43 Or. 547, 73 Pac. 1034, all approving and applying the rule; Chrisman v. Chrisman, 16 Or. 130, 136, 18 Pac. 7, 10, holding that the burden of proving sanity, when denied, rests on the proponent; Luper v. Werts, 19 Or. 126, 127, 23 Pac. 852, stating proof required to entitle will to probate; In re Pickett's Will, 49 Or. 140, 89 Pac. 381, holding burden on proponent to show want of undue influence; Richardson v. Green, 61 Fed. 435, 9 C. C. A. 565, concurring opinion, to point that judgment admitting will to probate is conclusive until set aside on appeal or directly impeached.

Wills.—Standards of Testamentary Capacity Stated, p. 45.

Cited in Ames v. Ames, 40 Or. 504, 67 Pac. 741, enumerating several tests of testamentary capacity. Cited in notes to 31 Am. St.

Rep. 685, 686, on undue influence affecting validity of wills; 27 L. R. A., N. S., 8, on what is testamentary capacity.

Wills.—Unjust and Unnatural Disposition of property does not invalidate will, p. 46.

Cited in Re Holman's Estate, 42 Or. 357, 70 Pac. 913, to point that wishes of testator should be respected regardless of his disregard of natural claims upon him; 6 L. R. A., N. S., 203, on effect of unnatural testamentary disposition on question of undue influence.

Witnesses.—Where Witness Violates Rule excluding his presence in court he is not rendered incompetent unless party calling him was in complicity with him, p. 47.

Cited in O'Bryan v. Allen, 95 Mo. 75, 8 S. W. 227, and Holder v. United States, 150 U. S. 92, 14 Sup. Ct. Rep. 10, 37 L. ed.. 1010, both approving the rule; Commonwealth v. Crowley, 168 Mass. 129, 46 N. E. 416, holding that permitting such witness to testify is discretionary.

7 Or. 47–48, REES v. REES.

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7 Or. 49–54, 33 Am. Rep. 698, and note, SMITH BROS. v. WHEELER.

Sales.—Remedies of Seller on Failure of Buyer to accept delivery, pp. 51–54.

Approved and applied in Dwiggins v. Clark, 94 Ind. 54, 48 Am. Rep. 140, where the buyer prevented the seller from making delivery of tombstone; Black River L. Co. v. Warner, 93 Mo. 387, 6 S. W. 213, where buyer refused to inspect and accept lumber manufactured for him; Kinkead v. Lynch, 132 Fed. 697, where purchaser refused to accept manufactured article; Ex parte Jay, In re Benkhorn, 5 Eng. Rul. Cas. 97, not accessible.

7 Or. 54–58, STATE v. MOY LOOKE.

Contracts.—Question of Construction and Effect is for the court, p. 58.

Cited in Christensen v. Nelson, 38 Or. 479, 63 Pac. 650, reaffirming the rule. Cited in notes in 113 Am. St. Rep. 882, on proof of foreign laws and their effect; 25 L. R. A. 466, on oral proof of foreign laws.

7 Or. 58–68, BURCH v. EARHART.

Constitutional Law.—Whether Certain Sources of Income are sufficient to meet state expenses is a legislative question, p. 67.

Cited in State v. Brown, 10 Or. 223, discussing power to control official acts by writ of mandamus; Carr v. State, 127 Ind. 209, 22 Am. St. Rep. 624, 26 N. E. 779, 11 L. R. A. 370, holding appropriation of state funds a purely legislative function. Cited in note in 14 L.

R. A., N. S., 520, on validity of statute or ordinance authorizing levy of taxes, incurring indebtedness, or appropriation of money, for two or more purposes.

7 Or. 68–75, **MERRIMAN v. MORGAN.**

Habeas Corpus.—Review is Confined to Sufficiency of Writ or process by which prisoner is held, p. 73.

Cited in Re Howe, 26 Or. 185, 37 Pac. 538, and Turner v. Conkey, 132 Ind. 252, 32 Am. St. Rep. 251, 31 N. E. 779, approving and applying the rule; Winnovich v. Emery, 33 Utah, 360, 93 Pac. 994, confining investigation to jurisdictional matters. Cited in notes to 26 Am. St. Rep. 137, on malicious prosecution of criminal charge; 2 L. R. A., N. S., 935, 942, as to when action sufficiently at an end to support suit for malicious prosecution.

7 Or. 76–78, **SMITH v. HARRIS.**

This case has not been cited.

7 Or. 78-80, **REES v. REES.**

Appeal.—Notice may be Served on the Party or his attorney of record residing in the county; when the attorney resides without the county it must be served on the party, pp. 79, 80.

Cited in Poppleton v. Nelson, 10 Or. 439, Shirley v. Burch, 16 Or. 5, 6, 18 Pac. 346, Butler v. Smith, 20 Or. 129, 25 Pac. 381, Lewis & Dryden Printing Co. v. Reeves, 26 Or. 448, 38 Pac. 622, and Bennett v. Minott, 28 Or. 343, 39 Pac. 997, all approving the rule.

7 Or. 80–83, **STATE v. MUNDS.**

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7 Or. 83–86, 33 Am. Rep. 703, **HEILNER v. UNION COUNTY.**

County.—Notice of Defect in Bridge is prerequisite to county liability, p. 85.

Cited in Eastman v. County of Clackamas, 32 Fed. 35, 12 Saw. 613, holding that notice to a supervisor is notice to the county. Cited in note in 39 L. R. A. 53, on liabilities of counties for torts and negligence.

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Cited in Woodward v. Oregon etc. Co., 18 Or. 296, 22 Pac. 1079, reaffirming the rule; Rice v. Wallowa County, 46 Or. 576, 81 Pac. 358, holding complaint sufficient after verdict where it set out rotten and defective condition of bridge. Cited in notes in 59 L. R. A. 251, on sufficiency of general allegations of negligence; 21 L. R. A., N. S., 43, on sufficiency of allegation of facts in regard to defect in street or highway, in damage suit against municipality.

7 Or. 87–108, WILSON v. McEWAN.

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Cited in Willamette Real Estate Co. v. Hendrix, 28 Or. 497, 52 Am. St. Rep. 800, 42 Pac. 517, holding that occupancy of one of several known tracts is not a constructive occupancy of all; Wheeler v. Taylor, 32 Or. 436, 67 Am. St. Rep. 540, 52 Pac. 187, holding that actual occupancy of a farm is not constructive possession of a wood lot adjoining it; Gatling v. Lane, 17 Neb. 83, 22 N. W. 454, holding that one entering without color of title is restricted to land actually occupied. Cited in notes to 28 Am. St. Rep. 162, on adverse possession; 125 Am. St. Rep. 306, on possession of part as possession of whole; 15 L. R. A., N. S., 1199, on necessity of color of title, not expressly made a condition by statute, in adverse possession.

Estoppel.—Covenants of Warranty Estop Grantor from claiming title in himself, p. 108.

Cited in Hyde v. Holland, 18 Or. 333, 22 Pac. 1105, to point that estoppel of grantor passes title as effectually as a grant; Gardner v. Wright, 49 Or. 624, 91 Pac. 292, to point that deed estops grantor to assert after-acquired title; Doe d. Christmas v. Oliver, 1 Eng. Rul. Cas. 497, not accessible.

Distinguished in Salem Imp. Co. v. McCourt, 26 Or. 104, 41 Pac. 1107, holding that estoppel cannot be invoked against the state based on unauthorized act of officer.

7 Or. 108–110, BENTLEY v. JONES.

This case has not been cited.

7 Or. 110–115, 33 Am. Rep. 705, STEEPLES v. NEWTON.

Contracts.—Right to Recover Reasonable Value of services under special contract not performed, p. 114.

Cited in Todd v. Huntington, 13 Or. 10, 4 Pac. 295, and Gove v. Island City etc. Co., 19 Or. 369, 24 Pac. 523, approving and applying the rule. Cited in notes to 59 Am. St. Rep. 284, 291, on complete performance as essential to cause of action on entire contract; 35 Am. Rep. 477, on extent of recovery on partial performance of contract; 73 Am. Dec. 774, on practice upon impeaching witnesses; 24 L. R. A. 234, on effect of part performance of contract for services; 14 L. R. A., N. S., 707, on evidence of specific instances to prove character.

7 Or. 115–130, HANNAH v. SHIRLEY.

This case has not been cited.

7 Or. 130–133, RUNEY v. REA.

Mechanic's Lien.—Description of Property in Notice should be as certain and definite as in a deed or mortgage, p. 133.

Miscited in Silliman v. Gammage, 55 Tex. 371, not in point.

7 Or. 133–137, RICH v. PALMER.

This case has not been cited.

7 Or. 137–141, STATE v. ZINGSEM.

Appeal.—Without Filing Notice and Transcript the appellate court obtains no jurisdiction, p. 140.

Cited in Feller v. Feller, 40 Or. 77, 66 Pac. 470, to point that circuit court obtains jurisdiction of appeal only by filing of transcript; Taylor v. Lapham, 41 Or. 480, 69 Pac. 439, to point that filing of notice is as essential as its service.

7 Or. 141–143, STATE v. O'NEIL.

Criminal.—Lien for Costs of Prosecution does not attach to homestead before issue of patent, pp. 142, 143.

Cited in Adams v. Church, 42 Or. 272, 95 Am. St. Rep. 740, 70 Pac. 1037, 59 L. R. A. 782, holding pre-emption claim exempt from seizure for debt constructed prior to issue of certificate; Flanagan v. Forsythe, 6 Okl. 229, 50 Pac. 153, extending exemption to liability growing out of a tort; Leman v. Chipman, 82 Neb. 395, 117 N. W. 886, to point that "debt" in exemption statute includes all kinds of claims.

Disapproved in Brun v. Mann, 151 Fed. 157, 80 C. C. A. 513, 12 L. R. A., N. S., 154, holding homestead not exempt from liability for tort previously incurred.

7 Or. 143–149, DOSCHER v. BLACKISTON.

Cited in note to 54 Am. Dec. 588, on title by accession.

7 Or. 149–156, EDWARDS v. PERKINS.

Appeal.—Voluntary Payment of Judgment does not bar right, p. 155.

Cited in Woodward v. State, 58 Neb. 600, 79 N. W. 165, holding mere payment of costs no waiver of right to appeal; Manning v. Poling, 114 Iowa, 28, 86 N. W. 30, holding that a payment voluntarily made cannot be recovered.

Distinguished in Moores v. Moores, 36 Or. 263, 59 Pac. 328, dismissing appeal for want of controversy.

Landlord and Tenant.—Lease for Term of Years is a chattel interest, p. 155.

Cited in Eadie v. Chambers, 172 Fed. 78, 96 C. C. A. 561, quoting the rule approvingly.

Landlord and Tenant.—Right of Incoming Tenant to growing crops, p. 156.

Cited in Meffert v. Dyer, 107 Mo. App. 465, 81 S. W. 644, holding that tenant entering with notice of outgoing tenant's right to harvested corn has no right to it.

7 Or. 156–161, TRIBOU v. STROWBRIDGE.

Reference.—In Actions at Law Court may Refer Causes involving long accounts without consent of parties, p. 158.

Cited in McDonald v. American etc. Co., 17 Or. 634, 21 Pac. 886, Trummer v. Konrad, 32 Or. 56, 51 Pac. 447, and Salem Light etc. Co. v. Anson, 41 Or. 566, 69 Pac. 676, all approving the rule; Fleischner v. Citizens' Real Estate etc. Co., 25 Or. 131, 35 Pac. 177, denying right to jury trial in equity case; Raymond v. Flavel, 27 Or. 230, 40 Pac. 161, to the same effect; Salamon v. Cress, 22 Or. 169, 29 Pac. 441, 15 L. R. A. 614, upholding court's right to assess damages in tort action; Templeton v. Linn County, 22 Or. 328, 29 Pac. 800, 15 L. R. A. 730, dissenting opinion, majority protecting remedies existing at time of adoption of constitution. Cited in notes to 79 Am. Dec. 209, on power to refer action; 13 L. R. A., N. S., 147, on constitutionality of compulsory reference in actions at law; 25 L. R. A. 68, 69, on compulsory reference as denial of right to jury trial; 43 L. R. A. 40, on number and agreement of jurors necessary to valid verdict.

Contracts.—Recovery of Reasonable Value of Work performed under special contract not completed, p. 160.

Cited in Steeples v. Newton, 7 Or. 113, 33 Am. Rep. 705, Todd v. Huntington, 13 Or. 10, 4 Pac. 295, and State v. Sterritt, 19 Or. 370, 24 Pac. 523, all approving and applying the rule.

7 Or. 161-186, WALKER v. GOLDSMITH.

Principal and Surety.—Failure to Comply With Conditions discharges surety, p. 183.

Cited in Durrell v. Farwell, 88 Tex. 107, 30 S. W. 542, applying the rule.

Principal and Surety.—Extension of Time Discharges Surety, pp. 180-183.

Cited in Hoffman v. Habighorst, 49 Or. 393, 89 Pac. 957, approving the rule.

Mortgages.—Attorneys' Fees on Foreclosure were allowed to the tune of two thousand five hundred dollars, p. 180.

Disapproved in Burns v. Scoggin, 16 Fed. 737, 9 Saw. 73, holding such fee exorbitant. Cited in note to 78 Am. Dec. 82, on personal liability of grantee to pay off prior mortgage.

7 Or. 186-210, STATE v. BROWN.

Homicide.—Indictment for Murder in First Degree held sufficient, pp. 196-198.

Cited in State v. Ah Lee, 18 Or. 542, 23 Pac. 425, State v. Woolridge, 45 Or. 394, 78 Pac. 335, State v. Guglielmo, 46 Or. 253, 79 Pac. 579, 69 L. R. A. 466, and United States v. Clark, 46 Fed. 640, all approving indictment following form given in appendix; People v. O'Callaghan, 2 Idaho, 146, 9 Pac. 416, holding that indictment for murder in first degree must be substantially in language of statute defining that degree. Cited in notes in 18 Am. Dec. 786, on statutory division of murder into degrees; 28 L. R. A. 395, on limitation of general by specific allegations in indictment.

Homicide.—When Crime Takes Place in the Commission of robbery, purpose to kill need not be shown to make it murder in first degree, p. 198.

Cited in Rhea v. State, 63 Neb. 480, 88 N. W. 795, reaffirming the rule; State v. Ellsworth, 30 Or. 158, 47 Pac. 202, stating degree of homicide when committed by poisoning; Morgan v. State, 51 Neb. 693, 71 N. W. 794, sustaining conviction for murder committed in the perpetration of rape. Cited in note in 68 L. R. A. 356, 358, 369, on homicide in commission of unlawful act.

Jury.—Overruling of Challenge is Discretionary, p. 199.

Cited in Southern Pac. Co. v. Rauh, 49 Fed. 700, 1 C. C. A. 416, approvingly.

Homicide.—Instructions Set Forth and Upheld, pp. 203–207.

Cited in State v. Johnson, 7 Or. 211, approving instructions given in instance case.

Homicide.—When Robbery is Completed Within Meaning of law making homicide in commission of robbery murder in first degree, p. 209.

Cited in Conrad v. State, 75 Ohio St. 70, 73, 84, 78 N. E. 959, 961, 963, 6 L. R. A., N. S., 1154, in main and dissenting opinion applying the rule in a similar case; State v. Ward, 19 Nev. 309, 10 Pac. 141, in quoting another case discussing duration of conspiracy to steal.

Statutes.—Penal Statute is Construed According to fair import and not strictly as at common law, p. 209.

Cited in State v. Dunn, 53 Or. 308, 99 Pac. 280, reaffirming the rule.

7 Or. 210–212, **STATE v. JOHNSON.**

Conspiracy.—All Persons Associated are Responsible for crime committed by either in furtherance of common object, p. 211.

Cited in State v. Bishop, 131 N. C. 759, 42 S. E. 845, dissenting opinion, majority reversing conviction. Cited in note in 68 L. R. A. 194, 209, on homicide in carrying out unlawful conspiracy.

Homicide.—Killing One Person While Attempting to kill another is guilt of same degree as if person intended had been killed, p. 212.

Cited in State v. Smith, 43 Or. 117, 71 Pac. 976, approving the rule. Cited in note in 63 L. R. A. 660, on homicide by unlawful act aimed at another.

7 Or. 212–222, **DE LASHMUTT v. EVERSON.**

Equity.—Effect of Verdict in Equity Case, pp. 218–220.

Cited in McKinley Creek Mining Co. v. Alaska United Min. Co., 183 U. S. 569, 22 Sup. Ct. Rep. 84, 46 L. ed. 334, 21 Morr. Min. Rep. 730, to point that error cannot be based upon instructions given or refused in equity.

7 Or. 222–227, **SWEGLE v. WELLS.**

Equity.—Right to Submit Issues to Jury and effect of verdict, pp. 225, 226.

Cited in De Lashmutt v. Everson, 7 Or. 218, 220, approving and applying the rule; McKinley Creek Mining Co. v. Alaska etc. Min. Co.,

183 U. S. 569, 22 Sup. Ct. Rep. 84, 46 L. ed. 334, 21 Morr. Min. Rep. 730, to point that error cannot be based upon instructions given or refused in equity.

Bills and Notes.—Agent Who has not Possession of note has no presumptive authority to collect, p. 227.

Cited in McLeod v. Despain, 49 Or. 553, 565, 566, 124 Am. St. Rep. 1066, 92 Pac. 498, 1092, 19 L. R. A., N. S., 276, stating duty of debtor to see that payment reaches creditor. Cited in note in 23 L. R. A., N. S., 416, on effect of agent's nonpossession of security upon question of authority to receive payment.

7 Or. 228–232, 33 Am. Rep. 708, TRULLINGER v. KOFOED.

Payment.—Rule Governing Application of Payments Stated, p. 230.

Cited in Andersen v. Griffith, 51 Or. 120, 93 Pac. 936, reaffirming the rule; Bond v. Armstrong, 88 Ind. 69, stating rule when neither party makes specific application. Cited in notes to 47 Am. St. Rep. 789; 35 Am. St. Rep. 438; 96 Am. St. Rep. 47, 55, on application of payments.

Mechanics' Liens.—Taking Mortgage Waives Lien, p. 231.

Cited in Willison v. Douglass, 66 Md. 102, 6 Atl. 532, reaffirming the rule; Crane v. Runey, 26 Fed. 17, in stating contentions of counsel, not in point.

Distinguished in Howe v. Kindred, 42 Minn. 437, 44 N. W. 313, on the facts. Cited in notes to 41 Am. Dec. 223, on waiver of mechanic's lien; 41 Am. St. Rep. 764, on waiver of mechanics' liens by taking notes on other securities.

7 Or. 232–237, McCORMICK v. BLANCHARD.

Limitation of Actions.—Time Begins to Run Against Debt created in another state when the action accrued there, and not when the debtor arrived here, p. 236.

Cited in Crane v. Jones, 24 Or. 420, 33 Pac. 869, 21 L. R. A. 493, Van Santvoord v. Roethler, 35 Or. 252, 76 Am. St. Rep. 472, 57 Pac. 628, and Murray v. Farrell, 2 Alaska, 362, approving the rule; West v. Theis, 15 Idaho, 172, 128 Am. St. Rep. 58, 96 Pac. 933, 17 L. R. A., N. S., 472, construing limitation laws of Idaho.

Distinguished in Rhoton v. Mendenhall, 17 Or. 204, 20 Pac. 51, where defendant was not out of the state when the cause accrued; Chevrier v. Robert, 6 Mont. 323, 12 Pac. 704, holding that a Canada debt barred by residence in Nevada is not barred in Montana, where debtor subsequently resides.

7 Or. 237–258, STATE v. AH LEE.

Homicide.—Admission of Dying Declarations is Discretionary, p. 253.

Cited in State v. Fuller, 52 Or. 47, 96 Pac. 458, approving the rule. Cited in note in 56 L. R. A. 436, on dying declarations as evidence.

7 Or. 259–267, SCHUTZ v. DALLES MILITARY RD. CO.

Turnpikes.—Duty of Builder of Military Road under congressional grant, p. 263.

Cited in United States v. Dalles Military Road Co., 40 Fed. 118, 119, reviewing the decision and distinguishing it on the facts.

7 Or. 267–276, DORRIS v. SMITH.

Cited in note to 37 Am. Dec. 130, on power of municipality to grade or regrade streets.

7 Or. 277–285, PARKER v. MONTEITH.

Seduction.—Complaint Herein Sufficiently Alleges that girl is daughter of plaintiff, p. 282.

Cited in Lee v. Cooley, 13 Or. 434, 11 Pac. 71, holding that complaint stating girl's age at sixteen sufficiently shows that she was under twenty-one. Cited in note to 44 Am. Dec. 170, on requisites to right of action for seduction.

Seduction.—Flight of Defendant is Evidence of Guilt, p. 283.

Cited in Heneky v. Smith, 10 Or. 356, 45 Am. Rep. 143, admitting evidence of acts tending to show defendant's consciousness of liability for assault. Cited in note to 44 Am. Dec. 175, 176, on evidence in action for seduction.

Seduction.—Promise of Marriage as Inducement is sufficient to constitute, p. 283.

Cited in State v. Thornton, 108 Mo. 652, 18 S. W. 845, approving and applying the rule; Patterson v. Hayden, 17 Or. 243, 11 Am. St. Rep. 822, 21 Pac. 131, 3 L. R. A. 529, holding that criminal indulgence with a woman who was leading a lewd life is not seduction.

Appeal.—Review of Questions of Fact, pp. 284, 285.

Cited in Thomas v. Bowen, 29 Or. 262, 45 Pac. 769, approving the rule.

7 Or. 285–301, BROWN v. BROWN.

Charities.—Trust for Charitable Use is not Subject to same limitations as those of private nature, p. 297.

Cited in Re John's Will, 30 Or. 523, 47 Pac. 351, 36 L. R. A. 242, to point that trustees may be appointed to administer a charity without provision for perpetual succession; Raley v. Umatilla Co., 15 Or. 178, 3 Am. St. Rep. 142, 13 Pac. 893, to point that public corporation may take and hold property in trust for a charitable use. Cited in note in 14 L. R. A., N. S., 140, on enforcement of general bequest for charity or religion.

Courts.—Jurisdiction of Probate Court, p. 299.

Cited in Richardson v. Green, 61 Fed. 426, 9 C. C. A. 565, to point that probated will may be attacked by anyone interested.

Explained in Clark's Heirs v. Ellis, 9 Or. 181, holding that county court has jurisdiction to annul a will. Cited in note in 21 L. R. A. 152, on validity of acts under letters testamentary or of administration afterward revoked or held invalid.

7 Or. 302–315, BROWN v. LORD.

Specific Performance.—Terms of Contract must be Explicit and certain, p. 310.

Cited in Wagonblast v. Whitney, 12 Or. 89, 6 Pac. 402, Knight v. Alexander, 42 Or. 524, 71 Pac. 658, and Kirkpatrick v. Pettis, 127 Iowa, 612, 103 N. W. 957, all approving and applying the rule.

Statute of Frauds.—Change of Possession of Land necessary to take case out of operation of statute as performance or part performance, pp. 311-314.

Cited in Lake Erie etc. R. Co. v. Michigan Cent. R. Co., 86 Fed. 845, approving the rule; Roberts v. Templeton, 48 Or. 68, 80 Pac. 482, 3 L. R. A., N. S., 790, possession must have been taken under the agreement alleged; Cooper v. Thomason, 30 Or. 175, 45 Pac. 299, to point that part performance takes case out of statute. Cited in notes in 8 L. R. A., N. S., 872, on possession as ground for specific performance of parol gift of, or contract to convey, realty; 3 L. R. A., N. S., 813, 814, on taking possession of realty as part performance to satisfy statute of frauds; 49 Am. Dec. 252, on liability for injuries by trespassing animals.

7 Or. 315-325, RENSHAW v. TAYLOR.

Mortgages.—Mortgagor Owns the Fee Subject to the lien of the mortgagee, p. 321.

Cited in Dekum v. Multnomah, 38 Or. 256, 63 Pac. 496, approving the rule.

Mortgages.—Mortgagee in Possession is Estopped to deny lawfulness of his possession, p. 325.

Cited in Grady v. Newman, 1 Ind. Ter. 625, 43 S. W. 756, applying the rule to an assignee of the mortgagee.

7 Or. 326-328, LOUIS v. BROWN & CO.

Damages.—Stipulation Liquidating Damages is binding on the parties, p. 328.

Cited in Jackson v. Hunt, 76 Vt. 286, 56 Atl. 1011, approving and applying the rule. Cited in notes to 108 Am. St. Rep. 59, on agreements purporting to liquidate damages; 4 L. R. A., N. S., 756, on effect of provision for forfeiture of sums paid or retained under executory contract to prevent recovery of other damages after breach.

7 Or. 329-337, LADD v. CARTWRIGHT.

Corporations.—Individual Liability of Stockholder is limited to amount of this debt, p. 333.

Cited in Bunn's Appeal, 105 Pa. 71, 51 Am. Rep. 166, Hardy v. Norfolk Mfg. Co., 80 Va. 416, and Patterson v. Lynde, 106 U. S. 520, 1 Sup. Ct. Rep. 432, 27 L. ed. 266, all approving the rule; Macbeth v. Banfield, 45 Or. 564, 160 Am. St. Rep. 670, 78 Pac. 696, holding stockholder liable for difference between value of property traded for stock and actual value of stock; Turner Bros. v. Alabama Min. etc. Co., 25 Ill. App. 150, holding that subscriber is not a trustee for corporate creditors. Cited in notes to 43 Am. Dec. 699, 702, on liability of stockholders for corporate debts; 99 Am. Dec. 434, stockholders' liability for corporate debts; 3 Am. St. Rep. 838,

855, on liability of stockholders for corporate debts; 47 L. R. A. 258, on effect of transfer of stock upon liability for unpaid subscription.

Corporations.—Complaint Seeking to Enforce Stockholder's liability must allege demand or call by directors, p. 334.

Distinguished in Faull v. Alaska Gold & Silver Min. Co., 14 Fed. 659, 8 Saw. 420, holding a due and unpaid call or assessment a debt, collectable by a judgment creditor of the corporation by garnishment.

Corporations.—Before Creditor can Proceed to Enforce individual liability of stockholder he must exhaust his remedy against the corporation, p. 335.

Cited in Powell v. Oregonian Ry. Co., 38 Fed. 187, 13 Saw. 543, and Hazlett v. Woodhead, 27 R. I. 512, 63 Atl. 954, both approving the rule; Hawkins v. Donnerberg, 40 Or. 103, 66 Pac. 693, stating when cause of action accrues on stockholder's liability for unpaid subscription.

Distinguished in Hodges v. Silver Hill Min. Co., 9 Or. 202, holding that where corporation is shown to be insolvent judgment against it is not a condition precedent to suit against stockholder. Cited in note in 23 L. R. A., N. S., 4, on conditions precedent to equitable remedies of creditors.

Corporations.—Individual Liability of Stockholder can only be enforced in suit in equity, pp. 335–337.

Cited in Hodges v. Silver Hill Min. Co., 9 Or. 204, Patterson v. Lynde, 112 Ill. 208, and Van Pelt v. Gardner, 54 Neb. 710, 75 N. W. 877, all approving the rule.

Explained in Brundage v. Monumental etc. Co., 12 Or. 324, 326, 7 Pac. 315, 316, holding that the rule does not preclude the right to proceed against one or more delinquent stockholders.

Distinguished in Aldrich v. Anchor Coal etc. Co., 24 Or. 39, 41 Am. St. Rep. 831, 32 Pac. 759, where suit was to enforce ordinary contract liability not secondary statutory liability as stockholder.

7 Or. 337–346, MINTO v. DELANEY.

Waters.—Riparian Owner on Navigable River takes to water edge, not to meander line, p. 342.

Cited in Weiss v. Oregon etc. Co., 13 Or. 497, 11 Pac. 255, French Live Stock Co. v. Springer, 35 Or. 319, 58 Pac. 104, Johnson v. Tomlinson, 41 Or. 200, 68 Pac. 407, State v. Portland General Electric Co., 52 Or. 533, 98 Pac. 162, all approving and applying the rule; Moore v. Willamette Transportation etc. Co., 7 Or. 356, holding that rocks lying above tide water on shore belong to riparian owner; Lewis v. City of Portland, 25 Or. 161, 42 Am. St. Rep. 772, 35 Pac. 261, 22 L. R. A. 736, upholding rights of riparian owners who have built wharfs on banks of navigable rivers; Fuller v. Shedd, 161 Ill. 475, 52 Am. St. Rep. 380, 44 N. E. 290, 33 L. R. A. 146, to point that grant of land bordering on a river does not run to meander line but includes right to accretions and islands; Backus v. City of Detroit, 49 Mich. 114, 43 Am. Rep. 447, 13 N. W. 382, holding that city has the right to build a wharf where a street abuts a navigable

river; Shively v. Bowlby, 152 U. S. 36, 14 Sup. Ct. Rep. 548, 38 L. ed. 344, holding that the rights of riparian owners on navigable streams is governed by the laws of the several states. Cited in notes to 33 Am. Dec. 277, on alluvion; 35 Am. St. Rep. 308, on accretion and alluvion; 27 Am. St. Rep. 59, on waters as boundary lines; 42 L. R. A. 510, on effect of bounding grant on river or tide water.

7 Or. 346-355, BARR v. MITCHELL.

Bills and Notes.—Indorser Before Delivery is liable as a maker, pp. 354, 355.

Cited in D. M. Osborne etc. Co. v. Hubbard, 20 Or. 321, 322, 25 Pac. 1022, 11 L. R. A. 833, reaffirming the rule; Deering v. Creighton, 19 Or. 120, 20 Am. St. Rep. 800, 24 Pac. 199, holding that indorser before delivery is prima facie a second indorser but may be shown by parol to be a comaker; Macdonald v. Whitfield, 4 Eng. Rul. Cas. 550, not accessible. Cited in notes to 97 Am. St. Rep. 985, on liability of indorser of non-negotiable instrument; 72 Am. St. Rep. 683, on effect of indorsement by stranger before delivery; 97 Am. St. Rep. 987, on rights, duties and powers of guardians ad litem of infants; 85 Am. Dec. 762, on attempt to control or supplement wills by other papers.

7 Or. 355-359, MOORE v. WILLAMETTE TRANSP. & L. CO. (No. 1).

Navigable Waters.—Rocks in the River are Appurtenant to the land and belong to the riparian owner, p. 356.

Cited in Lewis v. City of Portland, 25 Or. 161, 42 Am. St. Rep. 772, 35 Pac. 261, 22 L. R. A. 736, upholding rights of riparian owners who have built wharfs on banks of navigable rivers; Backus v. City of Detroit, 49 Mich. 114, 43 Am. Rep. 447, 13 N. W. 382, holding that city has the right to build a wharf where a street abuts a navigable river. Cited in notes to 127 Am. St. Rep. 45, on relative rights of state and riparian owner in navigable waters; 42 L. R. A. 510, on effect of bounding grant on river or tide water; 42 L. R. A. 175, on title to land under water.

Pleading.—Inconsistent Defenses are Allowable under our code, p. 358.

Cited in Lake Shore & M. S. Ry. Co. v. Warren, 3 Wyo. 137, 6 Pac. 726, reviewing a mass of authorities and sustaining the right to file inconsistent pleas; Seattle Nat. Bank v. Carter, 13 Wash. 293, 43 Pac. 335, 48 L. R. A. 177, holding totally inconsistent defenses not allowable under the code of Washington. Cited in note in 48 L. R. A. 199, on right to plead inconsistent defenses.

7 Or. 359-373, MOORE v. WILLAMETTE TRANSP. & L. CO. (No. 2).

Courts.—A Paper Filed in Fact is not Affected by the failure of the clerk to mark it filed, p. 367.

Cited in Hilts v. Hilts, 43 Or. 164, 72 Pac. 698, holding that a paper is not filed until the statutory fee is paid; In re Conant's Estate, 43

Or. 535, 73 Pac. 1020, holding that a pleading is filed when delivered to the clerk, though he fail to indorse it.

Execution.—Deed Should be Executed by Sheriff in office at the time, p. 371.

Cited in Faull v. Cooke, 19 Or. 466, 20 Am. St. Rep. 832, 26 Pac. 664, leaving the question undecided.

Explained in Marx v. Hanthorn, 30 Fed. 582, holding that the sheriff in office must deed land sold for delinquent taxes.

Corporations.—Stockholders have Power to Direct Sale of corporate property on dissolution, p. 372.

Cited in Patterson v. Portland Smelting etc. Works, 35 Or. 105, 56 Pac. 410, confirming sale by directors assisted by a broker, the stockholders having authorized the directors to make the sale.

Corporations.—Mode of Executing Corporate Deed Upheld, p. 373.

Cited in Altschul v. Casey, 45 Or. 185, 186, 76 Pac. 1084, holding L. S. sufficient representation of corporate seal by recorder. Cited in note to 108 Am. St. Rep. 419, on administrators de bonis non.

7 Or. 374–385, 33 Am. Rep. 710, GILMORE v. BURCH.

Contracts.—Influence of Man Over Fiancé is presumed to be so great as to require vigilant scrutiny of the transaction, p. 383.

Cited in Hallett v. Fish, 120 Fed. 988, upholding the doctrine as well founded and salutary. Cited in note to 11 Am. St. Rep. 759, on fraud as between persons in fiduciary relations.

Curtesy Attaches to an Equitable as Well as to a legal estate in land, p. 384.

Cited in Beam v. United States, 162 Fed. 261, 89 C. C. A. 240, approving the rule; Huguenin v. Basely, Lyon v. Home, 6 Eng. Rul. Cas. 877, not accessible.

7 Or. 386–397, STATE v. WHITNEY.

Criminal Law.—Objections not Made in Lower Court cannot be considered on appeal, p. 387.

Cited in Nunn v. Bird, 36 Or. 520, 59 Pac. 810, to point that error not excepted to will not be considered.

Indictment.—Two Grounds for Setting Aside indictment mentioned in the code are exclusive, p. 388.

Cited in State v. Kelliher, 49 Or. 81, 88 Pac. 868, State v. Baker, 33 W. Va. 322, 10 S. E. 641, State v. Baughman, 111 Iowa, 73, 82 N. W. 453, State v. Tough, 12 N. D. 430, 96 N. W. 1026, and United States v. Mitchell, 136 Fed. 910, all approving and applying the rule.

Indictment.—Presence of Private Counsel in Grand Jury Room, assisting district attorney, is no ground for setting aside indictment, p. 388.

Cited in State v. Justus, 11 Or. 180, 8 Pac. 338, reaffirming rule; State v. Bock, 49 Or. 28, 88 Pac. 319, holding that action of court in excusing grand juror for personal reasons is no ground for setting aside the indictment; United States v. Rosenthal, 121 Fed. 872, on right of private counsel to aid prosecuting attorney; United States

v. Wells, 163 Fed. 325, quashing indictment procured through urging of prosecuting attorney. Cited in note in 28 L. R. A. 372, on improper influence or interference with grand jury.

Criminal Law.—Court must Instruct Jury in matters of law, p. 391.

Cited in State v. Reed, 52 Or. 389, 97 Pac. 631, reaffirming the rule.

Criminal Law.—Unless Clearly Admitted, the Court has No Right to charge that a fact was proven no matter how strong the proof, p. 391.

Cited in State v. Reed, 52 Or. 390, 97 Pac. 631, quoting the rule approvingly; State v. Mackey, 12 Or. 160, 6 Pac. 651, reversing for charge assuming fact.

Homicide.—Burden of Proof is on Prosecution to show malice, p. 392.

Cited in State v. Magers, 35 Or. 535, 57 Pac. 202, to point that burden is on prosecution throughout.

Criminal Law.—Accused Does not Admit Degree of Crime by failure to question it, p. 392.

Cited in State v. Ellsworth, 30 Or. 160, 47 Pac. 203, approving the rule. Cited in note in 19 L. R. A., N. S., 495, on applicability of rule of reasonable doubt to self-defense in homicide.

Criminal Law.—Degree of Guilt must be determined by the jury and not assumed by the court, p. 393.

Cited in State v. Magers, 35 Or. 534, 57 Pac. 201, reversing conviction for failure to charge on lesser degree of crime.

7 Or. 397–403, PORTLAND v. LEE SAM.

This case has not been cited.

7 Or. 403–407, DOSCHER v. BLACKISTON.

Divorce.—Court has Power by Its Decree to Transfer Property of one of the parties to the other, p. 407.

Cited in Brooks v. Ankeny, 7 Or. 466, and Hight v. Hirsch, 149 Fed. 892, approving and applying the rule.

7 Or. 407–414, ANKENY v. BLACKISTON.

Quieting Title.—Title to Land Determined, p. 413.

Cited in Hight v. Hirsch, 149 Fed. 892, holding defendants precluded by the judgment from prosecuting another suit. Cited in note in 32 L. R. A. 685, on admissions and waivers by fiduciaries in actions.

7 Or. 414–422, STATE v. GRANT.

Criminal Law.—Court Should Leave Degree of guilt to the determination of the jury, pp. 421, 422.

Explained in Territory of New Mexico v. Romero, 2 N. M. 477, as not intimating that court must charge on lesser degrees when there is no evidence thereof. Cited in note in 21 L. R. A. 3, 4, on letter to attorney or agent of plaintiff as publication of libel.

7 Or. 422-435, DEAN v. LAWHAM.

Contracts.—Two Contemporaneous Contracts Relating to the same subject matter must be construed together as one agreement, p. 426.

Cited in Bradtfeldt v. Cooke, 27 Or. 203, 50 Am. St. Rep. 701, 40 Pac. 4, reaffirming the rule.

Distinguished in Blagen v. Thompson, 23 Or. 246, 31 Pac. 650, 18 L. R. A. 315, the contracts not being between the same parties nor involving the same subject matter.

Bailment.—Bailee is Bound to Return Goods to bailor when his his demand is satisfied, p. 429.

Cited in Coos Bay etc. Co. v. Siglin, 34 Or. 87, 75 Am. St. Rep. 564, 53 Pac. 507, to point that sheriff is bound to return surplus after satisfying execution.

7 Or. 435-448, PARKER v. TAYLOR.

Navigable Waters.—Riparian Owner Owns to high-water mark only, p. 445.

Cited in Bowbly v. Shively, 22 Or. 418, 30 Pac. 157, Montgomery v. Shaver, 40 Or. 247, 66 Pac. 924, State v. Portland General Electric Co., 52 Or. 534, 98 Pac. 162, all approving and applying the rule; Grant v. Oregon etc. Nav. Co., 49 Or. 328, 90 Pac. 180, stating rights of riparian owner purchasing tide land between high and low water mark; Hume v. Rogue River Packing Co., 51 Or. 246, 131 Am. St. Rep. 732, 92 Pac. 1068, denying exclusive right of riparian owner to fish in adjacent waters; Shively v. Bowlby, 152 U. S. 52, 14 Sup. Ct. Rep. 548, 38 L. ed. 350, stating rights of riparian owners under laws of Oregon. Cited in note in 40 L. R. A. 702, on right of owner of upland to access to navigable water.

Public Lands.—Tide Lands Lying Between High and low navigable water mark belong to the state, p. 445.

Cited in Muckle v. Good, 45 Or. 232, 77 Pac. 743, reaffirming the rule; Astoria Exchange Co. v. Shively, 27 Or. 109, 40 Pac. 93, construing subsequent statute as not affecting stated title. Cited in notes in 22 L. R. A., N. S., 337, on right of state to grant tide lands; 45 L. R. A. 239, on title to land between high and low water mark.

Navigable Waters.—Under Statute Authorization Riparian Owner may build and own wharves, p. 446.

Cited in Lewis v. City of Portland, 25 Or. 166, 42 Am. St. Rep. 772, 35 Pac. 263, 22 L. R. A. 736, recognizing riparian owner's rights in wharf erected before passage of statute; Grant v. Oregon etc. Nav. Co., 49 Or. 327, 90 Pac. 179, to point that when right to construct wharf is exercised it becomes a vested right. Cited in note in 40 L. R. A. 643, on right to erect wharves.

Deeds.—Effect of Conveyance of Riparian Lands as carrying tide lands adjacent to it and owned by the grantor, p. 447.

Cited in Montgomery v. Shaver, 40 Or. 250, 66 Pac. 925, holding that right to construct wharf may be severed from riparian land by sale; Grant v. Oregon etc. Nav. Co., 49 Or. 331, 90 Pac. 181, stating effect of conveyance of submerged platted lands by metes and

bounds; State v. Black River Phosphate Co., 32 Fla. 90, 13 South. 643, 21 L. R. A. 189, to point that intent of grantor gathered from deed determines whether submerged land was conveyed with upland.

7 Or. 448–454, WATSON v. SMITH.

Deeds.—Rights of Parties to Deed given for support, pp. 452, 453.

Cited in Patton v. Nixon, 33 Or. 163, 52 Pac. 1049, granting equitable relief to one granting property for future support; Abbott v. Sanders, 80 Vt. 180, 130 Am. St. Rep. 974, 66 Atl. 1032, 13 L. R. A., N. S., 725, treating grant conditioned on support of grantor as a mortgage which may be foreclosed on breach. Cited in notes to 130 Am. St. Rep. 1042, on conveyances in consideration of support; 18 L. R. A., N. S., 220, on rights of promise, during promisor's lifetime, under contract to leave property; 13 L. R. A., N. S., 727, on agreement for support in consideration of conveyance, as basis for equitable lien.

7 Or. 454–456, BANK OF BRITISH COLUMBIA v. PAGE.

Execution.—Sale of Separate Tracts Separately or in Gross is in the discretion of the sheriff, p. 455.

Cited in Bays v. Tralson, 25 Or. 116, 35 Pac. 28, reaffirming the rule; Balfour v. Burnett, 28 Or. 76, 41 Pac. 3, holding such discretion conclusive unless abused.

Execution.—Return Sufficiently Showed Compliance With Statute as to publishing notice of sale, p. 455.

Cited in United States Mtg. etc. Co. v. Marquam, 41 Or. 407, 69 Pac. 43, upholding similar return.

7 Or. 456–460, DODGE v. MARDEN.

Waters.—Right to Use Water Secured by Federal Statutes belongs to the land, and is not lost by nonuser short of statutory period barring actions to recover land, p. 458.

Cited in Wimer v. Simmons, 27 Or. 7, 50 Am. St. Rep. 685, 39 Pac. 7, Oregon Const. Co. v. Allen Ditch Co., 41 Or. 216, 93 Am. St. Rep. 701, 69 Pac. 459, and Hough v. Porter, 51 Or. 434, 98 Pac. 1107, all reaffirming the rule. Cited in notes to 93 Am. St. Rep. 714, on prescriptive title to water; 43 Am. Dec. 282, on rights of riparian owners.

Abandonment.—There can be No Abandonment Without Some Action of the will and an intent to abandon, but intent may be inferred from acts and declarations, p. 460.

Cited in Hindman v. Rizor, 21 Or. 119, 27 Pac. 13, Low v. Schaffer, 24 Or. 243, 33 Pac. 679, Oviatt v. Big Four Min. Co., 39 Or. 122, 65 Pac. 812, Watts v. Spencer, 51 Or. 271, 94 Pac. 42, and Noland v. Coon, 1 Alaska, 42, all approving and applying the rule; Wimer v. Simmons, 27 Or. 13, 50 Am. St. Rep. 685, 39 Pac. 9, holding abandonment complete when intention and relinquishment of possession unite; Huffman v. Smyth, 47 Or. 580, 114 Am. St. Rep. 938, 84 Pac. 82, there must be a voluntary relinquishment of possession combined with intention to abandon. Cited in note in 30 L. R. A. 266, on abandonment or loss of rights of prior appropriators of water.

7 Or. 461–467, BROOKS v. ANKENY.

This case has not been cited.

7 Or. 467–472, JONES v. DOVE.

Landlord and Tenant.—Tenant is Estopped to Question his landlord's title, p. 472.

Cited in Elwert v. Marley, 53 Or. 595, 133 Am. St. Rep. 850, 101 Pac. 888, reaffirming the rule. Cited in notes to 89 Am. St. Rep. 107, on estoppel to deny landlord's title; 46 Am. Rep. 73, on extrinsic evidence to identify legatee or lands devised; 50 Am. St. Rep. 287, 291, 292, on extrinsic evidence to explain wills.

7 Or. 472–476, MORRISON v. CRAWFORD.

Trover.—It Seems That an Election to Consider Trespass as conversion transfers the ownership of the goods, p. 474.

Cited in Budd v. Multnomah etc. Co., 15 Or. 420, 3 Am. St. Rep. 169, 15 Pac. 663, not deciding whether the prosecution of an action for conversion is an election to claim money instead of goods.

Attachment.—Right to Prove Second Valid Attachment in mitigation of damages for prior invalid one, p. 475.

Cited in Koyer v. White, 6 Tex. Civ. 384, 25 S. W. 46, applying the rule.

Appeal.—Exhibit may be Made Part of Bill of Exceptions by reference and identification, p. 476.

Cited in Roberts v. Parrish, 17 Or. 588, 22 Pac. 138, holding that to make a deposition a part of a bill it must be copied into it or attached as an exhibit and marked for identification; Tatum v. Massie, 29 Or. 145, 44 Pac. 495, and Caspary v. City of Portland, 19 Or. 500, 20 Am. St. Rep. 842, 24 Pac. 1037, holding that exhibit may be made part of pleading by marking and reference.

7 Or. 477–478, STATE v. AH SAM.

Cited in note to 85 Am. Dec. 498, on perjury.

7 Or. 478–483, 33 Am. Rep. 717, ORTON v. ORTON.

Fraudulent Conveyances.—Chattel Mortgage Giving Mortgagor Right to sell the goods is void as to creditors, pp. 482, 483.

Cited in Jacobs v. McCalley, 8 Or. 126, Jacobs Bros. & Co. v. Ervin, 9 Or. 60, Bremer & Co. v. Fleckenstein, 9 Or. 273, Aiken v. Pascoll, 19 Or. 496, 24 Pac. 1040, Sabin v. Wilkins, 31 Or. 456, 48 Pac. 426, 37 L. R. A. 465, Benedict etc. Co. v. Renfro Bros., 75 Ala. 127, 51 Am. Rep. 429, and Eckman v. Munnerlyn, 32 Fla. 376, 37 Am. St. Rep. 109, 13 South. 925, all approving the rule; Fisher v. Kelly, 30 Or. 14, 46 Pac. 150, holding transfers reserving trust for debtor void as to creditor; In re Rasmussen's Estate, 136 Fed. 706, applying the rule to conditional sale. Cited in notes to 6 Am. St. Rep. 34; 15 Am. St. Rep. 914, on permitting chattel mortgagor to retain possession and sell mortgaged property; 18 L. R. A. 606, 622, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale.

Fraudulent Conveyances.—A Chattel Mortgage may be Shown by parol to be so conditioned as to be void as to creditors, p. 482.

Cited in Rothenberg v. Bradley, 69 Miss. 12, 10 South. 924, holding assignment of creditors void when parol evidence shows that its effect is to hinder creditors.

Fraudulent Conveyances.—Presumption of Fraud from Retention of Possession of mortgaged chattels applies only when mortgage is unrecorded, p. 482.

Cited in Marks v. Miller, 21 Or. 321, 28 Pac. 15, 14 L. R. A. 190, and Davis v. Bowman, 25 Or. 196, 35 Pac. 266, both quoting the rule approvingly.

7 Or. 483–486, HOLLADAY v. ELLIOTT.

Appeal.—Appellant may Abandon Appeal When Notice is defective or sureties cannot justify, and give new notice and undertaking, p. 485.

Cited in Van Anken v. Dammeier, 27 Or. 154, 40 Pac. 90, Fisher v. Tomlinson, 40 Or. 113, 60 Pac. 390, and Skinner v. Lewis, 40 Or. 574, 65 Pac. 523, all applying the rule.

7 Or. 486–491, MOORE v. MILLER.

Pleading.—Facts Peculiarly Within Knowledge of Plaintiff and constituting condition precedent to recovery must be pleaded, pp. 490, 491.

Cited in Chrisman v. State etc. Co., 16 Or. 289, 18 Pac. 469, applying the rule where plaintiff failed to plead his interest in subject matter.

7 Or. 491–497, CAPLES v. STEEL.

Vendor and Purchaser.—Purchaser is not Bound to Disclose his knowledge of facts enhancing value of land, but he must not misstate material facts to the owner or sale will be set aside for fraud, pp. 495, 496.

Cited in Stackpole v. Hancock, 40 Fla. 378, 24 South. 918, 45 L. R. A. 814, approving and applying the rule.

7 Or. 497–499, REED v. GENTRY.

Appeal.—Verdict is Presumed to be as Broad as the issues, p. 499.

Cited in Schmit v. Day, 27 Or. 117, 39 Pac. 872, presuming that every allegation in complaint was found true.

7 Or. 500–513, STARR v. STARK.

Trusts.—One Holding Possession Under Legal Title is trustee for equitable owner and must account to him for rents and profits, p. 511.

Cited in Hill v. Cooper, 8 Or. 258, 259, holding that cestui que trust must resort to equity to recover such rents and profits.

Judgment.—Judgment at Law as Bar to Proceeding for equitable relief, p. 510.

Cited in Burns v. Kennedy, 49 Or. 590, 90 Pac. 1103, holding judgment in forcible entry no bar to suit to quiet title or cancel a deed.

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